Royal Commission
into Institutional Responses
to Child Sexual Abuse

CONSULTATION PAPER

Criminal Justice

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Acronyms

AFP – Australian Federal Police

AIC – Australian Institute of Criminology

ALRC – Australian Law Reform Commission

BOCSAR – Bureau of Crime Statistics and Research in New South Wales

CASA – Centre Against Sexual Assault in Victoria

CCTV – Closed Circuit Television

CJ – Chief Justice

COPS – Computerised Operational Policing System in New South Wales

CPS – Crown Prosecution Service in England and Wales

CWS – Child Witness Service

DHHS – Department of Health and Human Services in Victoria

DPP – Director of Public Prosecutions

FACS – Family and Community Services in New South Wales

HMCPSI – Her Majesty's Crown Prosecution Service Inspectorate in England and Wales

JA – Judge(s) of Appeal

JIRT – Joint Investigation Response Team in New South Wales

J – Justice / Judge

JJ – Justice(s) / Judge(s)

JRU – JIRT Referral Unit in New South Wales

KiDS – Key information and Directory System in New South Wales

MDC – Multi-Disciplinary Centres in Victoria

MIST – Multi-agency Investigation and Support Team in Western Australia

NGO – Non-government organisation

NSW LRC – New South Wales Law Reform Commission

NSW SOPS – New South Wales Police Force's Standard Operating Procedures for Employment related child abuse allegations

OCSAR – Office of Crime Statistics and Research in South Australia

ODPP – Office of the Director of Public Prosecutions

OPP – Office of Public Prosecutions in Victoria

POI – Person of Interest

QC – Queen's Counsel

RASSO – Rape and Serious Sex Offence in England and Wales

SAPOL – South Australia Police

SC – Senior Counsel

SCAN – Suspected Child Abuse and Neglect team in Queensland

SOCIT – Sexual Offences and Child Abuse Investigation Teams in Victoria

VLRC – Victorian Law Reform Commission

VRR – Victims' Right to Review in England and Wales

WAS – Witness assistance services

Executive summary

Introduction

The Letters Patent provided to the Royal Commission into Institutional Responses to Child Sexual Abuse require that it 'inquire into institutional responses to allegations and incidents of child sexual abuse and related matters'.

Under paragraph (d) of the Terms of Reference we are given in the Letters Patent, we are required to inquire into:

> what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, *processes for referral for investigation and prosecution* and support services. [Emphasis added.]

Police and public prosecution agencies are also 'institutions' within the meaning of the Terms of Reference, and they are entities through which governments can act in relation to institutional child sexual abuse. These factors mean that they are directly relevant to our consideration of paragraphs (a) to (c) of our Terms of Reference, which focus on preventing and responding to institutional child sexual abuse.

We have commissioned a number of research projects to inform our criminal justice work. We have also obtained significant input on criminal justice issues from a broad range of sources, including private sessions, public hearings, an issues paper, public and private roundtables, and information obtained under summons.

Through this consultation paper, we seek submissions from all interested parties on the issues raised. Unless clearly stated otherwise, we have no settled views at this stage. We have drawn attention to some particular issues, but we welcome submissions on any or all of the issues raised in this consultation paper.

We invite all interested parties to make written submissions responding to this consultation paper by midday on **Monday 17 October 2016**, preferably electronically to criminaljustice@childabuseroyalcommission.gov.au.

Interested parties are welcome to make submissions responding to only one or a few issues, or to make submissions responding to all issues.

The importance of a criminal justice response

Criminal justice for victims

In Chapter 2, we discuss the importance of a criminal justice response for victims and survivors of institutional child sexual abuse.

Criminal justice involves the interests of the entire community in the detection and punishment of crime in general, in addition to the personal interests of the victim or survivor of the particular crime.

Survivors have told us of a variety of responses they have sought from the criminal justice system, and they have expressed a range of views on what they would have regarded as 'justice' for a criminal justice response.

We recognise that a criminal justice response is important to survivors not only in seeking 'justice' for them personally but also in encouraging reporting of child sexual abuse and preventing child sexual abuse in the future.

Past and future criminal justice responses

In private sessions and in personal submissions in response to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8), we have heard accounts from survivors of their experiences with police, particularly from the 1940s onwards, and of their experiences with prosecutions from the 1970s and 1980s onwards. Survivors have told us of both positive and negative experiences with police and prosecution responses. In general terms, many of the negative experiences we have been told about were experienced in earlier periods of time through to the early 2000s.

In our policy work on criminal justice responses, our main focus must be on understanding the contemporary response of the criminal justice system to institutional child sexual abuse and on identifying how it can be made more effective.

Criminal justice and institutional child sexual abuse

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.

Research identifies 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.

There are also features of institutional child sexual abuse cases that may affect the ability of the criminal justice system to respond effectively to these cases. These include:

- 'word against word' cases, where there are no eyewitnesses to the abuse and no medical or scientific evidence
- the importance of the complainant being willing to proceed, particularly where their evidence is the only direct evidence of the abuse
- lengthy delays, where many survivors take years, even decades, to disclose their abuse. This can make investigation and prosecution more difficult
- particularly vulnerable victims may be involved, including young children or people with disability.

There are also many myths and misconceptions about sexual offences, including child sexual abuse, that have affected the criminal justice system's responses to child sexual abuse prosecutions. The myths and misconceptions have influenced the law and the attitudes jury members bring to their decision-making. The following myths and misconceptions have been particularly prominent in child sexual abuse cases:

- women and children make up stories of sexual assault
- a victim of sexual abuse will cry for help and attempt to escape their abuser – that is, there will be no delay in reporting abuse and a 'real' victim will raise a 'hue and cry' as soon as they are abused
- a victim of sexual abuse will avoid the abuser – that is, a 'real' victim will not return to the abuser or spend time with them or have mixed feelings about them
- sexual assault, including child sexual assault, can be detected by a medical examination – that is, there will be medical evidence of the abuse in the case of 'real' victims.

Operation of the criminal justice system

There has been much academic debate about what might be said to be the purposes of the criminal justice system. 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 criminal justice systems in Australian jurisdictions function through an 'adversarial' system of justice, where the prosecution (representing the Crown) and the defence (representing the accused) each put forward their case and any evidence in relation to whether the act was committed, by whom, and with what intent. Theoretically, this 'contest between the parties' is designed to produce the most compelling argument as to what the truth of the matter is.

Given that the investigation and prosecution of criminal matters is undertaken by the state, there is seen to be an imbalance between the prosecution and the accused. In recognition of this imbalance,

a number of principles have emerged through the development of the common law to ensure that trials are conducted fairly. These include the following:

- The prosecution must prove, beyond reasonable doubt, that the accused committed the crime or crimes charged. The corollary of this principle is that the accused is presumed to be innocent until proven guilty.
- The accused has a right to silence. This means that the accused cannot be compelled to give evidence or confess guilt.
- The criminal trial should be conducted without unreasonable delay.
- The accused has the right to examine witnesses in order to test the credibility of the witness and their testimony.
- The prosecution is obliged to act independently and impartially and to conduct the case fairly.
- If an accused is charged with a serious offence and lacks the financial means to engage legal representation, he or she should be provided with a lawyer.

Many survivors have told us that they feel that the criminal justice system is weighted in favour of the accused. Some survivors who have participated as complainants in prosecutions have told us that they felt almost incidental to the criminal justice system and that they had little control over matters that were very important to them.

Recognition of victims has increased over the last 50 years. States and territories introduced victims' compensation schemes from 1967 onwards. In the 1990s, emphasis shifted towards providing greater support services for victims. Victim impact statements were also introduced, and Director of Public Prosecutions (DPP) guidelines required prosecutors to consult with victims. In 2013, Australia's Attorneys-General endorsed the National Framework for Rights and Services for Victims of Crime.

Other responses to institutional child sexual abuse

A number of stakeholders have argued that the Royal Commission should consider the use of restorative justice approaches (involving a range of processes to address the harm caused to victims) in connection with, or instead of, traditional criminal justice responses to institutional child sexual abuse. It appears that restorative justice may not be available for or of assistance to many survivors of institutional child sexual abuse, including:

- because of the power dynamics and seriousness of institutional child sexual abuse offending, restorative justice approaches may only be suitable in only a small number of these cases.
- many survivors do not wish to seek a restorative justice outcome with the perpetrator of the abuse
- given the frequent delay before reporting, many offenders will be unavailable or unwilling to participate in restorative justice approaches.

The Royal Commission provided for elements of restorative justice approaches in institutional child sexual abuse through the 'direct personal response' component of redress.

The recommendations we made in our *Report on redress and civil litigation* (2015) are not intended as an alternative to criminal justice for survivors. Ideally, victims and survivors of institutional child sexual abuse should have access to justice through both criminal justice responses and redress and civil litigation.

Some survivors have also told us that they found real benefit in state and territory statutory victims of crime compensation schemes because the decisions made by the relevant tribunals or administrators gave them official recognition of the crimes committed against them.

Our approach to criminal justice reforms

It must be recognised that the criminal justice system is unlikely ever to provide an easy or straightforward experience for a complainant of institutional child sexual abuse.

However, we consider it important that survivors seek and obtain a criminal justice response to any child sexual abuse in an institutional context in order to:

- punish the offender for their wrongdoing and recognise the harm done to the victim
- identify and condemn the abuse as a crime against the victim and the broader community
- emphasise that abuse is not just a private matter between the perpetrator and the victim
- increase awareness of the occurrence of child sexual abuse through the reporting of charges, prosecutions and convictions
- deter further child sexual abuse, including through the increased risk of discovery and detection.

We also consider that seeking a criminal justice response to institutional child sexual abuse is an important way of increasing institutions', governments' and the community's knowledge and awareness not only that such abuse happens but also of the circumstances in which it happens.

We consider that all victims and survivors should be encouraged and supported to seek a criminal justice response and that the criminal justice system should not discourage victims and survivors from seeking a criminal justice response through reporting to police.

We are satisfied that any necessary reforms should be made to ensure that:

- criminal justice responses are available for victims and survivors who are able to seek them
- victims and survivors are supported in seeking criminal justice responses
- the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused.

Regulatory responses to child sexual abuse

However, it is unrealistic to expect that all true allegations of institutional child sexual abuse will result in a criminal conviction of the accused, even if the criminal justice system is reformed to achieve these objectives.

We recognise the importance of ensuring that regulatory responses focusing on child protection can interact effectively with criminal justice responses, particularly in cases where there is no criminal conviction. These regulatory responses include reportable conduct schemes, Working with Children Check schemes and industry regulation.

We welcome submissions that discuss the issues raised in Chapter 2.

In particular, we seek the views of all interested parties on our proposed approach to criminal justice reforms and our view of the importance of seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context.

Issues in police responses

Current police responses

In Chapter 3 we discuss our work to date in relation to police data, improvements in police responses, and how states and territories currently provide police responses to child sexual abuse, including institutional child sexual abuse.

One of the areas in which police responses may differ is whether they provide different responses to child sexual abuse reported as a child, and to child sexual abuse reported as an adult. For example, some police responses provide a specialist response focused on the special aspects of interviewing children, while others provide a specialist response focused on the special nature of sexual offences.

We commissioned a research report, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research), which found that the longest delays in reporting occurred when the alleged perpetrator of the abuse was a person in a position of authority. This suggests that, particularly for institutional child sexual abuse, it is likely that many reports to police will be made by adults. This makes the issue of the police response to adults who report sexual abuse they suffered as a child of particular importance in relation to institutional child sexual abuse.

The Delayed Reporting Research considered the impact of delayed reporting on the likelihood of a case proceeding to a prosecution and the likely outcome of the prosecution. Its findings suggest that:

- many reports of institutional child sexual abuse are likely to be made by adults
- reports made by adults – delayed reports – should not be assumed to have poorer prospects of leading to a prosecution or a conviction when compared with reports made by children

- police responses to reports by adults are important particularly in relation to institutional child sexual abuse.

In Chapter 3 we also discuss the literature review we commissioned on the use and effectiveness of specialist police investigative units and multidisciplinary approaches.

Possible principles for initial police responses

We consider that there may be value in identifying principles which focus on general aspects of initial non-specialist police responses that are of particular importance or concern to victims and survivors and that might help to inform police responses.

The following could be considered as possible principles to inform initial police responses:

- A victim or survivor's initial contact with police is important in determining their satisfaction with the entire criminal justice response and in influencing their willingness to proceed with a report and to participate in a prosecution.
- All police who may come into contact with victims or survivors of institutional child sexual abuse should be trained to:
    - have a basic understanding of complex trauma and how it can affect people who report to police, including those who may have difficulties dealing with institutions or persons in positions of authority (such as the police)
    - treat anyone who approaches to police to report abuse with consideration and respect.

Encouraging reporting

Police cannot respond to allegations of institutional child sexual abuse unless they know about those allegations. Given that police are the entry point into the criminal justice system, reporting to police is usually a necessary first step in obtaining any criminal justice response.

Reporting may be important not only in securing a criminal justice response for the particular victim or survivor but also in preventing further abuse by the perpetrator.

An important part of the criminal justice system's response to the issue of child sexual abuse needs to be directed to encouraging victims, their families, survivors and third parties to report the abuse to police.

Our public roundtable on reporting offences provided us with a number of perspectives on why victims and survivors may not wish to report to police and on what measures may encourage them to report. We discuss the need to provide information for victims and survivors and to provide a range of channels for reporting.

We discuss the additional barriers to reporting which Aboriginal and Torres Strait Islander victims and survivors may face in reporting institutional child sexual abuse to police. We also discuss some of the options we have heard about which may encourage more effective police responses to Aboriginal and Torres Strait Islander victims and survivors and their communities.

We also discuss the particular needs of prisoners and those with criminal records, who may also face additional barriers to reporting to police.

The following could be considered as possible approaches to encourage reporting:

- To encourage reporting of allegations of institutional child sexual abuse, police should:
    - take steps to communicate to victims (and their families or support people where the victims are children or are particularly vulnerable) that any charges relating to abuse that they have suffered will not proceed unless they want them to – that is, victims retain the right to withdraw at any stage in the process and to decline to proceed further with police and/or any prosecution
    - provide information on the different ways in which victims and survivors can report to police or can seek advice from police on their options for reporting or not reporting abuse – this should be in a format that allows institutions and survivor advocacy and support services to provide it to victims and survivors
    - make available a range of channels to encourage reporting, including specialist telephone numbers and online reporting forms, and provide information about what to expect from each channel of reporting.
- To encourage reporting of allegations of institutional child sexual abuse among Aboriginal and Torres Strait Islander victims and survivors, police should take steps to develop good relationships with Aboriginal and Torres Strait Islander communities. They should also provide channels for reporting outside of the community (such as telephone numbers and online reporting forms).
- To encourage prisoners and former prisoners to report allegations of institutional child sexual abuse, police should provide channels for reporting that can be used from prison and do not require a former prisoner to report at a police station.

Police investigations

There may be value in identifying principles which focus on general aspects of police investigations that are of particular importance or concern to victims and survivors and which might help to inform police responses. Police agencies may consider that they already act, or aim to act, in accordance with such principles. However, there may be benefit in stating them so that they continue to receive priority in police responses.

These principles may be particularly important in non-specialist police responses, where officers may have less understanding of the particular needs of victims and survivors.

The main issues that victims and survivors have raised with us are the importance of continuity in staffing in the police response and regular communication from police to keep the victim or survivor informed.

Particularly in cases of historical child sexual abuse, we know that a survivor's criminal record or periods of addiction and mental health problems may reflect the impact of abuse. It is important

that police conducting investigations are non-judgmental towards the survivors and that they focus on the credibility of the survivor's allegations.

The following could be considered as possible principles to inform police investigations:

- While recognising the complexity of police rosters, staffing and transfers, police should recognise the benefit to victims and their families and survivors of continuity in police staffing and should take reasonable steps to facilitate, to the extent possible, continuity in police staffing on an investigation of a complaint.
- Police should recognise the importance to victims and their families and survivors of police maintaining regular communication with them to keep them informed of the status of their report and any investigation unless they have asked not to be kept informed.
- Particularly in relation to historical allegations of institutional child sexual abuse, police who assess or provide an investigative response to allegations 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 also discuss the issue of whether police should be able to obtain details of the identity of a person who has made a mandatory report without that person's consent. In considering family violence, the Australian Law Reform Commission and the New South Wales Law Reform Commission recommended that, in order to assist police investigations, this information should be made available in certain circumstances if certain requirements are met. We wish to hear whether interested parties consider that we should support these recommendations in the context of institutional child sexual abuse.

Investigative interviews for use as evidence in chief

Where the complainant in a child sexual abuse matter is still a child, the prosecution is generally allowed to use their prerecorded investigative interview, often conducted by police, as some or all of the complainant's evidence in chief.

This is likely to assist the complainant by reducing the stress of giving evidence for long periods in the witness box. It may also improve the quality of the evidence that the complainant gives because the interview can be conducted quite soon after the abuse is reported to police, which may be many months before the trial begins.

However, because the prerecorded interview is likely to be used as the complainant's evidence in chief, the quality of the interview is crucial. It is likely to constitute most, if not all, of the prosecution's direct evidence about the alleged abuse.

We discuss the findings of research we commissioned – *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants' Evidence Research) – on prerecorded investigative interviews, including what is needed for effective interviewing and the research

findings. The research suggests that there is room for improvement. We also discuss the skills and training needed for investigative interviewing and problems encountered with the technical aspects of recording interviews. We also discuss briefly the use of interpreters and intermediaries in police interviews. This is discussed further in Chapter 9.

The following could be considered as possible principles to guide police investigative interviewing:

- All police who provide an investigative response (whether specialist or generalist) to child sexual abuse should receive at least basic training in understanding sexual offending, including the nature of child sexual abuse and institutional child sexual abuse offending.
- All police who provide an investigative response (whether specialist or generalist) to child sexual abuse should be trained to interview the complainant in accordance with current research and learning about how memory works in order to obtain the complainant's memory of the events.
- The importance of video recorded interviews for children and other vulnerable witnesses should be recognised, as these interviews usually form all, or most, of the complainant's and other relevant witnesses' evidence in chief in any prosecution.
- Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:
    - a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses
    - skill development in planning and conducting interviews, including use of appropriate questioning techniques.
- Specialist police should undergo refresher training on a periodical basis to ensure that their specialist understanding and skills remain up to date and accord with current research.
- From time to time, experts should review a sample of video recorded interviews with children and other vulnerable witnesses conducted by specialist police for quality assurance and training purposes and to reinforce best-practice interviewing techniques.
- State and territory governments should introduce legislation to remove any impediments, including in relation to privacy concerns, to the use of video recorded interviews so that the relevant police officer, his or her supervisor and any persons engaged by police in quality assurance and training can review video recorded interviews for quality assurance and training purposes. This would not be intended to require legislative authority to allow the use of video recorded interviews for general training purposes.
- Police should continue to work towards improving the technical quality of video recorded interviews so that they are as effective as possible, from a technical point of view, in presenting the complainant's and other witnesses' evidence in chief.
- Police should recognise the importance of interpreters, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses.

- Intermediaries should be available to assist in police investigative interviews of children and other vulnerable witnesses.

Police charging decisions

The decision to charge is one of fundamental importance to victims and survivors, police and the accused. In private sessions, many survivors have told us about their experiences of police declining to lay charges for various reasons.

We discuss the police decision to charge and the possibility of obtaining charge advice from the DPP. We also discuss the issue of police declining to pursue charges on the basis that there is no corroboration of the victim or survivor's story. Also, in some jurisdictions, it appears that costs can be awarded against police if the accused is found not guilty, even if there is no suggestion of wrongdoing on the part of police.

The following could be considered as possible principles to guide police charging decisions:

- It is important to complainants that the correct charges be laid as early as possible so that charges are not significantly downgraded at or close to trial. Police should ensure that care is taken, and that early prosecution advice is sought where appropriate, in laying charges.
- In making decisions about whether or not to charge, police should not:
    - expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available
    - rely on the absence of corroboration as a determinative factor in deciding not to charge, where the victim or survivor's account does not suggest that there should be any corroboration available, unless the prosecution service advises otherwise.
- If costs can be awarded against police, this power should be removed or costs should be capped.

We welcome submissions that discuss the issues raised in Chapter 3.

In particular:

- we welcome submissions on the possible principles and approaches we discuss, including on whether it is sufficient to address these issues by setting out general principles or approaches or whether we should consider making more specific recommendations – and, if we should consider making more specific recommendations, what they should be
- we welcome submissions on whether we should support the Australian Law Reform Commission and New South Wales Law Reform Commission recommendations for reforms to the protections against disclosing the identity of mandatory reporters in the context of institutional child sexual abuse

- we seek the views of state and territory governments on the possible principles for investigative interviews, including:
  - whether it is sufficient to address this issue 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
  - any resourcing or implementation difficulties that might arise
- we seek the views of state and territory governments and other interested parties on:
  - whether costs are imposed on police for prosecutions that do not result in convictions
  - whether there should be limits on cost orders against police and prosecutors
  - if limits are set, what those limits should be.

Police responses and institutions

The issues discussed in Chapter 3 arise in relation to police responses to child sexual abuse generally, including institutional child sexual abuse. On these issues, the police response to institutional child sexual abuse is likely to be similar to the police response to other child sexual abuse.

However, there are some features of institutional child sexual abuse that may call for a different or additional police response.

Police communication and advice

In many cases involving allegations of institutional child sexual abuse, a response will be sought or required from both police and the institution. This is particularly so in cases of 'current allegations' of institutional child sexual abuse, where the alleged perpetrator is or has recently been working or volunteering at the institution.

These allegations are likely to raise particular concerns for police and child protection agencies, the institution, the parents of children involved in the institution, and the broader community. The institutional setting may have provided the alleged perpetrator with access to many children. Therefore, there may be concern about how to identify all affected children and to respond urgently and appropriately to their needs and the needs of others involved with the institution.

Case Study 2 on the YMCA NSW's response to the conduct of Mr Jonathan Lord is a particularly relevant example.

Our public roundtable on multidisciplinary and specialist police responses discussed the issues of what assistance institutions, victims, families and the broader community require from police and what assistance police can provide.

We discuss potential limitations that privacy and defamation laws place on what institutions can disclose when responding to allegations of institutional child sexual abuse. We also examine the

limitations that legislation protecting the identity of the accused places on what police and institutions can disclose.

We also discuss current guidance to police for providing assistance. The NSW Police Force has adopted Standard Operating Procedures for Employment Related Child Abuse Allegations (NSW SOPS). The NSW SOPS guide the police and institutions on the information and assistance police can provide to institutions where a current allegation of institutional child sexual abuse is made.

We discuss current police approaches to police communication and assistance to victims, families and the broader community in a number of jurisdictions. We also discuss current guidance to police for providing assistance. In New South Wales, the Department of Family and Community Services, NSW Health and the NSW Police Force have adopted the Joint Investigation Response Team (JIRT) Local Contact Point Protocol. The primary objective of the protocol is the provision of information and support to parents and concerned community members where there are allegations of child sexual abuse involving an institution.

We suggest that it may assist if all police agencies develop procedures or protocols to guide police and institutions on the information and assistance they can provide to institutions when a (current) allegation of institutional child sexual abuse is made. The NSW SOPs are an example of a possible approach.

We also suggest that it may assist if all police agencies, and/or multidisciplinary responses, develop procedures or protocols to guide police, institutions and the broader community on the information and assistance they can provide to children and parents, the broader community and the media when a (current) allegation of institutional child sexual abuse is made. The JIRT Local Contact Point Protocol is an example of a possible approach.

Blind reporting to police

'Blind reporting' refers to the practice of reporting to police information about an allegation of child sexual abuse without giving the alleged victim's name or other identifying details. The information reported typically would include the identity of the alleged offender and the circumstances of the alleged offence, to the extent they were known.

Blind reporting arises in relation to institutional child sexual abuse in particular because institutions may receive many allegations of abuse that include the victim or survivor's details. Institutions may face issues of whether to provide a victim's details to police even if the victim does want their details to be provided, and the police may have to determine how to respond to any blind reports.

The issues of reporting and blind reporting raise a number of potentially competing objectives and different perspectives, including:

- the desire to encourage victims and survivors of child sexual abuse to disclose their abuse so that they can receive any necessary support, including therapeutic and other support services and potentially compensation
- the desire to recognise and respect the wishes of victims and survivors so that it is their decision whether and to whom they disclose their abuse

- the desire to maximise reporting to police of child sexual abuse so that criminal investigations can be conducted and offenders can be prosecuted
- the desire to maximise the provision of information to police and other regulatory authorities about child sexual abuse so that any available regulatory measures can be taken to keep children safe.

Blind reporting has been a particularly controversial issue in New South Wales because of the offence under section 316(1) of the *Crimes Act 1900* (NSW) of concealing a serious indictable offence. The issue of blind reporting was also considered by the New South Wales Police Integrity Commission in 2015 in Operation Protea.

Our public roundtable on reporting offences discussed the issue of blind reporting. Drawing on this discussion, we outline current police approaches to blind reporting in New South Wales and Victoria, as well as the approaches to reporting and blind reporting taken by a number of survivor advocacy and support groups and two institutions.

Participants at the public roundtable identified the potential conflict of interest if institutions in which abuse is alleged to have occurred advise survivors about their reporting options or tell police whether or not a survivor wishes to report to police.

The issue of blind reporting is very closely linked to the issue of reporting offences, which we discuss in section 6.3.

In circumstances where there remains no obligation to report, we suggest that there might be benefit in institutions developing and following guidelines for reporting to police. We outline a possible approach for institutions that are willing to blind report in accordance with survivors' wishes. We also suggest that there might be benefit in survivor advocacy and support groups developing and following guidelines for reporting to police.

We welcome submissions that discuss the issues raised in Chapter 4.

In particular, we seek the views of state and territory governments, institutions and other interested parties on:

- whether privacy and defamation laws create difficulties for institutions in communicating within the institution, or with children and parents, the broader community or the media; and possible solutions, including communication by police or child protection agencies or legislative or policy reform
- issues of police communication and advice, including to institutions, children and parents, the broader community and the media
- the adequacy and appropriateness of the NSW SOPS and the NSW JIRT Local Contact Point Protocol as procedures or protocols to guide police communication and advice
- the issue of blind reporting and its interaction with reporting offences discussed in section 6.3.

Child sexual abuse offences

In Chapter 5, we briefly outline some developments in child sexual abuse offences generally. We then consider four issues in child sexual abuse offences which appear to us to be particularly important in relation to institutional child sexual abuse:

- the offence of persistent child sexual abuse
- the offence of grooming
- position of authority offences
- limitation periods on criminal prosecutions.

Persistent child sexual abuse offences

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.

The accused is entitled to a fair trial, which includes knowing 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.

States and territories have tried to address at least some of these concerns by introducing persistent child sexual abuse offences. Generally, these offences require proof of a minimum number (either two or three) of unlawful sexual acts over a minimum number of days.

However, it is not clear that these offences have adequately addressed these concerns. In particular, there may still be significant problems in what are arguably some of the worst cases, where a child has been repeatedly and extensively abused over a period of time and they cannot identify individual occasions of abuse.

We trace the development of persistent child sexual abuse offences in the states and territories and how they have been amended over time.

In most jurisdictions, the offence continues to require proof of the occurrence of at least a minimum number of unlawful sexual acts. However, Queensland has adopted an offence which focuses on the maintenance of an unlawful sexual relationship rather than particular unlawful sexual acts. In order

to convict, the jury must be satisfied that there was more than one unlawful sexual act over a period of time. However, the jurors do not have to agree on the same unlawful sexual acts.

The Queensland form of the offence appears to overcome the main difficulty in the offence as it applies in other states and territories.

An additional modification in South Australia and Tasmania allows the offence in those jurisdictions to apply to unlawful sexual acts that were committed before the offence was introduced. This means that the offence can be used in historical cases.

We also discuss the course of conduct charge introduced in Victoria in 2015. This enables a particular offence to be charged on the basis that it was part of a course of conduct. It may assist where the complainant is unable to distinguish particular occasions of offending from each other.

Commissioners agree with the concern identified in a recent South Australian Court of Criminal Appeal decision that it is a 'perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence'.

Commissioners are satisfied 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.

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

The Queensland offence appears to be the most effective of the current forms of persistent child sexual abuse. However, it still requires at least two distinct occasions of abuse to be identified. Also, it may not overcome the difficulties that arise where a complainant cannot identify or distinguish any particular occasion of repeated abuse. The Victorian course of conduct charge may assist in these circumstances.

There may also 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.

Grooming offences

'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.

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 behaviours by alleged perpetrators and convicted offenders. We have also heard evidence of parents being groomed in order to facilitate the perpetrators' access to their children without raising the parents' suspicions.

All Australian jurisdictions have offences in relation to grooming.

The current grooming offences broadly take three different forms as follows:

- **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.

The broadest grooming offences are in Victoria and Queensland.

In 2014, Victoria introduced a specific grooming offence based on the recommendations of 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 offence covers any words or conduct, and it covers both the grooming of the child and the grooming of a person who has care of supervision of, or authority over, the child.

The Queensland offence was introduced in 2013, and it is similarly broad in terms of covering any conduct. However, it only covers conduct in relation to the child.

South Australia and Tasmania also have broad grooming offences, although they cover communication rather than any conduct.

The issue in relation to grooming offences is whether there is benefit in having broader grooming offences, even though they are likely to be very difficult to prove in circumstances beyond the narrower online or specific grooming offences.

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.

There might be 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.

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, assisting institutions to educate staff and volunteers about the signs and dangers of grooming and encouraging compliance with the code of conduct

- any risk in a broader grooming offence – for example, discouraging (non-offending) staff and volunteers from engaging in healthy and appropriate behaviour with children in their care.

Position of authority offences

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.

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 with a child by a person in authority will be an offence.

However, Queensland and Tasmania have not introduced specific offences in relation to older children who are above the age of consent. Rather, they have essentially provided that, where 'consent' is obtained by the exercise of authority, consent will be vitiated.

We would like to hear from interested parties about any gaps in the regimes that recognise relationships of authority as aggravating factors in child sexual abuse offences.

We would also like to hear from interested parties as to whether it would be preferable for all jurisdictions to adopt person in authority offences applying to children up to 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.

Limitation periods on criminal prosecutions

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.

A number of jurisdictions have repealed limitation periods and have revoked any immunity for a perpetrator that might already have arisen under a limitation period before it was repealed.

It seems to us fairly clear that, generally, any remaining limitation periods for charging child sexual abuse offences should be removed and that the removal should have retrospective effect. However, this removal should not revive any sexual offences that are no longer in keeping with community standards – for example, offences that targeted homosexuality, which has been decriminalised.

We welcome submissions that discuss the issues raised in Chapter 5.

In particular, we welcome submissions on:

- persistent child sexual abuse offences, including:
  - how best to enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively
  - whether the approaches reflected in the current Queensland offence and the current Victorian course of conduct charge can be improved upon
  - whether the requirement for particulars can be further restricted without causing unfairness to the accused
  - whether retrospective operation of the offences – as currently allowed in South Australia and Tasmania – is appropriate
- broader grooming offences, including:
  - whether the approaches reflected in the current Victorian and Queensland offences can be improved upon
  - whether grooming of persons other than the child should be included in the offence
- persons in position of authority offences, including:
  - whether there are currently any gaps in the recognition of relationships of authority as aggravating factors in child sexual abuse offences
  - whether all jurisdictions should adopt person in authority offences applying to children up to the age of 18 years, rather than allowing the relationship of authority to be a factor that can vitiate consent for 16- and 17-year-olds
- limitation periods that apply to criminal prosecutions, including whether:
  - any limitation periods or associated immunities remain in operation in any jurisdictions
  - there are any prosecutions that cannot proceed because of limitation periods or associated immunities
  - removing limitation periods and associated immunities would risk reviving any sexual offences that are no longer in keeping with community standards.

Third-party offences

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.

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. However, there may be good reasons for the criminal law to impose positive obligations on third parties to act in relation to child sexual abuse, including because of how difficult it can be for victims to disclose and because of the importance of detection and prevention of further abuse.

We discuss a number of examples from our case studies which reveal circumstances where abuse was not reported or where steps were not taken to protect children.

Failure to report

We briefly outline the regulatory context, including mandatory reporting and reportable conduct obligations, before turning to criminal law offences in relation to reporting.

The common law offence of misprision of felony has been abolished in all Australian jurisdictions. However, in 1990, New South Wales replaced misprision of felony with the offence of 'concealing serious indictable offence' in section 316(1) of the *Crimes Act 1900* (NSW).

The New South Wales offence in section 316(1) requires a person who knows or believes that:

- a serious indictable offence has been committed
- he or she has information which might be of material assistance in securing the apprehension or prosecution or conviction of the offender for it,

to bring the information to the attention of the police or other appropriate authority. It is an offence to fail to do this without reasonable excuse.

The New South Wales offence has been subject to criticism. The New South Wales Law Reform Commission unanimously recommended that section 316(1) be repealed, with a minority recommending that it be repealed and replaced with a new provision. The New South Wales Police Integrity Commission also concluded that there was an urgent need for section 316(1) to be reconsidered, including whether it should be repealed or substantially amended.

Victoria introduced a new offence in 2014 under section 327(2) of the *Crimes Act 1958* (Vic). Under section 327(2), 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.

There are a number of exceptions to the obligation to report.

In particular, a person does not commit the offence if their 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 and the victim requested that the information not be disclosed. This exception would prevent an obligation to disclose arising in circumstances 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.

There is also an exception where the person comes into possession of the information when they are a child. 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.

The Victorian offence in section 327 was discussed at our public roundtable on reporting offences, and we discuss its development and some of the issues that arose in relation to it.

We raise for discussion whether there should be a criminal offence in relation to a failure to report and what the scope of any offence should be.

We suggest that there are three broad approaches to the scope of a reporting offence:

- a broad offence applying to all serious crimes and requiring all people with the relevant knowledge or belief to report to police – such as the New South Wales offence in section 316(1)
- an offence targeting child sexual abuse offences and requiring all people with the relevant knowledge or belief to report to police – such as the Victorian offence in section 327(2)
- an offence targeting institutional child sexual abuse offences and requiring those within institutions with the relevant knowledge or belief to report to police.

A significant benefit of an offence that targets institutions is 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 reporting obligation could 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.

We also raise the issue of whether there should be protection for whistleblowers who disclose child sexual abuse, particularly institutional child sexual abuse, and whether a criminal offence designed to provide this protection may encourage reporting.

Failure to protect

In 2015, 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. It targets individuals in positions of authority working in institutions and was introduced in response to a recommendation in the Betrayal of Trust report.

Under the Victorian offence in section 49C, 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. They must not negligently fail to reduce or remove a risk which they have the power or responsibility to reduce or remove.

Many of our case studies 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.

Where there are reporting offences – either the current offences in New South Wales and Victoria or any new offences, including any we recommend – senior staff in institutions may be obliged to report to police. However, these offences will only apply where the required level of knowledge or belief exists. There must also be knowledge or belief that an offence has been committed.

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 could apply to action taken or not taken before it is known that an offence has been committed.

Also, 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.

The Victorian offence is targeted quite narrowly. 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 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 welcome submissions on an offence for failure to protect. In particular, we welcome submissions from institutions on whether the Victorian offence is appropriately targeted or whether it might have any unintended adverse consequences for institutions' ability to provide children's services.

Offences by institutions

In the research report *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research), the researchers 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. The researchers provide a detailed discussion of institutional offences, including why organisational responsibility for child sexual abuse might be appropriate and how organisational offences might be framed.

We outline the possible institutional offences as follows:

- being negligently responsible for the commission of child sexual abuse
- negligently failing to remove a risk of child sexual assault
- reactive organisational fault

- institutional child sexual abuse.

There may be good reasons of principle why offences targeting institutions should be introduced. Institutions themselves may be 'criminogenic', in that they are likely to cause or produce criminal behaviour, or they may contribute to offending indirectly. The criminal law may also be more appropriate than civil law for punishing and deterring wrongdoing because conviction carries with it serious consequences and social stigma.

However, there is also 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.

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. There may also be an issue as to whose actions or inactions should be included in considering institutional responsibility or culture, and in some cases what might be considered the 'corporate culture' may be divided.

Independently of considering broad institutional offences, an institutional failure to protect offence might be of value in supplementing an individual failure to protect offence such as the Victorian offence in section 49C. It is possible that some failures to protect that the community would consider deserving of criminal sanction might escape punishment under an offence targeted at individuals because of more diffuse management and control structures within some institutions.

In considering institutional offences, it is relevant to consider whether civil liability of the kind we recommended in our *Redress and civil litigation report*, 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.

We welcome submissions that discuss the issues raised in Chapter 6.

In particular:

- we welcome submissions on whether there should be a criminal offence in relation to failure to report and, if so, whether it should apply to:
  - all serious criminal offences
  - child sexual abuse
  - institutional child sexual abuse
- we welcome 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

- we welcome submissions as to whether a criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action would encourage reporting
- we welcome submissions on an offence for failure to protect
- we seek submissions from institutions on whether the Victorian offence of failure to protect is appropriately targeted or whether it might have any unintended adverse consequences for institutions' ability to provide children's services
- we welcome submissions on possible institutional offences, including:
    - whether institutional offences are necessary in addition to offences for failure to protect
    - 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.

Issues in prosecution responses

Many survivors have told us in private sessions of their experiences in interacting with prosecutors. We have also heard evidence in a number of our public hearings about decisions made by prosecutors and their interactions with complainants and witnesses. A number of submissions to 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.

We have also heard evidence from many 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.

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. Also, changes in criminal offences and criminal procedure and evidence legislation have enabled prosecutors to respond more effectively to victims and survivors.

We outline the current 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 that states and territories currently provide to assist witnesses, particularly victims, in the prosecution process.

Possible principles for prosecution responses

We discuss a number of general aspects of prosecution responses which we consider are of particular importance to victims and survivors.

There may be value in identifying principles which focus on general aspects of the prosecution response that are of particular importance or concern to victims and survivors. Prosecution agencies may consider that they already act, or aim to act, in accordance with such principles. However, there may be benefit in stating them so that they continue to receive priority in prosecution responses.

The following could be considered as possible principles to inform 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 persons 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.
- Witness Assistance Services are particularly important in keeping victims (and their families) and survivors informed and ensuring that they are put in contact with relevant support services. Witness Assistance Services 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.

Charging and plea decisions

The most significant decisions that prosecutors make for victims and survivors – and for the accused – are decisions:

- whether or not 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.

We discuss the requirements in prosecution guidelines in relation to key prosecution decisions, including:

- the test that governs the decision to prosecute
- the decision to discontinue a prosecution
- principles that apply to negotiating charges
- requirements to consult victims.

The following could be considered as possible principles to guide prosecution charging and plea 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.

DPP complaints and oversight mechanisms

We had not particularly anticipated finding significant problems in decision-making processes within the offices of DPPs in any of our case studies. However, two case studies revealed such problems. We discuss these case studies in detail.

DPPs make decisions that have significant impacts on complainants, including decisions to discontinue prosecutions and to withdraw charges or substitute less serious charges in return for a guilty plea. DPP guidelines generally require consultation with victims and the police officer in charge of the investigation.

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 preparation for our public roundtable on DPP complaints and oversight mechanisms, the Hon. Justice Peter McClellan AM prerecorded discussions with participants who have expertise in the extensive complaints and oversight mechanisms that apply in England and Wales. Discussions were recorded with the DPP for England and Wales, senior staff of the Appeals and Review Unit in the Crown Prosecution Service which operates the Victims' Right to Review scheme, and the Chief Inspector of Her Majesty's Crown Prosecution Service Inspectorate.

We outline the various complaints and oversight mechanisms applying in England and Wales, particularly the Victims' Right to Review scheme and judicial review, and the Crown Prosecution Service Inspectorate.

We also outline the current position for Australian DPPs, including their independence and the current accountability measures that apply to them.

The work we have done to date 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.

At this stage, taking account of the discussion at the roundtable, it seems that all Australian DPPs should be able to implement the following minimum requirements 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.

It seems likely to be important also to provide an opportunity to discuss the reasons in person, before written reasons are provided, and it may also be important that this is 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. 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.

It also appears that providing a formalised internal complaints mechanism, allowing 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 – should be available.

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 view 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.

We raised for discussion at the public roundtable the option of allowing external judicial review of key decisions, particularly those to do with not commencing or discontinuing a prosecution. It seems reasonably clear that judicial review is not favoured, either by the High Court or by DPPs.

However, 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.

If DPPs introduced an internal complaints mechanism which was robust and effective, it may be that there would be no need for judicial review. 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.

We also 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. Given the expressed support for and current implementation of internal audit processes, these may be a worthwhile way to proceed.

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, enabling the reporting of changes in compliance over time.

We welcome submissions that discuss the issues raised in Chapter 7.

In particular:

- we welcome submissions on:
    - the possible principles for prosecution responses and charging and plea decisions, including 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

  - whether there is sufficient liaison between prosecutors and police in relation to charging decisions

- we seek 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.

Delays in prosecutions

In private sessions, many survivors have told us about their experiences in participating in trials. Also, in a number of our public hearings, we have heard evidence about the experiences of victims and their families and survivors in court processes. A number of submissions in response to Issues Paper 8 also told us of personal and professional experiences of prosecution responses during the trial stage of the prosecution.

Regardless of whether the overall experience was positive or negative, many of those from whom we have heard have raised concerns about delays. Even where there the prosecution ultimately results in a successful outcome for the complainant in that the accused is convicted, a number of complainants have told us of the stress and distress they and those close to them suffered, sometimes for years, while the prosecution took its course.

Every state and territory has a different court structure and different procedural rules for dealing with criminal proceedings. It is probably unrealistic to think that we could recommend particular structures or processes that would be effective in eight states and territories, each with their own different system. However, there seem to be common themes and elements that might contribute to reducing delay and creating more efficient court processes and case management.

We discuss the extent and impact of delay, and we give examples of approaches that some jurisdictions are currently taking to addressing delay.

There is rarely just one issue that causes delay in the criminal justice system. Rather, many factors interact with each other. A number of aspects of the system may need to change in order to bring about a reduction in delay.

We discuss the following possible options to address delay:

- specialist courts and prosecution units and the specialist measures that have been introduced to address sexual offences in some Australian jurisdictions
- early allocation of prosecutors, which might:
  - enable the prosecutors to make sure the charges are correct early in the proceedings
  - allow early identification and narrowing of the issues

    - facilitate disclosure to the defence and any negotiations which may encourage early guilty pleas
- encouraging appropriate early guilty pleas
- abolishing committal hearings in jurisdictions that have not already abolished them
- case management mechanisms to ensure early identification of the issues
- reviewing trial listing practices.

These issues and possible reforms are not new. However, a lack of resources for the key participants, particularly courts and prosecution agencies, may make it difficult to implement reforms.

Some states and territories do not have particular problems with delay, or at least not to the same extent as the larger jurisdictions, in relation to child sexual abuse trials. The differences between jurisdictions that are experiencing unacceptable delays may also mean that solutions in one jurisdiction may not work in other jurisdictions. Given these jurisdictional differences and the complexities involved, it may not be feasible for us to make detailed recommendations about how eight very different prosecution and court systems should operate.

However, it may be that some principles can be identified, such as:

- the importance of reducing delay
- the importance of allocating prosecutors as early as possible
- the importance of the Crown – including subsequently allocated Crown prosecutors – being bound by early prosecution decisions
- the importance of securing appropriate early guilty pleas
- the importance of determining preliminary issues before trial.

We welcome submissions that discuss the issues raised in Chapter 8.

In particular, we welcome submissions on:

- the possible options for addressing delays in prosecutions discussed in Chapter 8
- any other possible options to address delay
- 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.

Evidence of victims and survivors

Many survivors have told us how daunting they found the criminal justice system. Those survivors whose allegations proceeded to a prosecution told us that the process of giving evidence was

particularly difficult. Many survivors told us that they felt that they were the ones on trial. Some survivors told us that the cross-examination process was as bad as the child sexual abuse they suffered. Many survivors told us that they found the process re-traumatising and offensive.

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

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

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

We discuss the examples we examined in the second week of Case Study 38 that illustrate the difficulties facing children and people with disability and their families, and adult survivors, in participating in the criminal justice system.

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

- the use of a prerecorded investigative interview, often conducted by police, as some or all of the complainant's evidence in chief
- prerecording all of the complainant's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the complainant need not participate in the trial itself. This measure can also reduce uncertainty in timing and delay
- closed circuit television (CCTV) may be used so that the complainant is able to give evidence from a room away from the courtroom
- the complainant may be allowed to have a support person with them when giving evidence, whether in the courtroom or remotely by CCTV
- if the complainant is giving evidence in court, screens, partitions or one-way glass may be used so that the complainant cannot see the accused while giving evidence
- the public gallery of a courtroom may be cleared during the complainant's evidence
- in some cases, particularly while young children are giving evidence, the judge and counsel may remove their wigs and gowns.

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

- restricting the scope of questions that can be asked in cross-examination

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

We discuss the eligibility for special measures in each jurisdiction and what the Complainants' Evidence Research tells us about the use of special measures.

We discuss other courtroom issues, including how judges test the competence of young children to give sworn evidence. We also discuss at some length the findings of the Complainants' Evidence Research in relation to courtroom questioning, particularly cross-examination.

In the second week of Case Study 38, we heard evidence from a number of experts familiar with the operation of the Registered Intermediary Scheme, which has been in operation across England and Wales since 2008.

Intermediaries can be used to assist vulnerable witnesses at both the investigative stage by police and in preparation for a trial. Ideally, the intermediary will also participate in a 'ground rules' hearing before the witness's evidence is taken. In the hearing, the intermediary can report to the court on the witness's requirements and the judge can give guidance to counsel as to which recommendations of the intermediary are to be adopted.

We discuss the following possible reforms:

- the prerecording of all of a witness's evidence
- the introduction of intermediaries, including recent reforms in New South Wales and South Australia
- the introduction of ground rules hearings
- improving special measures through addressing any gaps in eligibility, considering their extension to adult complainants who do not have disability, and addressing technical problems
- improving courtroom issues – in addition to the use of intermediaries and ground rules hearings – through training and professional development and reconsidering the form of competency testing
- improving the availability and use of appropriate interpreters, including for Aboriginal and Torres Strait Islander victim sand survivors.

We recognise that a number of these possible reforms may have resourcing implications for state and territory governments.

We welcome submissions that discuss the issues raised in Chapter 9.

In particular, we seek submissions from:

- interested parties on:
  - eligibility for, and use of, special measures and how special measures can be improved
  - intermediaries and ground rules hearings
  - whether competency testing should be reformed
  - whether other reforms should be considered to improve courtroom questioning – particularly cross-examination – for complainants
  - the use and availability of interpreters
- state and territory governments in relation to special measures, including:
  - the range of, eligibility for and use of special measures
  - the possibility of prerecording all of an eligible witness's evidence
  - the possible extension of special measures to all adult complainants of institutional child sexual abuse
  - how to improve technical aspects of special measures
  - any resourcing issues in improving and extending special measures
- state and territory governments in relation to intermediaries and ground rules hearings, including:
  - the introduction of intermediaries and ground rules hearings
  - any resourcing or procedural issues in introducing intermediaries and ground rules hearings
- state and territory governments in relation to interpreters, including:
  - the adequacy of interpreter services in relation to the investigation and prosecution of institutional child sexual abuse, particularly for Aboriginal and Torres Strait Islander victims and survivors
  - any resourcing issues in providing adequate interpreter services.

Tendency and coincidence evidence and joint trials

One of the most significant issues we have identified in our criminal justice work to date is the issue of how the criminal justice system deals with allegations against an individual of sexual offending against more than one child.

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' can 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 or not the accused is guilty of the particular charges being tried.

In May 2016, after the public hearing in Case Study 38, we published a significant research study on jury reasoning – *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research) – which is particularly relevant to our understanding of these issues. The 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.

These are a complex and technical issues. They have troubled the courts for many years.

Based on what we have heard to date, and the research and other material we have considered, Commissioners are now reasonably satisfied that the current law needs to change so that it facilitates more cross-admissibility of evidence and more joint trials in child sexual abuse matters.

However, we remain open to considering submissions that the current law does not need to change. We welcome submissions on the issues discussed in this chapter, including submissions on how the law should change.

In Chapter 10, we outline tendency and coincidence reasoning and relationship or context evidence. We also outline the current law in Australian jurisdictions, particularly:

- the common law – and most restrictive approach to admissibility of tendency and coincidence evidence, which applies in Queensland
- the Uniform Evidence Act approach, which applies in the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory – although

differences have emerged between New South Wales and Victoria. Victorian courts have tended to take a more restrictive approach to admitting tendency and coincidence evidence, including in institutional child sexual abuse cases

- the approach in South Australia, which is similar to the Uniform Evidence Act approach
- the most liberal approach to admitting tendency and coincidence evidence, which applies in Western Australia.

We discuss the examples we examined in the first week of Case Study 38 illustrating the issues in relation to tendency and coincidence evidence and joint trials and the difficulties facing complainants when tendency and coincidence evidence is excluded and trials are separated.

We then outline the concerns the courts have expressed for many decades about admitting tendency and coincidence evidence, or other evidence of the accused's 'bad character', including the concern that juries will make too much of the evidence and will too readily assume that the accused is guilty of the offence charged.

We discuss in detail the Jury Reasoning Research, including its key findings that the researchers found no evidence of unfair prejudice to the accused in the joint trials or where tendency evidence was admitted in a separate trial. The researchers found that:

- no jury verdict was based on impermissible reasoning
- jury verdicts were logically related to the probative value of the evidence
- there was no significant difference between conviction rates in the tendency evidence trial and the joint trial, so there was no 'joinder effect'
- the credibility of the complainants was enhanced by evidence from independent witnesses
- 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
- conviction rates for the weakest case did not increase significantly with extra witnesses or charges, thus showing no 'accumulation prejudice' through the number of charges or the number of prosecution witnesses
- the convincingness of the defendant was rated consistently by jurors across the different trial variations, suggesting that there was no character prejudice.

We discuss the approaches taken in some overseas jurisdictions, particularly England and Wales.

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*. 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 approach in England and Wales now allows considerably more evidence of the accused's bad character to be admitted than would be allowed in Australian jurisdictions.

We also outline the approaches in Canada, New Zealand and the United States.

We have received opinions on the law in Australian jurisdictions from a number of experts as follows:

- in 2015, barristers Mr Tim Game SC, Ms Julia Roy and Ms Georgia Huxley provided advice to the Royal Commission
- in Case Study 38, we obtained expert evidence from the DPPs of New South Wales, Victoria, Queensland, Western Australia and South Australia
- in Case Study 38, we obtained expert evidence from senior members of the private bar in New South Wales, Victoria and Queensland, giving a defence counsel perspective
- following Case Study 38, we have obtained the opinion of Counsel Assisting in Case Study 38 in relation to the issues considered in the first week of the public hearing.

We outline these opinions in Chapter 10, although we acknowledge that the opinions should be read in full for a good understanding of the opinions expressed.

Having considered all of this material, it seems that a rational argument can 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.

Commissioners are now reasonably satisfied that the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters. We consider that the Jury Reasoning Research provides strong support for the view that the courts' long and strongly held concerns about tendency and coincidence evidence are misplaced.

The Uniform Evidence Act has moved substantially from the common law position, yet we have seen no evidence or heard any suggestion of injustices arising as a result of these changes.

Similarly, the Western Australian provisions – at least as they are applied in Western Australia – have moved further than the Uniform Evidence Act, yet again we have seen no evidence or heard any suggestion of injustices arising as a result of these changes.

Finally, the position in England and Wales has moved even more substantially from any of the positions applying in Australian jurisdictions, and again 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.

It is also a significant concern – and a significant impetus for reform – that currently the location in Australia where offences are alleged to have been committed may have a significant bearing on whether an alleged offender is convicted or acquitted.

We know enough about institutional child sexual abuse 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. Given this evidence of the variety of institutional offending, the test for admitting tendency and coincidence

evidence should not require degrees of similarity that are inconsistent with this evidence of the nature of institutional child sexual abuse offending.

While we are reasonably satisfied that the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials, it is not yet clear to us how this can best be achieved. We seek the assistance of all interested parties on this issue.

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, an approach that allows more relevant evidence to be placed before juries is appealing. It may be 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 will be a test of mere relevance or the approach in England and Wales.

Although we are reasonably satisfied that the current law needs to change, we remain open to considering submissions that it does not. Given the complexity of these issues and the extent to which they have troubled the courts for many years, we recognise that reform is likely to be challenging. We want to be confident that any reforms we propose will achieve the desired outcomes and will not have unintended consequences.

We welcome submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions from interested parties on:

- whether or not the law in relation to tendency and coincidence evidence and joint trials should be reformed
- the validity of the concerns of the courts in relation to unfair prejudice in light of the Jury Reasoning Research findings and any other relevant material
- the approaches adopted in any overseas jurisdictions and, in particular, whether there is any reason why we should not recommend adopting the approach in England and Wales
- if the law is to be reformed:
    - should there be any requirement beyond relevance for admissibility and, if so, what should it be
    - if there is to be any requirement for similarity in the evidence, how should it be expressed and what should it allow and exclude
    - if there is to be a weighing of probative value against prejudicial effect, should the test favour admissibility or exclusion of the evidence
    - should the burden for persuading the court be on the prosecution (to admit the evidence) or the accused (to exclude the evidence)
    - should issues of concoction, contamination or collusion be left to the jury

- should the evidence need to be proved beyond reasonable doubt
- should evidence of prior convictions be admissible
- should evidence of alleged conduct for which the accused has been acquitted be admissible

- in relation to joint trials:
  - does any specific provision need to be made in favour of joint trials, in addition to any reform to the law in relation to admissibility of tendency and coincidence evidence
  - if so, what provision should be made
- in relation to tendency and coincidence evidence and joint trials, should any reforms apply specifically to child sexual abuse or institutional child sexual abuse offences, or should any reforms be of general application.

Judicial directions and informing juries

The trial judge is obliged to ensure that a trial of the accused is fair. The judge must give the jury a firm direction as to the appropriate law and remind the jury of the relevant facts. A misdirection by the judge may result in a miscarriage of justice.

When giving directions in a trial, the judge may in some circumstances be required to give the jury an appropriate warning or caution. It is common in trials of child sexual offences for some directions and warnings to be given over and above the directions commonly given in trials for other offences. The law with respect to judicial directions and warnings in sexual offence – including child sexual abuse – trials is complex and controversial, and it has been the subject of considerable review and research in Australia over the last decade.

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

In some cases, we know that judges' assumptions have been far from correct. For years, judges assumed that victims of sexual offences will complain at the first reasonable opportunity. As a consequence, delay was accepted to adversely affect the complainant's credibility. The common law developed special rules for warning the jury in accordance with this assumption. Research has discredited this assumption. We now know that delay in complaint of sexual abuse is common rather than unusual, particularly in the context of child sexual abuse. Parliaments have legislated to limit or displace this erroneous assumption and the common law rules that developed from it.

The history of judicial directions and warnings – particularly directions and warnings based on judicial assumptions about the unreliability of women, children and complainants of sexual offences, including child sexual abuse – reflects a tension between the view of the High Court and the legislation of the parliaments.

In Chapter 11, we trace this tension through the decisions of the High Court and the legislative responses of the New South Wales and Victorian parliaments. We focus in particular on directions relating to the assumed unreliability of sexual assault complainants, the need for corroboration of their evidence, the impact of delay on the credibility of the complainant and as a source of forensic disadvantage to the accused, and the unreliability of children as witnesses.

Judges and counsel ask jurors to draw on their 'common sense' and 'life experience' when assessing whether a child complainant is telling the truth. However, a significant body of research has shown that children's behaviours and reactions to child sexual abuse can be counterintuitive and inconsistent with juror expectations. This may lead jurors to question whether abuse has in fact occurred, with child complainants' credibility undermined on the basis of incorrect assumptions. The misconceptions may negatively affect jurors' perceptions of both child and adult complainants in child sexual abuse trials. We discuss research on myths and misconceptions that jurors may hold.

The purpose of judicial directions is to ensure the accused is tried according to the law. While this focuses on ensuring the accused receives a fair trial, the tension between the High Court and parliaments suggests that some judicial directions have been more likely to have improved the accused's prospects of acquittal, to the detriment of the community at large and the complainant in particular. Notwithstanding the legislated changes in some jurisdictions, this raises the question of whether further changes should be made.

Judicial directions should ensure that the accused receives a fair trial and that the jury is given the necessary information and assistance to perform its tasks. These considerations raise issues of possible reforms to judicial directions but also issues of improving the information and education available to judges and lawyers and to jurors.

Possible options for reform are as follows:

- **Reforming jury directions:** The Victorian Parliament appears to have gone further than other parliaments towards resolving tension with the courts over judicial directions by enacting the *Jury Directions Act 2013* (Vic) and the *Jury Directions Act 2015* (Vic). Codifying judicial directions may assist in avoiding judicial directions that are not supported by social science and other research. It may also assist in simplifying directions with a minimisation of error and successful appeals.

  Given the Victorian example, it may be that all states and territories should consider codifying judicial directions. Codification would be for the purposes of both:

  - accuracy and fairness, by prohibiting judicial directions that are not supported by social science and other research, particularly in cases of sexual offending including child sexual abuse
  - simplification, for the assistance of juries, trial judges and all parties.

  However, if governments pursue codification then, particularly in cases of sexual offending, including child sexual abuse, they would need to keep appellate decisions on judicial directions under careful review to ensure that the law is applied as the parliaments intend.

- **Improving information for judges and legal professionals:** Assumptions that judges make about how complainants behave and how memory works are embedded in the common law. They have

been repeated regularly over the decades by appellate judges, with limited, if any, reference to any relevant research to support them. It may be that part of the response to the problems associated with the complexity of jury directions is enhanced skills training for both judicial officers and counsel.

Formal training and continuing legal education could provide, at least, greater awareness of current academic literature on victims of child sexual abuse and the impact that the abuse can have on them. The work of this Royal Commission may also play a role in raising awareness of these issues.

- **Improving information for jurors:** Jurors may need assistance in better understanding children's responses to child sexual abuse. Possible options to improve jurors' understanding are:
  - the use of expert evidence: legislation allows the use of expert evidence about the behaviour of children; however, there may be some doubt about the effectiveness of this evidence
  - particular judicial directions: in New Zealand, judges may be required to give a particular direction when a witness is a child under six years of age. Recommendations have been made in Australia for judicial directions that would summarise expert opinion on children's behaviour and abilities as witnesses
  - the timing of giving judicial directions: judicial directions about children's behaviour may be more effective in assisting the jury if they are given before the complainant gives evidence in the trial. The *Jury Directions Act 2015* (Vic) requires some directions to be given as soon as practicable and before relevant evidence is given
  - providing educational material to juries: There may be methods – other than or in addition to expert evidence and judicial directions – that might help to inform and educate juries. For example, a standard video tutorial played to jurors before a child sexual abuse trial could be considered.

We welcome submissions that discuss the issues raised in Chapter 11.

In particular, we welcome submissions on:

- whether judicial directions and warnings in the nature of those discussed in section 11.3.1 continue to create difficulties in child sexual abuse trials, including institutional child sexual abuse trials, in any jurisdiction
- whether judicial directions should be codified
- whether particular judicial directions, such as the Markuleski direction, should be abolished or reformed
- what education or training would be most effective in ensuring judges – including appellate judges – and lawyers are better informed about child sexual abuse, including from up-to-date social science research

- what method or methods are most effective for improving jurors' understanding of child sexual abuse, including:
  - expert evidence
  - particular judicial directions
  - giving judicial directions early and repeating them through the trial
  - providing other educational material.

Sentencing

The sentencing of offenders involves an often complex task of applying the principles and purposes of sentencing to the characteristics of the offence and the subjective characteristics of the offender. Terms of imprisonment must be within statutory limits and will be influenced by sentences imposed for similar offences and, in some jurisdictions, standard non-parole periods or baseline sentences.

The approach to sentencing child sex offenders, and the term of head sentences, have altered significantly in recent times. There has been an upward trend in the number of offenders who receive custodial sentences, and the lengths of sentences for child sexual abuse has increased.

Sentencing sits at the 'end of a long series of decisions', including the initial decision by the complainant to report the abuse to police, the police response, and the finding by the prosecutor that there is a reasonable prospect of conviction followed by a decision to prosecute. Much of our focus in this consultation paper is on pre-conviction concerns and ensuring that victims and survivors are able to report to police, have their reports investigated and, where appropriate, have offenders prosecuted.

However, the sentencing of child sex offenders is an important issue. This is in part because of the role sentencing plays in achieving some of the purposes of the criminal justice system – particularly punishment and deterrence.

In Chapter 12, we discuss the findings of the two research reports that we commissioned on sentencing in matters of child sexual abuse, with a focus on institutional child sexual abuse: the Sentencing Research and *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study). The Sentencing Research examines the factors that inform sentencing policy and judicial decision-making when sentencing for institutional child sexual abuse. The Sentencing Data Study analysed 283 matters in which an offender was sentenced for child sexual abuse offences in an institutional context.

We outline the general principles and purposes of sentencing and the sentencing factors that are most relevant in child sexual abuse cases.

We identify the following possible areas for reform of sentencing for child sexual abuse, including institutional child sexual abuse:

- **Excluding good character as a mitigating factor:** Generally, an offender's prior or other good character (apart from the offending behaviour) can be a mitigating factor in sentencing. However, allowing good character as a mitigating factor can be highly problematic in sentencing for child sexual abuse offences. In particular, offenders may use their reputation and good character to facilitate the grooming and sexual abuse of children and to mask their behaviour. This may be particularly so in matters of institutional child sexual abuse.

  New South Wales and South Australia have legislated to prevent the offender's good character being taken into account as a mitigating factor if that good character was of assistance to the offender in the commission of the offence.

  Although the sentencing courts in other jurisdictions appear to give only slight consideration to good character in cases of child sexual abuse, it may be appropriate for all states and territories to introduce legislation similar to that applying in New South Wales and South Australia. Consideration could also be given to whether all states and territories should follow the approach of England and Wales and allow prior good character to be raised as an aggravating factor in cases where it has facilitated the offending.

- **Cumulative and concurrent sentencing:** The issue of whether sentences are imposed concurrently or cumulatively (consecutively) is relevant in matters where an offender is convicted and sentenced for more than one count on the indictment or on multiple indictments, or where the offender is still serving a sentence for a prior conviction.

  In private sessions and in public hearings, a number of survivors have expressed dissatisfaction about concurrent sentencing.

  All states and territories other than Victoria continue to have a presumption in favour of concurrent sentencing. Victoria legislated in 1993 to reverse the presumption in favour of concurrency when sentencing serious child sexual abuse offenders.

  The issue arises as to whether there might be benefit in other states and territories introducing legislation to make provision for a presumption in favour of cumulative sentencing for child sexual abuse offences that is similar to the presumption in Victoria.

- **Sentencing standards in historical cases:** In most Australian jurisdictions, an offender is sentenced with reference to the sentencing standards that existed at the time of the offending, including in relation to the maximum penalty, non-parole period and the prevailing sentence lengths accepted by the courts at the time of offending.

  The use of historical sentencing standards is particularly relevant to matters of institutional child sexual abuse, which are often prosecuted many years, even decades, after the offending occurred. Applying historical sentencing standards can result in sentences that do not align with the criminality of the offence as currently understood. Applying historical sentencing standards can also be complicated.

  Australian jurisdictions generally sentence by applying historical sentencing standards. However, Victorian legislation directs the sentencing court to have regard to current sentencing practices, and South Australia provides for current sentencing standards to apply in cases of multiple or persistent child sexual abuse, regardless of when the offending occurred.

England and Wales have implemented more substantial reform. While the statutory maximum penalty that applied at the time of the offence continues to apply, they otherwise sentence in accordance with the sentencing standards that apply at the time of sentencing.

It may be difficult to accept that an offender should benefit from a lighter sentence because the effect of their offending resulted in the victim substantially delaying reporting. This is especially so considering that an offender may receive a lighter sentence due to the passage of time between the offending and sentence, especially where the offender had demonstrated good behaviour in the intervening period or is of advanced age or ill health.

We welcome submissions that discuss the issues raised in Chapter 12.

In particular, we welcome submissions on:

- whether provision should be made to exclude good character as a mitigating factor in sentencing for child sexual abuse offences, similar to the approach of the provisions in New South Wales and South Australia – and whether provision should be made for good character to be an aggravating factor, as in England and Wales, where good character facilitated the offending
- whether there should be a presumption in favour of cumulative sentencing for child sexual abuse offences, similar to the approach of the provisions in Victoria
- whether child sexual abuse offences should be sentenced in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales.

Appeals

Appeals play an important role in the criminal justice system. They provide an avenue for parties to correct errors in individual matters. They also enable the appellate courts to provide guidance to trial courts on the correct way to apply the law in similar cases, which improves consistency across the criminal justice system.

While a criminal appeal following a conviction for child sexual abuse offences may be traumatic for the complainant, a defendant's right to appeal is enshrined in the criminal law. It is fundamental to the integrity of the criminal justice system and the ongoing development of principles of law.

Each state and territory's legislation governing appeals in criminal matters allows a convicted person to appeal against their conviction, either as of right or with leave depending upon the issues raised in the appeal. A convicted person is allowed to appeal against their sentence with the leave of the court. Some offenders appeal only against their sentence, while other convicted persons appeal against both their conviction and sentence.

The prosecution is allowed to appeal against a sentence imposed by the sentencing court, although such appeals should be rare. The prosecution is generally not allowed to appeal against an acquittal.

In most jurisdictions, the prosecution is allowed to appeal against interlocutory judgments or orders – that is, judgments or orders made by the trial judge before or during the trial – at least in some circumstances. The accused may also appeal against interlocutory judgments or orders with the appeal court's leave or a certificate from the trial judge. Interlocutory appeals may be particularly important for the prosecution if a trial judge makes orders that could have a significant impact on the prosecution's case.

In Chapter 13, we discuss research we commissioned on appeals to the New South Wales Court of Criminal Appeal in child sexual assault matters in New South Wales from 2005 to 2013 – the Appeals Study.

We discuss a number of issues in relation to appeals and raise the following as areas for possible reform:

- **Interlocutory appeals by the prosecution:** While the prosecution cannot appeal against an acquittal, in some jurisdictions there are provisions that allow the prosecution to appeal against interlocutory decisions. These appeals are described as interlocutory appeals. The prosecution is most likely to bring an interlocutory appeal if the trial judge's judgment or order is likely to have a significant adverse effect on the prosecution's case.

  Only New South Wales, Victoria, the Australian Capital Territory and the Commonwealth provide for a general right of appeal by the prosecution against interlocutory decisions made during the course of a trial. Some other states have appeal rights but only in respect of specific interlocutory decisions.

  Given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial. It may be that the DPP's right to bring an interlocutory appeal should be broadened in those jurisdictions that do not currently have the broadest general right for the DPP to bring an interlocutory appeal.

- **Inconsistent verdicts:** A ground of appeal that is commonly raised in child sexual abuse cases is what is referred to as 'inconsistent verdicts'. This ground may arise where, in a trial involving multiple counts, the jury returns a guilty verdict on one or more counts and a not guilty verdict on one or more other counts.

  Particularly in child sexual abuse cases where the only evidence of the abuse is the evidence given by the complainant, the offender may argue that a verdict of not guilty on one or more counts shows that the jury must not have believed the complainant. The offender may then argue that the verdicts of guilty on one or more other counts are therefore 'unsafe' because the jury should have had doubts about all of the complainant's evidence.

  The High Court has clarified the principles that govern the approach an appellate court should take in 'inconsistent verdict' appeals. However, appellate judges may still differ as to whether a conviction should be overturned on this basis.

- **The importance of recording complainants' evidence:** Survivors have told us of the stress and trauma of having to give their evidence again at a retrial following a successful appeal. In circumstances where evidence can be given via a recording or CCTV, there should be no barrier to

reusing the recording or to using a recording of the evidence given by CCTV in any retrial. This would avoid the need for the complainant to give evidence again.

New South Wales and Victoria have provisions that allow for recordings of the evidence of complainants in sexual offence proceedings to be used in new trials. These provisions apply regardless of whether the complainant was eligible for or used special measures to give their evidence.

It may be desirable for reliable audiovisual recordings to be made of evidence given live in court in child sexual abuse matters and for all jurisdictions to have legislative provisions allowing these recordings to be tendered in subsequent trials.

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

The use of prerecorded evidence goes some way toward reducing the often extraordinary stress and distress that complainants face in proceeding with a prosecution.

- **Prosecution discretion following a successful appeal against conviction:** Many conviction appeals that succeed result in the appeal court ordering a retrial. Following the ordering of a retrial by the court, the DPP retains a discretion whether or not to proceed with a new trial. The DPP guidelines in each jurisdiction do not necessarily provide principles guiding whether the DPP should retry a matter where a conviction at trial has been overturned and a retrial ordered.

  Given the impact on complainants of the decision whether or not to proceed with a retrial, it may be beneficial for prosecution guidelines to explicitly address this issue and to require consultation with the complainant and the relevant police officer before the DPP decides whether or not to retry a matter after a conviction has been overturned.

- **Monitoring appeals:** As we suggest in relation to judicial directions, it may be beneficial if relevant government agencies monitor the number, type and success rate of appeals, and the issues raised, to identify areas of the law in need of reform. This may be particularly important following any significant reforms to crimes or evidence legislation – including any such reforms arising from implementation of any recommendations the Royal Commission makes – to ensure that the reforms are working as intended.

We welcome submissions that discuss the issues raised in Chapter 13.

In particular, we welcome submissions on:

- whether reform is needed in any state or territory to expand the prosecution's right to bring interlocutory appeals
- whether there are any remaining difficulties in relation to 'inconsistent verdicts' which we should consider addressing

- whether the provisions for recording complainants' evidence at trial for use in any retrial should be expanded or otherwise reformed
- whether prosecution guidelines should explicitly address the issue of decision-making on whether or not to bring a retrial after a successful appeal by the defendant, including requiring consultation with the complainant and the relevant police
- any issues in relation to monitoring appeals and appellate decisions to ensure that the law and any reforms are working as intended.

Post-sentencing issues

In Chapter 14, we discuss three criminal justice responses that can occur at sentencing or after a child sexual abuse offender has been sentenced:

- treatment for adult offenders who have committed child sexual abuse offences while they are serving their sentences, either in custody or in the community
- indefinite sentences and supervision or detention orders
- risk management measures applying on release of child sexual offenders, including sex offender registration schemes.

Generally, these measures aim to protect the community through treating offenders, keeping offenders in custody or restricting offenders' activities in the community. Only a few survivors have raised concerns with us about any of these measures in relation to institutional child sexual abuse.

We held a public roundtable on adult sex offender treatment programs. We outline the roundtable discussions on current programs and evidence for the effectiveness of treatment programs. At the public roundtable, we raised the issue of whether the successful completion of an adult sex offender treatment program should have any impact on a convicted sex offender's eligibility for a Working with Children Check clearance. We outline the discussion, which was generally to the effect that treatment is potentially positive, but it should not be assumed to be a cure; offenders who sought to place themselves back in a position of risk by working with children would raise concerns.

We outline the provisions for and use of supervision and detention orders and indefinite sentences in Australian states and territories.

In relation to risk management measures on release of an offender, we outline the operation of child sex offender registries and discuss how they interact with Working with Children Check schemes and the different approaches adopted between the states and territories.

We welcome submissions that discuss the issues raised in Chapter 14.

We also welcome submissions that identify any additional post-sentencing issues in relation to institutional child sexual abuse offenders that we should consider that are not raised in Chapter 14.

Juvenile offenders

It is apparent that there is a significant level of sexual abuse committed by children on other children. Child-to-child sexual abuse may involve peers, but it can also involve sexual abuse committed by a child of a different age, particularly older children who abuse younger children.

We have heard from many victims and their families and survivors of their experiences of being sexually abused by other children in institutions.

The criminal justice system will only respond to child-to-child sexual abuse if the child perpetrating the abuse is old enough to be held criminally responsible for their actions. Children under 10 cannot be charged or prosecuted. For children from the age of 10 until they turn 14, the prosecution bears the burden of proving that they should be held criminally responsible for their actions.

Even for children over the age of criminal responsibility, different considerations may arise if the sexual offending is 'consensual' and between children of similar ages.

However, in institutional contexts, there may be a risk that child-to-child sexual abuse is not taken as seriously as it should be. Institutional staff, as well as parents or carers of the children, may not recognise or understand the seriousness of the behaviour and they may downplay the abuse.

If children are reported to the police and a criminal justice response is pursued, the criminal justice system typically treats juvenile offenders differently from adult offenders. Children are usually tried in different courts. If they are convicted, children are sentenced in accordance with different sentencing principles and they are eligible for different types of sentences. If children receive a custodial sentence, it may be served in a juvenile detention facility rather than an adult prison.

Treatment is likely to be a significant priority for many children with harmful sexual behaviour. This may be particularly the case for children who are below the age at which they will be held criminally responsible for their actions. It might also be a consideration for some children who are dealt with in the criminal justice system. We are considering the issue of treatment for children with harmful sexual behaviour in a separate project and we will report on it separately from our work on criminal justice.

Apart from the issue of treatment, the criminal justice system's response to child-to-child sexual abuse has not been raised with us as a significant issue.

In Chapter 15, we discuss the data and research we have on juvenile child sexual abuse offenders. We also outline police and prosecution responses to juvenile offending and the sentencing of juvenile offenders.

In relation to risk management issues, we outline the operation of child sex offender registries and discuss how they interact with Working with Children Check schemes in relation to juvenile offenders.

We welcome submissions that discuss the issues raised in Chapter 15.

We also welcome submissions that identify any additional issues in relation to juvenile child sexual abuse offenders – apart from the issue of treatment, which we are considering separately – that we should consider that are not raised in Chapter 15.

1 Introduction

1.1 Terms of Reference

The Letters Patent provided to the Royal Commission into Institutional Responses to Child Sexual Abuse require that it 'inquire into institutional responses to allegations and incidents of child sexual abuse and related matters'.

In carrying out this task, the Royal Commission is directed to focus its inquiries and recommendations on systemic issues but also recognise that its work will be informed by an understanding of individual cases. The Royal Commission must make findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse on children when it occurs.

Under paragraph (d) of the Terms of Reference we are given in the Letters Patent, we are required to inquire into:

> what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, *processes for referral for investigation and prosecution* and support services. [Emphasis added.]

This requires consideration of the extent to which justice is, or has been, achieved in terms of both criminal justice and civil justice for those who suffer institutional child sexual abuse.

We examined civil justice in our *Redress and civil litigation report*, which was published in September 2015,[1] and we are considering broader support services in a separate project.

This consultation paper focuses on criminal justice issues.

In addition to the reference to investigation and prosecution processes in paragraph (d) of the Terms of Reference, police and public prosecution agencies are also 'institutions' within the meaning of the Terms of Reference, and they are entities through which governments can act in relation to institutional child sexual abuse. These factors mean that they are directly relevant to the Royal Commission's consideration of paragraphs (a) to (c) of its Terms of Reference. These paragraphs require the Royal Commission to inquire into:

(a) what institutions and governments should do to better protect children against sexual abuse and related matters in institutional contexts in the future;

(b) what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;

(c) what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional

contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;

The Royal Commission will not inquire into the courts. While we will consider relevant decisions by courts, our interest will be in relation to the factual matters and legal principles that they illustrate. If there are any criticisms to be made in relation to decisions by courts, the criticisms will be of the laws the court was required to apply and not of the court itself.

Our Terms of Reference require us to focus on child sexual abuse in an institutional context (also referred to as 'institutional child sexual abuse'). We appreciate that the particular context in which child sexual abuse occurs is not necessarily relevant to the criminal justice system. Even where an institutional context might have some relevance (for example, in 'position of authority' offences), it is likely to be far narrower than the definition of 'institution' in our Terms of Reference.

In our criminal justice work, we seek to identify and focus on issues that cause particular difficulties in criminal justice responses to institutional child sexual abuse, and on reforms that are likely to significantly improve criminal justice responses to institutional child sexual abuse. However, we will not exclude issues or reforms that also affect child sexual abuse in other contexts.

As recognised in the Letters Patent, while we 'will not specifically examine the issue of child sexual abuse and related matters outside institutional contexts', 'any recommendations [we] make are likely to improve the response to all forms of child sexual abuse in all contexts'.

In this consultation paper, we may use 'survivor' rather than 'victim' to refer to those who suffer child sexual abuse in an institutional context. We will also use 'victim' or 'complainant' in some places, because these are the terms used in the criminal justice system and in relevant legislation and guidelines. However, we acknowledge that 'victim' may be appropriate in addition to, or instead of, 'survivor' in some places where we use 'survivor'. We also acknowledge that some of those who have suffered child sexual abuse in an institutional context prefer 'victim' instead of 'survivor'.

1.2 Recommendations

Commissioners have agreed to endeavour to make findings on criminal justice by the middle of 2017.

We have already obtained significant input on criminal justice issues from a broad range of sources, as discussed in section 1.4.

In this consultation paper we set out the issues we have considered to date in criminal justice. On some issues we think the way forward is fairly clear, while on other issues there is a range of options. In some areas, there may be little need for change at all. We have not formed concluded views on any issues at this stage.

After we have received submissions in response to this consultation paper, we will hold a public hearing to enable key topics and areas of disagreement to be examined publicly so that all interested parties can follow the debate.

Submissions to this consultation paper and the public hearing will help us to finalise our recommendations so that we can submit our report on criminal justice issues by the middle of 2017.

1.3 Criminal justice

Early in the work of the Royal Commission, Commissioners identified criminal justice as a key focus area.

Many survivors of institutional child sexual abuse have told us of the importance of an effective response on the part of the criminal justice system. Some survivors have obtained a strong sense of validation from an effective criminal justice response. A conviction publicly records that the survivor's account has been believed beyond reasonable doubt. A conviction may also reassure the survivor that other children will not have to suffer as they did because it can prevent the offender from being allowed to work with children again. Some survivors have also told us that being believed by police was of great value to them, even where a prosecution was not pursued.

Convictions for child sexual abuse offences also clearly identify this abuse as a crime against the community as well as a victim and can act as a deterrent to future abuse.

Many survivors have also told us of the disappointment and, in some cases, the harm caused by poor or inadequate criminal justice responses. The importance of an effective criminal justice response is clear in ensuring justice for victims.

An effective criminal justice response for survivors raises issues across the entire criminal justice system. They include issues of:

- the appropriate criminal offences
- reporting of crimes and allegations
- the police investigation
- decision making by prosecutors
- preparation for trial
- legal rules for the conduct of trials
- methods for witnesses to give evidence
- judges' directions to juries
- sentencing and post-sentencing options.

We know that some institutional child sexual abuse is committed by other children, from very young children through to those who are 17 years of age, who are still considered to be children. Where children are old enough to be dealt with by the criminal justice system, our work also involves consideration of the criminal justice response for survivors where the offender is a juvenile.

1.4 What we have done to date

1.4.1 Private sessions

When the Royal Commission was appointed, it was apparent to the Australian Government that many people (possibly thousands) would wish to tell us about their personal history of child sexual abuse in an institutional setting. As a consequence, the Commonwealth Parliament amended the *Royal Commissions Act 1902* to create a process called a 'private session'.

A private session is conducted by one or two Commissioners and is an opportunity for a person to tell their story of abuse in a protected and supportive environment. At 26 August 2016, the Royal Commission had held 5,842 private sessions and 1,550 people were waiting for one.

Written accounts are an alternative method for people affected by institutional child sexual abuse to tell us of their experiences. At 26 August 2016, the Royal Commission had received 801 written accounts.

Many survivors and family members of victims and survivors have told the Royal Commission in private sessions or written accounts about their experiences in seeking a criminal justice response. These are an important source of information for us in understanding survivors' experiences of the criminal justice system and what survivors consider is necessary to give them justice.

1.4.2 Public hearings

At 26 August 2016, the Royal Commission had held 42 public hearings, or 'case studies'.

The decision to conduct a case study is informed by whether or not the hearing will advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes so that any findings and recommendations for future change that the Royal Commission makes will have a secure foundation.

In many of the 42 case studies to date, we have heard evidence relevant to criminal justice. We refer to these case studies throughout this consultation paper. Our findings on individual case studies are published in separate reports. These are available on the Royal Commission's website.

In March 2016, the Royal Commission held a two-week public hearing dealing specifically with criminal justice issues. This criminal justice public hearing is Case Study 38.

In the first week of the public hearing we focused on how the criminal justice system deals with allegations against an individual of sexual offending against more than one child. We inquired into the admissibility and use of tendency and coincidence – or propensity and similar fact – evidence. We considered the law and practice concerning when charges in relation to multiple complainants of institutional child sexual abuse may be tried together in a joint trial against a single accused. The issues considered in week one of Case Study 38 are discussed in Chapter 10 of this consultation paper.

In the second week of the public hearing we focused on the experiences of survivors, particularly young children and people with disability, in reporting institutional child sexual abuse to police and

being complainants in prosecutions. We examined how the requirements of the criminal justice system, including requiring oral evidence and cross-examination, affect the investigation and prosecution of allegations of institutional child sexual abuse where the complainant is a young child or a person with disability. The issues considered in week two of Case Study 38 are discussed in a number of places in this consultation paper, but particularly in Chapter 9.

1.4.3 Consultations

We have already conducted a wide range of public and private consultations on criminal justice issues. This consultation paper is another important element in our continuing consultations.

Issues papers

At 26 August 2016, the Royal Commission had published 11 issues papers on topics relevant to its Terms of Reference.

Issues Paper No 8 – Experiences of police and prosecution responses (Issues Paper 8) is the issues paper most relevant to our criminal justice work. Issues Paper 8 was released on 1 May 2015 and submissions were due on 15 June 2015.

In Issues Paper 8, we sought submissions from:

- those who had personally experienced police and prosecution responses, whether as:
    - a victim, survivor or complainant
    - a family member
    - a witness
    - a support person
    - an affected institution
- those with professional experience of police and prosecution responses, including legal representatives, service providers or researchers.

We received a wide range of submissions in response to Issues Paper 8. A number of survivors and family members told us of their relevant personal experiences – both good and bad – and their suggestions for improvements or reforms to aspects of the criminal justice response. We also received submissions from survivor advocacy and support groups, organisations that provide services to survivors, legal professional associations, academics and other interested parties. These submissions are an important source of information that has helped us to understand the many different perspectives on the issues raised.

Generally, submissions we receive in response to issues papers are published on the Royal Commission's website, unless:

- the author has expressly requested that their submission not be published

- the Royal Commission has made the decision not to publish a submission. The Royal Commission generally makes the decision not to publish a submission for procedural fairness reasons. For example, the submission may refer to an institution or make allegations about a person that are of such a nature that it would not be fair to publish the submission without giving that institution or person an opportunity to respond.

We published 24 submissions to Issues Paper 8 made by those who have professional experience of police and prosecution responses on the Royal Commission's website.

We received 65 submissions from 73 individuals telling us about their personal experiences of police and prosecution responses. A number of those who made personal submissions requested that their submissions remain confidential. Others who made personal submissions requested that their submissions be published.

We reviewed the submissions of those who requested that their submissions be published to identify any issues that might prevent or limit publication. Many of these submissions contained specific allegations adverse to particular individuals or organisations. The Royal Commission does not publish such allegations made in submissions to issues papers for reasons of procedural fairness to the individuals or organisations the subject of the allegations. However, we were also concerned that simply redacting the adverse allegations and then publishing the remaining more positive aspects of people's experiences of police and prosecution responses would not be a fair representation of what we have been told in submissions.

We have prepared a summary paper to present a balanced overview of what we have been told about people's personal experiences of police and prosecution responses. The paper does not include adverse allegations – or positive comments – about particular individuals or organisations. It is published on the Royal Commission's website. We will not publish any personal submissions to Issues Paper 8.

Roundtables

From February to June 2016 we held 12 public and private roundtables with invited participants. The roundtables were conducted by the Chair of the Royal Commission, the Hon. Justice Peter McClellan AM, Justice Jennifer Coate and Mr Bob Atkinson AO APM. They were joined by Ms Helen Milroy for the private roundtable with Aboriginal and Torres Strait Islander people and agencies.

These roundtables allowed for more focused consultations with invited participants on key issues in relation to criminal justice. They also provided a forum for participants to directly exchange views with each other.

We heard from a wide range of participants, including police, public prosecutors, public defenders and Legal Aid services, criminal justice policy officials, survivor advocacy and support groups, institutions, community service organisations and academics.

The public roundtables were streamed live on the Royal Commission's website. We have also published the attendance lists and transcripts of the public roundtables on the Royal Commission's website. We refer to and quote from the public roundtable transcripts where relevant throughout this consultation paper.

The private roundtables were not public events. We made clear to participants that the roundtables were not open to the public and that we would not publish any recordings or transcripts of them. We do not reference any individual contributions made at the private roundtables in this consultation paper.

We consider that both the public and private roundtables were of great value to us in testing and refining our views. We particularly appreciate the time that participants gave in preparing for and attending the roundtables and the generosity and goodwill of their contributions to the discussions. We also encourage all of those who participated in the roundtables to continue to give us the benefit of their experience and opinions by responding to this consultation paper.

February roundtables

In February 2016 we convened four private roundtables on criminal justice. We spoke with the following groups of participants, which have particularly extensive involvement and expertise in the criminal justice system:

- police
- Directors of Public Prosecutions (DPPs)
- public defenders, defence counsel and Legal Aid
- criminal justice policy officials.

April roundtables

In April 2016 we convened three public roundtables:

- 20 April 2016 – reporting offences, including the issue of 'blind reporting'
- 21 April 2016 – adult sex offender treatment programs
- 29 April 2016 – DPP complaints and oversight mechanisms.

We also convened a private roundtable with participants from Witness Assistance Services.

June roundtables

On 15 June 2016 we convened a public roundtable on multidisciplinary and specialist policing responses.

We also convened two private roundtables:

- with Aboriginal and Torres Strait Islander people and agencies to discuss criminal justice responses to Aboriginal and Torres Strait Islander victims of child sexual abuse
- with police, prosecutors, criminal justice policy and other representatives to discuss complainants' evidence and case management.

1.4.4 Research projects

The Royal Commission has an extensive external research program. A number of research projects focus on criminal justice issues.

Criminal Justice Working Group

In 2013 the Royal Commission convened a Criminal Justice Working Group. We invited a number of academics and practitioners who we considered would be able to assist us, particularly with advice on commissioning research on relevant criminal justice issues, to join the working group. The working group was chaired by Justice McClellan.

The working group has met on a number of occasions, and members have assisted us with input and advice between meetings. In addition to advising on commissioning research, the working group has provided feedback on the preliminary findings of commissioned research projects and draft research reports.

We consider that the contribution of the working group has been of great value to us. Commissioners appreciate the considerable time and expertise that members of the working group gave to this work and the generosity and goodwill of their contributions.

Published research

The Royal Commission commissioned the following research reports focusing on criminal justice issues. Some report on major primary research projects, while others report on literature reviews. The reports are published on the Royal Commission's website.

Table 1.1: Research reports commissioned by the Royal Commission

Topic	Research report
Restorative justice	**The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms** Authors: Dr Jane Bolitho and Ms Karen Freeman The literature review focuses on restorative justice approaches used within criminal justice systems. It considers: • the extent to which restorative justice is currently used in cases of institutional child sexual abuse and other child sexual abuse • the empirical evidence to support using restorative justice for child sexual abuse • issues and criticisms in relation to restorative justice approaches • considerations and implications for institutional child sexual abuse.
Police	**A systematic review of the efficacy of specialist police investigative units in responding to child sexual abuse** Authors: Dr Nina Westera, Dr Elli Darwinkel and Dr Martine Powell The literature review examines the available literature concerning the use and effectiveness of specialist police investigative units and multidisciplinary

	approaches in Australia, the United Kingdom and the United States. It discusses what features of specialist units might determine their effectiveness.
Offences	**Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013** Authors: Ms Hayley Boxall, Dr Adam Tomison and Ms Shann Hulme of the Australian Institute of Criminology (AIC) The research provides an overview of: • the sociopolitical context within which child sexual abuse legislation has developed in Australia and internationally • the offences a person who sexually abused a child may be charged with for the period 1950 to 2013 in each Australian jurisdiction.
	Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update Authors: Ms Hayley Boxall and Ms Georgina Fuller of the AIC The research describes offences by categories of offence, such as contact and non-contact offences, and by jurisdiction.
Prosecutions and courts	**Specialist prosecution units and courts: A review of the literature** Author: Professor Patrick Parkinson AM The literature review identifies the potential benefits of using specialist prosecution units and courts to deal with child sexual abuse cases. It considers what can be learned about the advantages and disadvantages of specialist courts generally, particularly from family violence courts.
Trial processes	**An evaluation of how evidence is elicited from complainants of child sexual abuse** (Complainants' Evidence Research) Authors: Professor Martine Powell, Dr Nina Westera, Professor Jane Goodman-Delahunty and Ms Anne Sophie Pichler The research identifies: • how complainants of child sexual abuse are permitted to give evidence for use in court in each Australian jurisdiction • how evidence is in fact being given • the impact that different means of taking evidence from a complainant have on the outcome of the trial. It includes analyses of prerecorded interviews used as evidence in chief; court transcripts; and surveys of criminal justice professionals.
	The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions Author: Associate Professor David Hamer The literature review considers the legal treatment of tendency, coincidence and relationship evidence applicable in sexual assault prosecutions in the following foreign jurisdictions: • England and Wales • New Zealand • Canada • the United States.
	Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study (Jury Reasoning Research)

	Authors: Professor Jane Goodman-Delahunty, Professor Annie Cossins and Natalie Martschuk The 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.
Sentencing	**Sentencing for child sexual abuse in institutional contexts** (Sentencing Research) Authors: Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb The research examines a number of sentencing and post-sentencing issues with a focus on institutional child sexual abuse, including: • sentencing law and practice • the principles of sentencing • sentencing standards • the range of non-sentencing statutory measures available to detain offenders in custody • restrictions on and monitoring of offenders' movements. The research examines sentencing data for institutional child sexual abuse cases. It discusses possible bases for making institutions criminally liable for institutional child sexual abuse.
	A statistical analysis of sentencing for child sexual abuse in institutional contexts (Sentencing Data Study) Author: Dr Karen Gelb The research expands on the sentencing database created for the *Sentencing for child sexual abuse in institutional contexts* research report. Originally, the database included only cases from New South Wales. The database was expanded for this research to include cases from other Australian jurisdictions. It also provides a more detailed analysis of the interactions between the factors collected in the database to build a more nuanced picture of the nature of, and responses to, institutional child sexual abuse.
Delayed reporting and appeals	**The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases** (Delayed Reporting Research) Authors: Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM The research looks at the impact of delayed reporting – which is common in child sexual abuse offences – on the prosecution of child sexual abuse offences in New South Wales and South Australia. It uses quantitative and qualitative data to compare prosecution processes and outcomes in matters of child sexual abuse reported in childhood with those reported when the complainant is an adult. A separate part of the research (Appeals Study) analyses grounds of appeal and appeal outcomes in child sexual abuse cases in the New South Wales Court of Criminal Appeal.

1.4.5 Other projects

The Royal Commission has commissioned the following additional projects in relation to criminal justice issues.

Tendency, coincidence and joint trials

In 2015, the Royal Commission obtained the 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. We asked them to advise on whether 'the rules as to admissibility of tendency and coincidence evidence and as to when joint trials should be allowed – and the way they are being applied – are appropriate'. Their opinion is published on the Royal Commission's website. It is particularly relevant to the issues discussed in Chapter 10 of this consultation paper.

In 2014, Royal Commission staff wrote the background paper *Similar fact and propensity evidence and joint trials in Australian jurisdictions*. It reflects the law at 1 October 2014. The background paper is available on the Royal Commission's website.

Police data, guidelines and procedures

In 2015, the Royal Commission commenced the following three projects in relation to police responses to child sexual abuse:

- **Police data:** The Royal Commission engaged Associate Professor Anna Ferrante and the Centre for Data Linkage, Faculty of Health Sciences, at Curtin University to assist us to obtain and analyse police administrative data from each jurisdiction. This police data project is designed to give us information about current reports to police of child sexual abuse and how police respond to them. We obtained police administrative data from each state and territory for the five-year period from 1 January 2010 to 31 December 2014. This work is ongoing. We expect it to be completed later in 2016.
- **Police guidelines and procedures:** The Royal Commission obtained under notice, from each jurisdiction, information and documents relating to a number of matters relating to how police respond to child sexual abuse. The documents sought included:
    - policies and procedures on receiving and responding to reports of child sexual abuse
    - police training
    - specialist units or squads
    - communication with institutions.
- **Multidisciplinary and specialist policing data:** This small data project was designed to estimate how many child sexual abuse matters that are referred to multidisciplinary units involve child sexual abuse in an institutional context, within the meaning of our Terms of Reference. The Royal Commission engaged the New South Wales Department of Family and Community Services to undertake a random sample of case files taken from sexual abuse cases accepted for a Joint Investigation Response Team (JIRT) response by the JIRT Referral Unit to identify how many of the case files involved allegations of institutional child sexual abuse.

1.4.6 Obtaining information under summons

The Royal Commission has powers to issue summonses and Notices to Produce specified documents or data.

For our work on criminal justice issues, we used these powers to obtain data and documents on a range of issues, including:

- the police data and guidelines and procedures projects discussed in section 1.4.5
- the charging of certain offences in particular jurisdictions
- Witness Assistance Services
- adult sex offender treatment programs
- data and documents to support a number of the external research projects described in section 1.4.4.

We also used these powers to obtain many documents and information for public hearings, including Case Study 38 in relation to criminal justice issues.

1.5 Next steps

We seek input from all interested parties on the issues we raise in this consultation paper. This is an important step for us in testing relevant views and raising options for further input.

Unless clearly stated otherwise, we have no settled views at this stage. We have drawn attention to some particular issues, but we welcome submissions on any or all of the issues raised in this consultation paper.

We invite all interested parties to make written submissions responding to this consultation paper by midday on Monday 17 October 2016, preferably electronically, to criminaljustice@childabuseroyalcommission.gov.au.

Interested parties are welcome to make submissions responding to only one or a few issues, or to make submissions responding to all issues.

Submissions to this consultation paper will be made public unless the person making the submission requests that it not be made public or the Royal Commission considers it should not be made public. The Royal Commission generally makes the decision not to publish a submission for procedural fairness reasons – for example, the submission may refer to an institution or make allegations about a person that are of such a nature that it would not be fair to publish the submission without giving that institution or person an opportunity to respond.

2 The importance of a criminal justice response

2.1 Criminal justice for victims

In our *Redress and civil litigation report*, tabled on 14 September 2015, we set out our recommendations on redress and civil litigation, which were designed to ensure civil justice for survivors.

While some of the issues in criminal justice and the criminal justice system's response to institutional child sexual abuse overlap with issues in civil justice, the criminal justice system raises a number of additional or different considerations.

Criminal justice involves the interests of the entire community in the detection and punishment of crime in general, in addition to the personal interests of the victim or survivor of the particular crime. In contrast, civil justice operates much more as an adjustment of rights between the private parties concerned.

Criminal justice may result in punishment that deprives an offender of their liberty. The stakes are so high for the accused that the criminal justice system imposes a very high burden of proof and grants a number of protections to the accused. In contrast, in civil justice, generally for the defendant only money is at stake, and the system treats the parties more equally.

A criminal conviction provides public condemnation of an accused for wrongdoing. In contrast, damages in civil justice may flow from much less serious conduct – that is, a failure to take adequate care that caused loss to the plaintiff.

As we recognised in our report on redress and civil litigation, 'justice' is a broad term and it can be an inherently individual and subjective experience.[2]

Many survivors have told us what they sought from the criminal justice system and what they would have regarded as 'justice' for a criminal justice response:

- For some survivors, 'justice' requires a criminal conviction and lengthy term of imprisonment for the perpetrator who abused them. Even then, some survivors have told us that no prison term could adequately punish the offender for the acts of abuse that they committed, and no criminal justice outcome could really reflect the damage the survivor has suffered in childhood and as an adult.
- For some survivors, the public recognition that comes with a perpetrator's conviction is 'justice'. A conviction gives some survivors a strong sense of justice, acknowledgement and recognition and a very public statement that they have been believed.
- For other survivors, knowing that the police and the prosecution service have investigated their allegations, laid charges against the alleged perpetrator and done their best to present the evidence in a trial is 'justice'. Even without a conviction, some survivors have told us that they

found real benefit in being believed and supported by police and prosecutors and having a chance to give their evidence and tell the court what happened to them.

- Other survivors have told us that they found real benefit in telling their story to the police and feeling that they were believed. Even if an investigation was no longer possible or charges could not be laid, their experiences in being listened to, respected and believed by people in authority gave them a sense of 'justice'.

Across all of these different levels of response and outcome, survivors have told us how important it was to them to initiate a criminal justice response – even if it went no further than making a report to police – because they wanted to protect other children and ensure that the person who abused them could not go on to abuse other children. Many survivors also felt that they were speaking up on behalf of other victims who were unable to report their abuse.

We recognise that a criminal justice response is important to survivors not only in seeking 'justice' for them personally but also in encouraging reporting of child sexual abuse and preventing child sexual abuse in the future.

2.2 Past and future criminal justice responses

Many survivors of institutional child sexual abuse have told us of their experiences with the criminal justice system.

In private sessions, we have heard accounts from survivors of their experiences of abuse from as early as the 1920s. We have also heard accounts from survivors of their experiences with police, particularly from the 1940s onwards, and of their experiences with prosecutions from the 1970s and 1980s onwards.

Personal submissions in response to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8) told us of abuse experienced in every decade from the 1940s through to the 2000s, with many accounts relating to abuse experienced in the 1960s and 1970s. Many of the personal submissions gave accounts of reporting to police, in most cases many years after the abuse was experienced. Some submissions gave accounts of attempting to report to police on a number of separate occasions. The earliest account of reporting to police given in the personal submissions was a report in 1942. Other submissions gave accounts of reporting to the police in each decade from the 1960s until the present decade.

From the accounts in private sessions and the personal submissions in response to Issues Paper 8, it is clear that some survivors have had positive experiences with the criminal justice system, while others have had negative experiences. Some survivors have had a mix of both positive and negative experiences over the course of their interactions with police, prosecutors, defence counsel and the courts.

In general terms, many of the negative experiences we have been told about were experienced in earlier periods of time through to the early 2000s. Many survivors have told us of positive experiences with police and prosecutors in the last 10 years. Some survivors who told us of very negative experiences in early periods also told us of much more positive experiences in more recent

years, including where police have reopened investigations of their earlier reports and where prosecutions have followed.

We know from our work on criminal justice issues that the criminal justice system has improved considerably over recent times in recognising the serious nature of child sexual abuse and the severity of its impact on victims. Governments have improved the capacity of the criminal justice system to respond to child sexual abuse through amendments to crimes, criminal procedure and evidence legislation. Police and prosecution services have improved their understanding of and responses to allegations of child sexual abuse and to the needs of victims.

In our policy work on criminal justice responses, our main focus must be on understanding the contemporary response of the criminal justice system to institutional child sexual abuse and on identifying how it can be made more effective.

We have taken account of the many experiences of the criminal justice system we have heard about in private sessions and personal submissions in response to Issues Paper 8 relating to earlier periods of time. They have helped us to understand what survivors seek from a criminal justice response and how criminal justice responses have already improved. In our report on criminal justice, we intend to give a much fuller account of those past experiences and more recent improvements.

In this consultation paper, we focus on the contemporary response of the criminal justice system and identifying areas where it might warrant further reform.

2.3 Criminal justice and institutional child sexual abuse

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.

Research identifies the following features of the criminal justice system's treatment of these crimes:

- **Lower reporting rates:** Although data was only collected for persons over 18 years, the Australian Bureau of Statistics Crime Victimisation Survey 2014–15 reported that only 25 per cent of victims of sexual assault reported their most recent incident to police. This compares with 39 per cent reporting face-to-face threatened assaults and 55 per cent reporting physical assault.[3]
- **Higher attrition rates:** Studies have found that police commence proceedings in only 15 to 20 per cent of reported sexual assault matters, and one would expect the rate in child sexual assault matters to be even lower for the reasons discussed below.[4]
- **Lower charging and prosecution rates:** In *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research) commissioned by the Royal Commission, researchers Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM report that in 2014 legal proceedings were commenced in nearly 17 per cent of matters where children reported sexual assault incidents to police in New South Wales and 33 per cent of matters reported by adults.[5] The figures are substantially higher in South Australia (from 2010 to 2012, 55 per cent commenced for child

sexual assault reports and 45.5 per cent of matters reported in adulthood), although the research notes that a much greater proportion of matters was withdrawn or dismissed in South Australia.[6]

- **Fewer guilty pleas:** The New South Wales Bureau of Crime Statistics and Research study on attrition in the criminal justice system found that, in the higher courts, 45 per cent of those proceeded against for a sexual offence against a child pleaded guilty, compared with 65 per cent of those proceeded against for assault and 71 per cent for all offences. In the lower courts, 21 per cent of those proceeded against for a sexual offence against a child pleaded guilty, compared with 47 per cent of those proceeded against for assault and 57 per cent for all offences.[7]
- **Fewer convictions:** Drawing from a number of studies, the Delayed Reporting Research quotes figures ranging between 8 and 15 per cent of all matters reported to police ending with conviction.[8]

Research also identifies the importance of detection – which is dependent upon reporting and investigation – in deterring offending. The New South Wales Bureau of Crime Statistics and Research has previously noted several studies showing little evidence that offenders given a prison sentence are any less likely to reoffend than comparable offenders given a non-custodial sanction.[9] They have also noted studies showing that, unless the perceived risk of apprehension is high, the threat of tougher penalties does not exert much deterrent effect on the stated willingness of people to become involved in a particular offence.[10] In other words, the perceived risk of being caught may be a greater deterrent to committing crime than the risk of more severe punishment alone.

There are also features of institutional child sexual abuse cases that may affect the ability of the criminal justice system to respond effectively to these cases. These include:

- **'Word against word' cases:** Child sexual abuse offences are generally committed in private. Typically, there are no eyewitnesses to child sexual abuse offences. Often there will be no medical or scientific evidence capable of confirming the abuse. Typically, the only direct evidence of the abuse is the evidence the complainant gives about what occurred. If the accused denies the complainant's allegations then the criminal justice system is left with a 'word against word' case, and it is likely to be more difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence actually occurred.
- **Complainant's willingness to proceed:** Because the complainant's evidence is often the only direct evidence of the abuse in child sexual abuse cases, their willingness to proceed with the investigation and prosecution is usually vital; it is unlikely to be able to proceed without them. This puts a particular focus on elements of the criminal justice system that are difficult for victims and survivors, who are required to give accounts of the most personal and intimate details of the abuse and to be challenged on those accounts in cross-examination. It also makes support for victims and survivors particularly important.
- **Lengthy delays:** We know that many survivors take years, even decades, to disclose the abuse they suffered. They may need counselling and psychological care before they feel able to report the abuse to police and more support before they are willing to make a statement and agree to participate in a formal investigation. The delay can make it harder for them to give sufficient details of the abuse. It may also make an investigation more difficult. If charges are laid, the

accused may seek a stay of the prosecution or directions to the jury about the difficulties they have faced in making a defence because of the passage of time and the loss of witnesses.

- **Particularly vulnerable witnesses:** Where there is no lengthy delay and the abuse is reported fairly soon after it occurred, the victims may be young children who are particularly likely to face difficulties in giving evidence and being cross-examined. Where the victim is a person with disability which affects their ability to give evidence, they are also likely to face particular difficulties independently of any issue of delay in reporting.

There are also many myths and misconceptions about sexual offences, including child sexual abuse, that have affected the criminal justice system's responses to child sexual abuse prosecutions. The myths and misconceptions have influenced the law – particularly the common law through judicial directions – and the attitudes jury members bring to their decision-making. The myths and misconceptions may lead to a complainant's behaviour being regarded as 'counterintuitive' to the behaviour expected of a 'real' victim of sexual abuse, even though social science research establishes that the behaviour is common – and sometimes even typical – for victims of sexual abuse.

The following myths and misconceptions have been particularly prominent in child sexual abuse cases:

- children are easily manipulated into making up stories of sexual abuse
- a victim of sexual abuse will cry for help and attempt to escape their abuser – that is, there will be no delay in reporting abuse, and a 'real' victim will raise a 'hue and cry' as soon as they are abused
- a victim of sexual abuse will avoid the abuser – that is, a 'real' victim will not return to the abuser or spend time with them or have mixed feelings about them
- sexual assault, including child sexual assault, can be detected by a medical examination – that is, there will be medical evidence of the abuse in the case of 'real' victims.[11]

2.4 Operation of the criminal justice system

2.4.1 Purpose

There has been much academic debate about what might be said to be the purposes of the criminal justice system. Purposes put forward include to protect the innocent, to punish individual offenders, to maintain social order and to define how one person should treat another.[12] In addition to the purpose of punishing the particular offender, the criminal justice system also seeks to reduce crime by deterring others from offending.

In 2013, in an appeal relating to a sentence for manslaughter, six judges of the High Court stated:

> the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To

> view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise *the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence*.[13] [Emphasis added.]

The *Crimes (Sentencing Procedure) Act 1999* (NSW) recognises the multiple purposes of the criminal justice system when it identifies the purposes of sentencing in section 3A as follows:

- to ensure that the offender is adequately punished for the offence
- to prevent crime by deterring the offender and other persons from committing similar offences
- to protect the community from the offender
- to promote the rehabilitation of the offender
- to make the offender accountable for his or her actions
- to denounce the conduct of the offender
- to recognise the harm done to the victim of the crime and the community.

Australian legal systems were adopted from the English common law. In English history, the prosecution of crimes was a private matter, and victims were able to prosecute their own matters.[14] However, as cities became more densely populated, particularly following the Industrial Revolution, the criminal law became seen as a means to impose social order and thus a public matter.[15]

Acts that can be described as 'criminal' are those which society has determined are so undesirable that they should be publicly investigated and, where proven to the relevant standard, condemned. The purpose of such condemnation is to make a public statement that the behaviour is a crime against the community as well as the victim and requires punishment. Punishment recognises the harm done to the victim but also operates to specifically deter the offender from reoffending and to generally deter others in the community from offending.

In order to ensure transparency and consistency across society, these acts are generally specified as offences in legislation passed by Parliament, and a maximum penalty is identified to guide courts in setting a punishment that appropriately reflects society's condemnation of the behaviour.

Police, prosecutors, courts and corrective services are publicly funded in recognition of the fact that, in and of itself, the criminal behaviour is an offence against society itself. Regardless of whether the crime has affected a victim, the criminal act is to be condemned, and it is a societal responsibility to investigate, determine and punish that act.

The role of the state, and the community's recognised interest in criminal justice, distinguish criminal justice from civil justice. In redress and civil litigation, a survivor can initiate an application, pursue it to completion and decide whether or not to accept any redress or compensation offered. Even where there are formal systems and requirements, the survivor's role is central and very little may happen without the survivor's active participation in and pursuit of the matter.

In contrast, in the criminal justice system, agencies of the state, representing the community, determine whether the matter can be investigated and prosecuted. Although the complainant's participation is likely to be vital, as noted above, their role in the criminal justice system is less clear. It is not 'their' prosecution and they are likely to have far less control or 'say' over a criminal justice response than they will in a civil justice response.

2.4.2 Adversarial nature

The criminal justice systems in Australian jurisdictions function through an 'adversarial' system of justice, where the prosecution (representing the Crown) and the defence (representing the accused) each put forward their case and any evidence in relation to whether the act was committed, by whom, and with what intent. Theoretically, this 'contest between the parties' is designed to produce the most compelling argument as to what the truth of the matter is.

In 2001 in the High Court's decision in *Doggett v The Queen*,[16] Gleeson CJ discussed the nature of the adversarial system as follows:

> In our system of criminal justice, a trial is conducted as a contest between the prosecutor (almost always a representative or agency of the executive government) and the accused (almost always an individual citizen). In the case of a trial by jury for an indictable offence, the presiding judge takes no part in the investigation of the alleged crime, or in the framing of the charge or charges, or in the calling of the evidence. Where the accused is represented by counsel, the judge's interventions in the progress of the case are normally minimal. The prosecution and the defence, by the form in which the indictment is framed, and by the manner in which their respective cases are conducted, define the issues which are presented to the jury for consideration. Those include not only the ultimate issue, as to whether the prosecution has established beyond reasonable doubt the accused's guilt of the offence or offences alleged, but also the subsidiary issues which, subject to any directions from the trial judge, are said to be relevant to the determination of the ultimate issue. *Such a system, sometimes described as adversarial, reflects values that respect both the autonomy of parties to the trial process and the impartiality of the judge and jury*.[17] [Emphasis added.]

The adversarial system of justice derived from the common law system of justice developed in England and adopted in Australia. A criticism of this system is that, in setting the prosecution and defence in competition with one another, the search for the truth of the matter is subsumed by each party's desire to establish their version as the 'correct' one in the pursuit of winning the case.

In Case Study 38 on criminal justice issues, a number of witnesses expressed the view that the adversarial system does not meet the needs of vulnerable witnesses, including children and people with disability, and that some modification of traditional approaches may be required.[18]

In his statement for Case Study 38, survivor Mr Kevin Whitley stated:

> I want the system changed to one that seeks the truth, rather than an adversarial system where it comes down to how good a barrister you can afford and/or the efficacy of the DPP (or lack thereof). The French system, as an inquisitorial system, focuses on finding the truth. I know there are positives and negatives of both systems but maybe there is some middle ground.[19]

Some participants in our private roundtable consultations also said that the adversarial system can lead to poor outcomes for vulnerable participants. Those who may have difficulties communicating, particularly orally, or a cognitive impairment may find it difficult to defend their evidence when it is challenged by the defence in cross-examination. We have heard accounts of child witnesses breaking down under cross-examination, essentially 'giving up' and then simply agreeing to everything the defence counsel says to them in order to bring the cross-examination to an end.

Some jurisdictions have an 'inquisitorial' system of criminal justice, where the prosecution and, in some cases, the judge participate in the investigation and evidence-gathering stages of the case. At trial, it is the judge who is primarily responsible for the examination of witnesses and determining the facts of the case. However, these jurisdictions use inquisitorial systems across their criminal justice systems, not just in relation to child sexual abuse offences or institutional child sexual abuse.

We would not wish to see child sexual abuse cases pursued through a different system that is outside of the main criminal justice system. There is always a risk that a different system for these offences would have the effect of labelling them as less important or not 'real' crimes. Rather, we consider that the criminal justice system should be made as effective as possible for responding to child sexual abuse cases.

Of course, a recommendation that moved us from an adversarial to an inquisitorial system of criminal justice for all criminal offences would take us considerably beyond our Terms of Reference.

In our criminal justice work, we are seeking to identify reforms that will make the criminal justice system response to institutional child sexual abuse as effective as possible.

2.4.3 Protections for the accused

Given that the investigation and prosecution of criminal matters is undertaken by the state, there is seen to be an imbalance of resources between the prosecution and the accused.[20] Historically, this imbalance was not simply that the state had more economic resources but also that the state could effectively control aspects of the process – for example, determining the timing and location of any trial – and had significant powers of investigation and arrest that were not available to the accused, including questioning the accused themselves.

In recognition of this imbalance, a number of principles have emerged through the development of the common law to ensure that trials are conducted fairly. These include the following:

- The prosecution must prove, beyond reasonable doubt, that the accused committed the crime or crimes charged. The corollary of this principle is that the accused is presumed to be innocent until proven guilty.
- The accused has a right to silence. This means that the accused cannot be compelled to give evidence or confess guilt.
- The criminal trial should be conducted without unreasonable delay.
- The accused has the right to examine witnesses in order to test the credibility of the witness and their testimony.

- The prosecution is obliged to act independently and impartially and to conduct the case fairly.
- If an accused is charged with a serious offence and lacks the financial means to engage legal representation, he or she should be provided with a lawyer.[21]

Although some of these principles have been amended to some extent through legislation (for example, the right to silence and the right to examine witnesses), these protections for the accused exist for all criminal offences, not just child sexual abuse offences.

Many survivors have told us that they feel that the criminal justice system is weighted in favour of the accused. This may reflect the particular features of institutional child sexual abuse cases that affect the ability of the criminal justice system to respond effectively to these cases, as discussed above. For example:

- requiring proof beyond reasonable doubt is a very hard standard to satisfy in 'word against word' cases
- the onus of proof means that the accused is under no obligation to suggest a motive for the complainant to lie or to offer an alternative explanation for events.

It may also reflect the fact that the prosecution is undertaken on behalf of the state and, until relatively recently, the victim has had a confined role in any criminal trial.

2.4.4 Recognition of victims

Some survivors who have participated as complainants in prosecutions have told us that they felt almost incidental to the criminal justice system and that they had little control over matters that were very important to them.

The criminal justice system has been challenged by the need to recognise and support victims and survivors in the criminal justice system while maintaining focus on the central role of the criminal justice system in protecting the public interest in identifying and punishing crimes.

Recognition of victims has increased over the last 50 years.

As noted above, the criminal justice system operates on behalf of society as a whole, determining whether an alleged offence occurred and punishing it in accordance with legislated maximum penalties and sentencing procedures. Due to the adversarial nature of trials, and the right of the prosecution and defence to run their cases as they see fit, the emergence of the modern criminal justice system in the 1800s led to a system where the role of the victim was limited to that of being a witness for the prosecution.[22]

However, in the 1960s and 1970s, literature emerged re-examining victim–offender relationships and identifying the difficulties and distrust of the justice system that many victims experienced.[23] Victims' compensation schemes were introduced in the states and territories between 1967 and 1983.[24] These systems recognise that the victim has suffered harm that should be compensated but divorces that process from the determination of the guilt of the offender.

The General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power on 29 November 1985. The principles set out to define the

basic rights or entitlements of victims in relation to criminal investigation, court proceedings and the provision of information. The key principles are:

- access to justice and fair treatment
- restitution (from the offender)
- compensation (from the state if it is not otherwise available from the offender)
- practical, medical and other assistance.

Each Australian state and territory has subsequently adopted or recognised victims' rights.[25]

In the 1990s, emphasis shifted towards providing greater support for victims.[26] Australian jurisdictions have also implemented legislation allowing victims to describe the impact of the offence on them as part of the sentencing process. South Australia was the first to introduce victim impact statements in 1989, with other jurisdictions following during the 1990s. Victim impact statements are discussed further in Chapter 12. In most Australian jurisdictions, Director of Public Prosecutions (DPP) guidelines now require prosecutors to consult with victims before making decisions to change, modify or not proceed with charges already laid or decisions to accept a guilty plea to a lesser charge. These requirements are discussed further in Chapter 7.

In 2013, Australia's Attorneys-General endorsed the National Framework for Rights and Services for Victims of Crime, which includes the following principles to guide existing services to victims and to support victims' rights:

> **1. Respectful and Dignified Treatment**
>
> Victims of crime are people from diverse backgrounds who should be treated with dignity and respect and be provided with support that is responsive to their needs.
>
> **2. Information and Access – Supporting Vulnerable People**
>
> Victims of crime are people from diverse backgrounds who should be provided with timely referral and information on a wide range of support services, regardless of the jurisdiction in which they reside.
>
> **3. Justice and Fair Treatment**
>
> Victims of crime should be supported in understanding and exercising their rights as enshrined in jurisdictional charters as they apply to them.
>
> **4. Financial Assistance**
>
> A person who has been injured by a crime should have access to financial assistance according to the jurisdiction in which the crime was committed, regardless of where the victim ordinarily resides.
>
> **5. Leadership and Collaboration**
>
> The Commonwealth, state and territory governments are committed to strong leadership at all levels and collaboration between multiple stakeholders in implementing a national

framework based on early intervention, streamlined service delivery, providing guidance to victims in navigating the criminal justice system and flexibility in addressing victims' needs.[27]

In some circumstances, victims themselves may have legal representation in connection with a trial. While the prosecutor represents the state or the public interest, there may be circumstances where the victim's interests warrant separate representation. For example, the defence may seek to obtain the victim's medical records, which may be subject to a claim for privilege such as sexual assault communications privilege. In our public roundtable on DPP complaints and oversight mechanisms, the Commissioner for Victims' Rights in South Australia, Mr Michael O'Connell APM, also noted that he has funded representation for victims in the context of consultation with the DPP when reviewing decisions not to prosecute.[28]

In a number of our roundtables, we have heard from victims' rights commissioners and survivor advocacy and support groups about the need to ensure that the provision of justice for victims and survivors is at the heart of our criminal justice work.

We note that the Victorian Law Reform Commission has been conducting an extensive reference regarding victims of crime in the criminal trial process and it is due to report to the Victorian Attorney-General by 1 September 2016. Its report will be delivered too late for us to consider for the purposes of this consultation paper, but we look forward to considering it when developing our report on criminal justice issues.

2.5 Other responses to institutional child sexual abuse

2.5.1 Restorative justice

A number of stakeholders have argued that the Royal Commission should consider the use of restorative justice approaches in connection with, or instead of, traditional criminal justice responses to institutional child sexual abuse.

'Restorative justice' can describe a range of approaches to address harm. Those approaches generally involve an offender admitting that they caused the harm and then engaging in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour.[29]

Some stakeholders have argued that restorative approaches may be a suitable alternative for survivors who would find the prospect of participating in the criminal justice process too daunting or that restorative approaches would meet the various justice needs of survivors better than the punishment of the offender through the criminal justice system.

Some stakeholders suggest that the criminal justice response to child sexual abuse is not effective, and they point to features discussed above, such as the lower reporting rates, the higher attrition rates, the lower charging and prosecution rates, fewer guilty pleas and fewer convictions. Some stakeholders suggest that restorative justice may offer more effective responses for more survivors than are available in the criminal justice system.

To assess the evidence base for the use of restorative justice in criminal justice responses to cases of child sexual abuse, particularly non-familial child sexual abuse, we commissioned a literature review

on the use of restorative justice in criminal justice responses to institutional child sexual abuse and related fields.

We were particularly interested in the outcomes of any evaluated approaches for other sexual or personal violence, or child related crime, to the extent that they may inform possible approaches to child sexual abuse or institutional child sexual abuse.

The literature review *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms* is published on the Royal Commission's website.

The literature review focuses on restorative justice approaches used within criminal justice systems. It considers:

- the extent to which restorative justice is currently used in cases of institutional child sexual abuse and other child sexual abuse
- the empirical evidence to support using restorative justice for child sexual abuse
- issues in and criticisms of restorative justice approaches
- considerations and implications for institutional child sexual abuse.

The literature review identified 15 restorative justice programs that were attached to criminal justice systems. The programs had a variety of aims, including reducing reoffending, addressing victim–survivor needs, including through providing alternative access to justice, and strengthening communities.[30]

Such a variety of aims meant that it was difficult to determine simply whether a program 'worked' or not, as it depended on who, and in what context, it was designed to work for. However, of the 30 studies evaluating the 15 programs, only three reported mixed or negative findings.[31] None of the programs that were identified had used restorative justice to address institutional child sexual abuse.[32]

The literature review also identifies conditions required for a program to be 'successful'. These are:

- **Skilled facilitators**: The literature review found that specialised facilitators who are more experienced and knowledgeable than standard restorative justice facilitators are required. Facilitators need to be specifically aware of the complex power dynamics of sexual abuse.
- **Specialisation:** The literature review found that programs which acknowledged the particular needs of victims and where experts in the harm to be addressed participated in both assessment and conference phases of the program tended to be successful. Programs require specialists in sexual violence.
- **Screening:** The majority of potential participants were actually screened out as either not interested or unsuitable to participate in the program. For example, in the study that reviewed the Victim Offender Conferencing program run by Corrective Services NSW, of all the referrals to the program, only 8 per cent of cases resulted in a face-to-face conference where both the victim and offender were interested in participating and assessed as suitable.
- **Safety:** Programs needed to ensure both the physical and emotional safety of participants.

- **Flexibility and responsiveness:** Programs needed to be responsive to participants' needs.
- **Timing of the conference:** As an aspect of flexibility and responsiveness, the program's timing and particularly the timing of the conference or meeting should suit the victim's needs, rather than being driven by a court timetable.
- **Treatment programs:** In most of the well-established sexual abuse programs, sex offender treatment was required either as a precursor to or alongside the restorative justice process.[33]

The literature review suggests that, for those victims of crimes who participate in restorative justice programs that meet the identified conditions for 'successful' programs, the outcomes may be very beneficial.

However, it appears that restorative justice may not be available for or of assistance to many survivors of institutional child sexual abuse, including:

- because of the power dynamics and seriousness of institutional child sexual abuse offending, restorative justice approaches may be suitable in only a small number of these cases
- many survivors do not wish to seek a restorative justice outcome with the perpetrator of the abuse
- given the frequent delay before reporting, many offenders will be unavailable or unwilling to participate in restorative justice approaches.

These considerations may explain why the literature review found no studies of restorative justice programs being used in criminal justice responses to institutional child sexual abuse.

The considerations may be different when dealing with juvenile offenders who commit child sexual abuse offences. Two of the programs identified in the literature review which offer restorative justice programs for sexual violence offences include young offenders.[34] One is the South Australian Family Conferences program and the other program operates in New Zealand.[35] The operation of the criminal justice system in relation to juveniles is discussed further in Chapter 15.

The Royal Commission provided for elements of restorative justice approaches in institutional child sexual abuse through the 'direct personal response' component of redress.

2.5.2 Redress and civil litigation

Our *Report on redress and civil litigation*, tabled on 14 September 2015, contained 99 recommendations aimed at providing civil justice to survivors of child sexual abuse in institutional contexts.

We recommended that a process for redress must provide equal access and equal treatment for survivors – regardless of the location, operation, type, continued existence or assets of the institution in which they were abused – if it is to be regarded by survivors as being capable of delivering justice. We made a series of recommendations about how such a redress process should be implemented.

Our recommendations in relation to direct personal response are discussed in Chapter 5 of the *Report on redress and civil litigation*. Commissioners recognised how important it is to some survivors to re-engage with the institution in which they were abused. Commissioners were very clear that the direct personal response element of redress must be emphasised, and it is presented as the first element of redress.

The Royal Commission's recommendations on direct personal response were designed to ensure survivors are provided with redress but are not required to re-engage with the institutions in which they were abused unless they wish to do so.

We recommended that all institutions should offer the following elements as the minimum content of direct personal response:

- an apology from the institution
- the opportunity to meet with a senior institutional representative and receive an acknowledgement of the abuse and its impact on the survivor
- an assurance or undertaking from the institution that it has taken, or will take, steps to protect against further abuse of children in that institution.

We also recommended a number of other principles for the provision of direct personal response which were designed to ensure it was provided safely and effectively and in a way that was responsive to survivors' needs.

Our recommendations on redress, including for direct personal response, were addressed to past incidents of institutional child sexual abuse – abuse that occurred before the cut-off date for our recommended redress scheme. Our recommendations to reform civil litigation were designed to address or alleviate the impact of future institutional child sexual abuse and to encourage institutions to continue to offer redress in a manner that remains attractive to survivors of future institutional child sexual abuse.

We see these recommendations as playing an important role in providing redress for survivors of institutional child sexual abuse, and in many cases they will provide some justice for a survivor where a conviction cannot be secured through the criminal justice system. We also see the changes to civil litigation as providing a powerful incentive for institutions to adopt child safe practices, thus helping to deter future abuse.

However, the recommendations on redress and civil litigation are not intended as an alternative to criminal justice for survivors. Ideally, victims and survivors of institutional child sexual abuse should have access to justice through both criminal justice responses and redress and civil litigation.

2.5.3 Victims of crime compensation schemes

All states and territories have established statutory schemes that allow victims of crime to apply for and receive a monetary payment, as well as counselling and other services, from a dedicated pool of funds. A victim of institutionalised child sexual abuse may apply for redress under these schemes if they meet the eligibility requirements.

As we discussed in our *Redress and civil litigation report*, some survivors have obtained some forms of redress through statutory victims of crime compensation schemes. As stated in that report, we are satisfied that higher payments than those available under statutory victims of crime compensation schemes are appropriate under a redress scheme for survivors.[36]

However, it is important to note statutory victims of crime compensation schemes here, because some survivors have obtained a response to institutional child sexual abuse from these schemes. In particular, some survivors have told us that they found real benefit in these schemes because the decisions made by the relevant victims of crime tribunals or administrators gave the survivors official recognition of the crimes committed against them.

2.6 Our approach to criminal justice reforms

It must be recognised that the criminal justice system is unlikely ever to provide an easy or straightforward experience for a complainant of institutional child sexual abuse. The very nature of the crime they are complaining of means that the experience is likely to be very distressing and stressful.

However, we consider it important that survivors seek and obtain a criminal justice response to any child sexual abuse in an institutional context in order to:

- punish the offender for their wrongdoing and recognise the harm done to the victim
- identify and condemn the abuse as a crime against the victim and the broader community
- emphasise that abuse is not just a private matter between the perpetrator and the victim
- increase awareness of the occurrence of child sexual abuse through the reporting of charges, prosecutions and convictions
- deter further child sexual abuse, including through the increased risk of discovery and detection.

We also consider that seeking a criminal justice response to institutional child sexual abuse is an important way of increasing institutions', governments' and the community's knowledge and awareness not only that such abuse happens but also about the circumstances in which it happens.

The criminal justice system can provide public recognition, condemnation and punishment of crimes that cannot be obtained as effectively through the civil justice system. If these crimes are not reported and prosecuted then there is a risk that institutions, governments and the community will be unaware that they occur or will doubt their prevalence and impact.

We consider that all victims and survivors should be encouraged and supported to seek a criminal justice response and that the criminal justice system should not discourage victims and survivors from seeking a criminal justice response through reporting to police.

We recognise that there are many reasons why a victim or survivor may choose not to report the abuse they have suffered or may withdraw from a prosecution. There are other circumstances in which prosecutions may not be able to proceed – for example, where the offender has died or cannot be identified.

However, we are satisfied that any necessary reforms should be made to ensure that:

- criminal justice responses are available for victims and survivors who are able to seek them
- victims and survivors are supported in seeking criminal justice responses
- the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused.

In this consultation paper, we focus on areas where we have identified, or interested parties have told us, that reforms might be needed to achieve these purposes.

2.7 Regulatory responses to institutional child sexual abuse

Given the difficulties in prosecuting institutional child sexual abuse cases discussed in section 2.3 and the operation of the criminal justice system discussed in section 2.4, it is unrealistic to expect that all true allegations of institutional child sexual abuse will result in a criminal conviction of the accused, even if the criminal justice system is reformed to achieve the objectives we identified in section 2.6.

Victims may be left with a sense that justice has been denied them and that other children may be left at risk of abuse by the perpetrator. This risk arises in the context of institutional child sexual abuse in particular, where offenders may have access to many children.

We recognise the importance of ensuring that regulatory responses focusing on child protection can interact effectively with criminal justice responses, particularly in cases where there is no criminal conviction.

In Case Study 38, we heard evidence about several regulatory responses in New South Wales that were able to operate even where a prosecution was discontinued and did not result in any conviction:

- **Reportable conduct:** The NSW Deputy Ombudsman, Mr Steve Kinmond, gave evidence about the operation of Parts 3A and 3C of the *Ombudsman Act 1974* (NSW), which establish reportable conduct schemes for the protection of children and of people with a disability, respectively. The reportable conduct schemes require a range of government and non-government institutions to report any allegations of sexual offending or misconduct against children or people with a disability to the Ombudsman within 30 days.[37] These allegations therefore may be reported to the Ombudsman at the same time as they are reported to police.

  Mr Kinmond outlined the role that the Ombudsman then plays in monitoring any investigation of the allegation by the institution. As part of this role, the Ombudsman also considers information available to him through his access to the NSW Police Force and child protection database systems, COPS and KiDS respectively.[38]

  The Ombudsman can then help to ensure that allegations do not 'fall through the cracks' by passing on relevant information to police and child protection agencies and, where relevant, the Office of the Children's Guardian so that they can feed into the administration of the Working

with Children Checks scheme.[39] This ensures that appropriate action is taken to minimise the risk of sexual abuse to children where criminal proceedings cannot be supported on the evidence available or for any other reason.

The Ombudsman's oversight of the investigation conducted by the institution also provides a means of managing risks to children. While institutions are usually responsible for conducting their own investigation, the oversight role provides a mechanism to ensure that investigations are carried out satisfactorily and that appropriate action is taken at the end of the process. This includes communicating with the appropriate regulator of the institution to ensure that appropriate conditions are placed, or maintained, on the institution to reduce the risk posed to children.[40]

- **Working with Children Checks:** As noted above, the NSW Ombudsman was able to provide information to the Office of the Children's Guardian and to require the institution to provide information to that agency for the purposes of its administration of the Working with Children Checks scheme.
- **Industry regulation:** The abuse alleged in this matter occurred in a childcare centre. We heard evidence of how the licensing system for childcare centres played a role in reducing risks to children. Ms Tracy Mackey, Executive Director of Early Childhood Education and Care Directorate within the New South Wales Department of Education, gave evidence that the regulator took immediate action to issue a notice of exclusion in relation to the alleged perpetrator.[41] The regulator then undertook an investigation and subsequently placed conditions on the licence of the childcare centre to ensure that the alleged perpetrator was excluded on the basis that he posed an unacceptable risk to the safety, welfare or wellbeing of a child or children enrolled at the centre.[42]

While our focus in the consultation paper is on criminal justice responses to institutional child sexual abuse, we also welcome submissions from interested parties identifying any difficulties or conflicts in interactions between the criminal justice and regulatory responses to institutional child sexual abuse which may prevent the effective protection of children from risks of institutional child sexual abuse.

We welcome submissions that discuss the issues raised in Chapter 2.

In particular, we seek the views of all interested parties on our proposed approach to criminal justice reforms and our view of the importance of seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context.

3 Issues in police responses

3.1 Introduction

Many survivors have told us in private sessions about their experiences in interacting with police. In a number of our public hearings we have also heard evidence about police responses and police interactions with victims, survivors and their families. 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 police responses.

Police responses are particularly important because contact with police is usually a survivor's point of entry to the criminal justice system. The way that police respond to people who report child sexual abuse can have a significant impact on the reporters' willingness to participate in the criminal justice system and their satisfaction with the criminal justice response.

Police are also effectively the 'gatekeepers' to later stages of the criminal justice response. Police investigations will usually determine whether or not charges are laid and whether or not matters are referred to the prosecution agency for possible prosecution.

In our private sessions, public hearings and submissions to Issues Paper 8, we have heard accounts of both positive and negative experiences with police responses.

Some survivors have told us:

- they were satisfied with the police officers they dealt with
- they felt respected and believed by the police
- the police officers kept them informed throughout the police investigation and, in some cases, throughout the prosecution process.

Other survivors have told us:

- they were dissatisfied with some or all of the police officers they dealt with
- their initial contact with police was a negative experience and this had an ongoing negative impact on them
- they felt the police did not believe them or were judgmental towards them
- they were not kept informed of progress in the investigation unless they chased the information themselves.

We have also heard evidence from a number of police officers about police responses and some of the challenges police face in investigating institutional child sexual abuse cases.

We have examined police responses in a number of our public hearings, including:

- Case Study 2, which considered YMCA NSW's response to the conduct of Mr Jonathan Lord, also examined the police investigation of Mr Lord. The police investigation was conducted through the multidisciplinary Joint Investigation Response Team (JIRT) located in Kogarah, Sydney. Case Study 2 considered the interactions between JIRT and YMCA NSW and between JIRT and parents of children involved in the allegations.
- Case Study 9 on the Catholic Archdiocese of Adelaide and St Ann's Special School examined the South Australia Police (SAPOL) investigation of the allegations of child sexual abuse by the bus driver at St Ann's Special School, Mr Brian Perkins. It also examined issues in relation to SAPOL not providing information to some parents and the broader school community.
- Case Study 30 on Victorian state-run youth training and reception centres examined the response of Victoria Police to allegations of child sexual abuse of former residents at youth training and reception centres, including its past and current policies and procedures.
- In the second week of Case Study 38 in relation to criminal justice issues, we examined police responses to victims and survivors, particularly young children and people with disability. We also examined how the requirements of the criminal justice system, including those concerning oral evidence and cross-examination, affect the investigation of institutional child sexual abuse, particularly where the complainant is a young child or a person with disability.

Over time, there have been many changes in how police agencies respond to victims and survivors of institutional child sexual abuse. Many of these changes have been designed to improve police responses for victims and survivors.

Changes in crimes, criminal procedure and evidence legislation have also enabled police to respond more effectively to victims and survivors in the sense that these changes have made it more viable for police to lay charges as an outcome of more investigations than was previously the case.

We have divided the discussion of police responses into two chapters. In this chapter, we first:

- outline our work to date in relation to police data
- discuss in more detail police responses to institutional child sexual abuse in the past
- discuss current features of police responses, including responses to historical and current child sexual abuse and specialist and multidisciplinary responses
- outline the structure of police responses in each jurisdiction.

We then discuss each of the following topics, which we consider to be of particular importance in ensuring that police responses are as effective as possible for victims and survivors of child sexual abuse, including institutional child sexual abuse:

- initial contact with police
- encouraging reporting to police
- support services for victims and survivors while engaging with police
- police investigations

- police investigative interviewing
- police charging decisions.

In Chapter 4, we consider issues that arise particularly in relation to child sexual abuse in an institutional context: police communication and advice to institutions, children, families and the community; and blind reporting to police.

3.2 Police data

3.2.1 Police administrative data

In 2015 the Royal Commission engaged Associate Professor Anna Ferrante and the Centre for Data Linkage, Faculty of Health Sciences, at Curtin University to assist us to obtain and analyse police administrative data from each state and territory.

This police data project is designed to give us information about current reports to police of child sexual abuse and how police respond to them.

We obtained police administrative data from each state and territory for the five-year period from 1 January 2010 to 31 December 2014. We sought data on all alleged incidents of child sexual abuse reported to and/or finalised by police in this period. The data sought includes details about:

- the time and place of the incident
- the nature of the alleged offence
- the victim and their relationship to the offender
- the offender(s) or alleged offender(s)
- the processing and outcome of each incident or 'case', including finalisation status and methods.

An analysis of the initial dataset suggested large variations between jurisdictions in the volume and patterns of reported child sexual abuse and in the outcome of police investigations. It also identified that some data was missing for some jurisdictions. We have obtained further data, and Associate Professor Ferrante is undertaking further analyses.

This work is ongoing. We expect it to be completed later in 2016, and we expect to be able to report on it in full in our report on criminal justice.

3.2.2 Multidisciplinary and specialist police data

We also undertook a smaller data project which was designed to estimate how many child sexual abuse matters referred to multidisciplinary units involve child sexual abuse in an institutional context, within the meaning of our Terms of Reference.

The Royal Commission engaged the New South Wales Department of Family and Community Services to undertake a random sample of case files taken from sexual abuse cases accepted for a

JIRT response by the JIRT Referral Unit to identify how many of the case files involved allegations of institutional child sexual abuse.

We discuss the findings of this project in section 3.4.3.

3.3 Improvements in police responses

As we discussed in section 2.2, in our policy work on criminal justice responses, our main focus must be on understanding the contemporary response of the criminal justice system to institutional child sexual abuse and on identifying how it can be made more effective.

However, survivors had given us many accounts of police responses in the past. We have also heard from police about significant changes over time in how they respond to child sexual abuse, including institutional child sexual abuse.

3.3.1 Police responses in the past

In private sessions, case studies and submissions responding to Issues Paper 8, we have heard accounts of people's experiences in reporting to police. We have also heard accounts of people not reporting to police, in some cases because of fear of the police or of not being believed. Some survivors have told us that they disclosed the abuse to someone in authority – a teacher or child protection officer – but, when these people did not believe them, they did not attempt to report to the police.

In the personal submissions to Issues Paper 8, the earliest account of reporting to police was in 1942. Other submissions gave accounts of reporting to the police in each decade from the 1960s until the present decade.

In Case Study 28 on the Catholic Diocese of Ballarat, a survivor, Mr Gordon Hill, gave evidence that, in the 1950s, he woke up in hospital some days after he had left the premises of St Joseph's Home – an orphanage in Ballarat, Victoria – to pick blackberries. He said that he tried to tell the doctor about the physical and sexual abuse he had suffered in the home. Mr Hill gave the following evidence:

> The copper in uniform turned around and said, 'No, he's just a runaway kid that we've been looking for, for nearly three or four days'. He said to the other people, 'Nobody does that sort of thing [the abuse], I know the Home. I know because we've picked up runaways before'. I said, 'I wasn't running away, all I was trying to do was have a feed'. He said to the other people, 'You're wasting your time'.
>
> From that day on, I trusted no one. At that time I was talking to somebody in authority, somebody who you tell your kids they can look up to. But when you get that sort of reaction that I did, it was like talking to a brick wall.[43]

In Case Study 30 on Victorian state-run youth training and reception centres, we heard evidence from survivors about their interactions with police in the 1960s. One of the cases considered in the public hearing involved Mr Norman Latham, who was 15 years old in 1962. He was sexually abused by a man in a car. He escaped from the car when police drove up to the car. Police arrested the man.

The police document 'Details of previous court appearances or warnings by an officer' recorded the following information:

> LATHAM does not get on well with family and it appears that his parents do not take too much interest in him …
>
> LATHAM was found in the company of a [redacted] who had offered to drive the boy home but had taken him to a deserted track of the Boulevard Port Melbourne and Indecently Assaulted him. LATHAM was not perturbed about the assault at all when questioned.[44]

In response to a question about what this notation tells us about attitudes of police to offences of indecent assault in 1962, Victoria Police Assistant Commissioner Stephen Fontana stated:

> it really highlights the lack of understanding that police had at the time in terms of the impact these types of offences can have on individuals, particularly young children. When you read this, whilst it says that it acknowledges that he was indecently assaulted, it sort of doesn't really highlight the seriousness of the actual offence, and it's sort of commenting on the victim rather than the perpetrator.[45]

He also commented on attitudes towards victims when he started policing in 1975:

> I would say that the attitude of members would vary, but I think there was probably a disbelief, and I think that's what came out in the Victorian Law Reform Commission's review in 2004, that there was a lot of disbelief at times. And particularly if you're dealing with – and I know in this case we're dealing with children that were in institutions such as Turana, Winlaton and Baltara – well, a number of members would probably consider them, if they were out there involved in crime, they were probably considering them to be troublemakers and maybe not believable and that wouldn't have been the case, and this is probably the difficulty, they weren't really drilling into the background of these children to find out what was actually going on in their lives.[46]

Case Study 19 considered the response of the State of New South Wales to child sexual abuse at Bethcar Children's Home in Brewarrina, New South Wales. In the early 1980s, some children who lived in the home complained to police about abuse in the home. One survivor, Ms Leonie Knight, told of her experience of reporting the abuse:

> She took me to the police station in Bourke to make a statement. I cannot remember if I made a statement or not. I do not recall any action being taken and I remember getting the sense that the police did not believe my story. I kept going to the police station and asking them if there was a court date or what was happening, but there were different police officers there each time and they didn't know much about it.[47]

We found that the police responses to the children who reported abuse in 1980 and 1983 failed to comply with the procedures in place at the time.[48]

Many survivors have given us accounts of reporting to the police in the 1990s and early 2000s. Some told us that their experience of reporting to police left them feeling disbelieved or unsupported. Some said that they felt police were rude and dismissive or that they were unprepared for the

reports and were unsympathetic. Some survivors told us that police seemed uninterested and did not take a statement or decided not to investigate.

A lack of continuity of staffing in the police response was also raised. For example, one survivor told us that the investigation of their matter ran for two years and there were six different officers in charge at different times.

Some survivors told us that they found the interview experience unsatisfactory. Survivors have told us about having to discuss the abuse in the public area of the local police station or having their statements taken with other people walking in and out of the room.

3.3.2 Major inquiries affecting police responses

As we discussed in section 2.2, in general terms, many of the negative experiences of police responses that we have been told about occurred in earlier periods of time through to the early 2000s. We know that the criminal justice system, including the police response, has improved considerably over recent times in recognising the serious nature of child sexual abuse and the severity of its impact on victims.

Some of the improvements in police responses have been prompted or encouraged by various child protection inquiries in different states and territories. We note briefly here two major inquiries which were particularly significant in leading to changes in police responses to child sexual abuse in the two largest jurisdictions, New South Wales and Victoria:

- the Royal Commission into the New South Wales Police Service (Wood Royal Commission)
- the Victorian Law Reform Commission (VLRC) inquiry and *Sexual offences: Law and procedure final report*.

Wood Royal Commission – New South Wales

In New South Wales, the paedophile reference to the Wood Royal Commission, conducted from 1995 to 1997, made recommendations about police responses to child sexual abuse.[49] The report highlighted the need for greater collaboration, coordination and training when investigating child protection in New South Wales.

Before the Wood Royal Commission turned its attention to the paedophile reference, New South Wales Government agencies had already begun to work on improving collaboration. In September 1993 the investigation and management of child abuse was raised at a state-wide interagency conference. The then NSW Police Service developed an action plan to address issues that the NSW Police Service and the then Department of Community Services (DoCS) encountered when investigating child abuse. Central to this plan was the formation of teams consisting of police and DoCS officers.

In 1994 and 1995, two joint investigation teams were set up as the pilot program. An evaluation of this model identified a reduction in emotional trauma for child victims, more effective investigation, improved interagency collaboration and better-quality briefs of evidence.[50]

Following the recommendations of the Wood Royal Commission, the New South Wales Government made a commitment to coordinating the key government agencies to implement the joint investigation model.

In 1997, the Commissioner of the NSW Police, the Director-General of DoCS and the Director-General of NSW Health signed a memorandum of understanding about joint investigation. This memorandum recorded the responsibilities of the three agencies most directly involved in child abuse investigations.[51] We discuss the multidisciplinary approach in New South Wales in section 3.4.3.

Victorian Law Reform Commission inquiry and report

In Victoria, the VLRC inquiry and *Sexual offences: Law and procedure final report*[52] were key drivers of reforms to Victoria Police's response to sexual offending, including child sexual abuse.

The VLRC found that the police response to sexual assault was undermined by police attitudes and beliefs among detectives that there is a high rate of false complaints.[53]

The VLRC found that there was a lack of investigator knowledge about sexual offending. It recommended the establishment of specialist sexual assault investigative units, the development of specialist training for sexual offence investigators, more transparent brief authorisation and better data collection.

In 2006 the Victorian Government responded to the VLRC report through the launch of the Sexual Assault Reform Strategy. Victoria Police has developed specialist and multidisciplinary approaches to responding to sexual offences, including child sexual abuse, which we discuss in section 3.4.4.

In Case Study 30 on Victorian state-run youth training and reception centres, we heard evidence from Assistant Commissioner Fontana of Victoria Police. Assistant Commissioner Fontana stated that there were significant shifts in both the culture and practice of policing in Victoria during the 40 years that he has been with the police force.[54] He gave evidence about a rape investigation and evaluation group that he was part of in the 1980s:

> historically we had no centralised rape squad; all the investigations of serious sexual offences were done by local criminal investigation branches …
>
> We found sufficient deficiencies in the investigation of these offences [serious sexual offences committed by serial offenders]; the lack of specialist skills and knowledge and, as I said before, there was poor record-keeping in a lot of cases; some files had been destroyed unfortunately, and so, we recommended some significant change which resulted in the establishment of the former Rape Squad.[55]

He agreed that the VLRC inquiry and report had resulted in a significant change in the attitudes amongst police as an institution:

> In terms of police and others, in terms of how we approach investigations and provide support for victims in these matters particularly.[56]

3.4 Current police responses

3.4.1 Introduction

States and territories take different approaches in their police responses to child sexual abuse, including institutional child sexual abuse. This is not surprising given the different sizes – in relation to population and geographically – of the states and territories. We anticipate that the police administrative data analysis we discussed in section 3.2.1 will show that the jurisdictions experience very different rates of reporting of child sexual abuse and that the nature of the reports also differ.

In section 3.4.2 we outline two of the key issues around which police responses may differ:

- child sexual abuse reported as a child and child sexual abuse reported as an adult
- specialist, multidisciplinary and co-located policing responses.

In sections 3.4.3 to 3.4.11 we outline the current approach in police responses in each Australian jurisdiction.

3.4.2 Issues in police responses

Reporting as a child or as an adult

One of the areas in which police responses may differ is whether they provide different responses to child sexual abuse reported as a child, and to child sexual abuse reported as an adult. For example, some police responses provide a specialist response focused on the special aspects of interviewing children, while others provide a specialist response focused on the special nature of sexual offences.

The research report, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research), by Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM, looks at the impact of delayed reporting – which is common in child sexual abuse offences – on the prosecution of child sexual abuse offences in New South Wales and South Australia. It uses quantitative and qualitative data to compare prosecution processes and outcomes in matters of child sexual abuse reported in childhood with those reported when the complainant is an adult.

New South Wales and South Australia were studied because they are the only states with equivalent statistical analysis bodies that can produce multi-year 'clean' datasets for both police and court data collections.[57] The Bureau of Crime Statistics and Research (BOCSAR) provided data for New South Wales and the Office of Crime Statistics and Research (OCSAR) provided data for South Australia.

The Delayed Reporting Research identifies a number of interesting aspects of relevance to police responses, including:

- trends in reporting to police
- delays in reporting to police

- the likelihood of cases proceeding to prosecution.[58]

A point of particular interest here is the delay in reporting where offences are alleged to have been committed by a person in a position of authority. The Delayed Reporting Research states:

> In both states, most reports were made within three months of the incident, but there was an upward trajectory in the number of reports made beyond 10 years after the offence data, especially for sexual and indecent assault. In both states too, males were more likely to delay their reporting, and for longer, than females. *The longest delays occurred when the person of interest/suspect was a person in a position of authority. For these suspects, the majority of reports were made at least 10 years after the incident*, especially in South Australia; 75 per cent of reports of sexual assault involving persons in a position of authority in South Australia were made 10 years or more after the incident compared with 56.5 per cent in New South Wales. The state difference was much more marked for indecent assault: 72.1 per cent in South Australia and 45.3 per cent in New South Wales. This may reflect the abolition of the statute of limitations and the impact of the Mullighan Inquiry.[59] [Emphasis added.]

Police and court data does not allow a close match with the definition of child sexual abuse in an institutional context under the Royal Commission's Terms of Reference. 'Person in authority' in police and court data will catch some institutional abuse but not all institutional abuse. 'Person in authority' is therefore a conservative proxy for institutional child sexual abuse, and it is likely that it understates institutional abuse within the Royal Commission's Terms of Reference.[60]

In the Delayed Reporting Research, it can be seen that the significantly longer delays in reporting where the suspect is a person in authority are particularly evident in Figures 14a and 14b in relation to New South Wales[61] and Figures 58a and 58b in relation to South Australia.[62]

This suggests that, particularly for institutional child sexual abuse, it is likely that many reports to police will be made by adults. This makes the issue of the police response to adults who report sexual abuse they suffered as a child of particular importance in relation to institutional child sexual abuse.

Another point of particular interest for both police and prosecution responses is the impact of delayed reporting on the likelihood of a case proceeding to a prosecution and the likely outcome of the prosecution.

The Delayed Reporting Research states:

> The association between the New South Wales and South Australia Police data on the likelihood of legal action being initiated in adult and child reports was not straightforward … In New South Wales, legal action was more likely with increasing delay, until the delays extended to 10 to 20 years, after which the likelihood of legal action decreased. In South Australia, the pattern was quite different – reports of sexual assault were somewhat more likely to result in legal action with immediate reporting but there was little difference for indecent assault … in the most recent South Australian data for the period 2010–12, there was little difference between the likelihood of arrest or report for child and adult reported offences (see Figure 81: 51 per cent compared to 46.4 per cent).[63]

The Delayed Reporting Research also discusses possible explanations for these patterns, including the following:

> There are several possible explanations for the perhaps counterintuitive finding of delayed reports in New South Wales being more likely to proceed than those reported more quickly. One explanation articulated by a Crown prosecutor was that the complainants in historical matters are generally willing to proceed in contrast to those involved in recent reports:
>
> > Very often if they have delayed reporting for some time, and now they are reporting, they are quite vehement about proceedings whereas if you have a child where it's just been reported, the parents are trying to balance whether this is in the best interests of the child to proceed.
>
> In contrast, cases of same day or next day disclosure in childhood may involve more situations where parents, having made an initial report to the police, decide that they do not want to proceed with the prosecution.[64]

The Delayed Reporting Research also discusses factors that may lead to differences in the likelihood of conviction between prosecutions where the report was made as a child and prosecutions where the report was made as an adult. The researchers report:

> there was no drop-off in convictions for sexual assault with increasing delays between the offence and finalisation in the higher courts in either state. This was not the case for indecent assaults or cases heard in the lower courts …
>
> The fact that there was no diminution in the conviction rate with longer delays in the higher courts is counterintuitive given concerns about evidentiary issues and the impact of warnings to the jury about the dangers of delayed complaints …
>
> However, there is some indication that judges may view adult witnesses more positively than children, in terms of cognitive ability, even though all the complainants were children at the time of the alleged offence/s … ODPP lawyers also suggested that juries may be likely to believe a complainant-victim in 'old' matters with long delays; in the words of one, 'otherwise why would you come forward after all these years?' There is also the possible selection factor, and the view that testifying in such mattes is very stressful and complainants are unlikely to go through all it entails unless they are determined and reliable witnesses.[65]

These two points of interest suggest that:

- many reports of institutional child sexual abuse are likely to be made by adults
- reports made by adults – delayed reports – should not be assumed to have poorer prospects of leading to a prosecution or a conviction when compared with reports made by children
- police responses to reports by adults are important particularly in relation to institutional child sexual abuse.

It is still likely that many reports of institutional child sexual abuse will be made by children and that police responses to reports by children are important.[66] It is not a question of favouring or

prioritising responses to either adults or children; rather, the aim should be to provide the most effective response possible to both groups.

Specialist and multidisciplinary responses

The Royal Commission engaged Dr Nina Westera, Dr Elli Darwinkel and Dr Martine Powell to conduct a review of the literature concerning:

- the use and effectiveness of specialist police investigative units and multidisciplinary approaches in Australia, the United Kingdom and the United States
- what features of specialist units might determine their effectiveness.

The literature review, *A systematic review of the efficacy of specialist police investigative units in responding to child sexual abuse*,[67] is published on the Royal Commission's website.

The literature review suggests that specialist units, especially in the form of multi-agency centres, can improve police responsiveness to complainants who allege child sexual abuse.

The literature review distinguishes between the following specialist and multidisciplinary responses:

- **Police-only specialist unit:** A unit where police officers are co-located to perform the primary role of investigating sexual abuse or assault.
- **Joint investigation specialist response:** A unit where police and child protection officers are co-located to perform the primary role of investigating sexual abuse or assault.
- **Multi-agency centre:** A unit where police and at least two other agencies are co-located to perform the primary role of providing a coordinated response to sexual abuse or assault. The combination of agencies varies in each centre but may include child protection, counselling, medical and forensic, child interviewing, victim advocate and prosecution services.

A summary of some of the key findings of the literature review is as follows:

- Overall, 23 out of 27 published evaluations of specialist investigative units found that the units resulted in a more effective police response than traditional approaches. The four main categories measured in the published evaluations were victim satisfaction, professional stakeholder satisfaction, investigative process and investigation outcomes. Specialist units either improved outcomes in these measures or left them unchanged.
- Inadequacies in the design of the published evaluations made it difficult to draw clear conclusions about the efficacy of specialist units. The only published studies directly comparing specialist and traditional units related to four of the 11 different specialist units, all of which were multi-agency centres. This small number makes it impossible to delineate which features of the specialist units make them more or less effective.
- **Victim satisfaction:** Qualitative surveys and interviews with adult victims and the families of child victims suggest that these participants were more satisfied with a specialist unit than a traditional response. Positive results from specialist unit involvement included the victim feeling valued by

police, having greater privacy and having improved access to services. However, some victims were still concerned about negative police attitudes and lengthy delays in investigations.

- **Professional stakeholder satisfaction:** Qualitative surveys and interviews suggest that professional stakeholders strongly support specialist units as opposed to a more traditional response. Professional stakeholders mostly cited improved response effectiveness and increased job satisfaction as the main benefits. They supported the need to co-locate agencies and deliver services by way of a collaborative approach between agencies.
- **Investigative process:** Cases involving specialist units reported higher rates of police, child protection and medical service involvement compared with cases dealt with using traditional responses. The extent of delays in investigation times did not change, but professional stakeholders suggested that specialist unit involvement improved the timeliness and ease with which victims were able to access services. There is insufficient published research to conclusively determine the influence of specialist units on the quality of investigation.
- **Investigation outcomes:** Specialist units recorded higher arrest rates and numbers of charges compared with traditional responses. However, there was not enough evidence to draw any conclusions about how specialist units influence prosecution and conviction rates or sentence length.
- **Challenges:** Common themes in the published evaluations identified the challenges inhibiting the effectiveness of specialist units as:
    - insufficient resources (including staffing) to meet the high workload
    - inadequate quality of leadership, management and personnel
    - insufficient training for unit staff
    - ineffective multi-agency collaboration.

The literature review helps to inform an understanding of the current approaches adopted in Australian jurisdictions.

3.4.3 New South Wales

Structure of police response

The NSW Police Force response to child sexual abuse is structured as follows:

- **Child Abuse Squad:** The Child Abuse Squad is a specialist response organised around children rather than around sexual abuse. In addition to sexual abuse, it responds to serious physical abuse and neglect. It is located within the Serious Crime Directorate of State Crime Command. Generally, it focuses on alleged offences against children under 16 years of age. It also covers alleged offences against Aboriginal and Torres Strait Islander children aged 16 and 17 and some 'person in authority' offences which extend to children aged 16 and 17. (Person in authority offences are discussed in Chapter 5.) The Child Abuse Squad is the policing component of the

multidisciplinary response to child abuse through the JIRT, discussed below. It includes the Child Abuse Response Team (CART) and the police component of 22 JIRTs.

- **Sex Crimes Squad:** The Sex Crimes Squad responds to sexual assault matters that are likely to be protracted, complex, serial and serious. It also provides support to Local Area Commands and assistance to the Child Abuse Squad. It is located within the Serious Crime Directorate of State Crime Command. It provides leadership on some issues in relation to historical child sexual abuse. It also contains the Child Exploitation Internet Unit, which investigates child sexual abuse and exploitation of children facilitated through the use of the internet and related computer and telecommunications devices; and the Child Protection Register.
- **Local Area Commands:** Local Area Commands generally respond to child sexual abuse matters where the complainant is 16 or older at the time of report or investigation. Local Area Commands are likely to provide the response to child sexual abuse reported as an adult, including reports of historical child sexual abuse.
- **Specialist task forces:** Specialist task forces are established from time to time, including to respond to child sexual abuse matters. For example, a number of historical institutional child sexual abuse matters involving multiple complainants have been investigated by specialist task forces.

Joint Investigation Response Team (JIRT)

JIRT is a multidisciplinary response to child abuse, including child sexual abuse. Initially, police and child protection were partners in the multidisciplinary response. Following a recommendation made in 2006, in 2009 NSW Health became a full partner in JIRT.

Under the multidisciplinary response, joint decision-making commences at the JIRT Referral Unit (JRU). The three partner agencies collectively review and assess each referral against JIRT criteria to determine whether a matter is accepted for a joint response.

Referrals to JRU come from the Child Protection Helpline. Many matters are reported by mandatory reporters, including police. The matters are triaged and assessed, and information is gathered from all three agencies. Once a referral has been assessed, if it is accepted it is sent out to the JIRT units for further investigation.

The multidisciplinary response through JIRT combines:

- risk assessment and protective intervention services from the Department of Family and Community Services
- criminal investigation services from the NSW Police Force through the Child Abuse Squad
- therapeutic and medical services from NSW Health.

Half of the 22 JIRTs are co-located, which means that all three agencies work from the same premises. In the other JIRTs, staff from the three agencies do not work from the same site, although they still provide a joint response.

In practice, in the JIRT process each of the agencies receives information and undertakes a local planning response. A joint coordinated response to an allegation is then provided. The police response takes the lead on issues of criminal investigation.

The criteria for determining what sexual abuse matters will be referred to JIRT are as follows. There are also criteria for matters of physical abuse and neglect:

> **Sexual abuse**
>
> Sexual abuse is any sexual threat imposed on a child or young person. Adults, adolescents or older children, who sexually abuse children or young people, exploit their dependency and immaturity. Coercion that may be physical or psychological is intrinsic to child sexual abuse and differentiates child sexual abuse from consensual peer sexual activity.
>
> **Referral criteria for sexual abuse reports:**
>
> - Disclosure and/or evidence of sexual assault.
> - Any reports of sexual abuse of a child under the age of 18 years where the alleged offender is over the age of criminal responsibility ie 10 years.
> - Presentation of physical indicators consistent with sexual abuse eg venereal diseases, pregnancy, unexplained bruising on or bleeding from genitals, presence of semen of [sic – on] child, unexplained bruises to breast, and
> - The CSC [Community Services Centre] will assess reports of sexualised behaviour and allegations where offenders are 10 years and under.[68] [Reference omitted.]

We understand that, where the alleged victim is between the ages of 16 and 18 years and where there are no reported ongoing risk of harm issues, reports of sexual assault by a peer, stranger or acquaintance are referred to the Local Area Command, rather than to JIRT, for investigation and management.

In 2015, the Royal Commission sought information on how much of JIRT's work involved allegations of institutional child sexual abuse within the meaning of the Royal Commission's Terms of Reference.

As discussed above, the JRU assesses all referrals to JIRT.

JRU provided us with a breakdown of the number of matters referred to, and accepted by, the JRU over a 12-month period in 2014–2015. In this period, 4,062 matters were accepted where the initial report involved possible child sexual abuse.

We contracted the New South Wales Department of Family and Community Services to analyse a random sample of 100 JRU case files from the 4,062 files in the category of accepted possible sexual abuse cases. The caseworkers who undertook the analysis were asked to identify whether the case involved allegations of institutional child sexual abuse and, if it did, what kind of institution was involved and what the position of the alleged offender was.

The sampling results indicated that 19 of the 100 cases involved possible child sexual abuse in an institutional context. Ten cases involved out-of-home care and five involved schools. In eight cases the alleged offender was another child.

Based on the error margin advice we obtained from researchers, the results suggest that, on the information available at referral stage, somewhere between 13 and 28 per cent of accepted referrals of possible child sexual abuse involve institutional child sexual abuse as defined by the Royal Commission's Terms of Reference.

The possible range of 13 to 28 per cent cannot be reduced without reviewing a much larger sample size.

In a submission in response to Issues Paper 8, the NSW Ombudsman discussed his audit of the implementation of the NSW Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities.[69] The Ombudsman's audit examined the operation of JIRT, with a particular focus on the operation of the Child Abuse Squad in 2011 and 2012.[70]

The Ombudsman's audit identified that the introduction of the JRU had led to a much higher than anticipated increase in the number of cases accepted by JIRT and that it would be timely to review the level of JIRT resourcing.[71] In his submission, the Ombudsman listed a number of initiatives introduced since his audit to improve productivity and performance in the Child Abuse Squad, including additional staff, development and review activities and the establishment of a Child Abuse Response Team to support squads that are working on complex investigations.[72]

The policies and procedures of JIRT have been considered in a number of case studies, including:

- **Case Study 2:** Case Study 2 considered YMCA NSW's response to the conduct of Mr Lord. It also considered the response of the NSW Police Force through JIRT. Case Study 2 is discussed in more detail in section 4.2.
- **Case Study 37:** Case Study 37 considered responses to child sexual abuse at RG Dance Pty Ltd and at the Australian Institute of Music. It also considered the response of the NSW Police Force through JIRT.
- Case Study 38: In the second week of Case Study 38 in relation to criminal justice issues, one of the matters considered involved allegations of child sexual abuse in a childcare centre in Sydney. The case study considered the response of the NSW Police Force through JIRT.

3.4.4 Victoria

Structure of police response

Victoria Police's response to child sexual abuse is structured as follows:

- **Sexual Offences and Child Abuse Investigation Teams (SOCITs):** SOCITs are a specialist response organised around both children and sexual abuse. In addition to responding to adult and child sexual offences, SOCITs also respond to other forms of child abuse. SOCITs provide the police component of Multi-Disciplinary Centres (MDCs), which provide co-located rather than joint responses. SOCITs receive most of their referrals from the Department of Health and Human Services (DHHS) Child Protection services. A Protecting Children Protocol between Victoria Police and DHHS governs both agencies' responses to victims.

- **Sexual Crimes Squad:** The Sexual Crimes Squad focuses on 'category 1' offences, which are serious and life-threatening sexual offences, particularly sexual assault offences by a stranger. While the Sexual Crimes Squad is unlikely to be involved in responding to individual cases of institutional child sexual abuse, they formed part of Taskforce Cider House, discussed below. The Sexual Crimes Squad is attached to Crime Command.
- **Task forces:** Specialist task forces are established from time to time, including to respond to child sexual abuse matters. In particular:
    - SANO Task Force was established to investigate historical and new allegations that have emanated from 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* (the Betrayal of Trust report) and from this Royal Commission.
    - Taskforce Cider House investigated allegations of the sexual exploitation of children in out-of-home and residential care in the Dandenong area. The task force combined investigators from the Sexual Crimes Squad and Dandenong SOCIT and a DHHS child protection worker.[73]
    - Taskforce Astraea investigates online child sexual abuse, grooming and child exploitation. It is now part of the Joint Agency Child Exploitation Team.[74]

Sexual Offences and Child Abuse Investigation Teams (SOCITs)

The SOCIT model started as a pilot in 2007 with a trial of two teams. The implementation of the model was completed in 2012. There are 28 SOCITs and 370 specialist detective positions throughout Victoria.

Procedures for handling child sexual assaults are governed by the Victoria Police *Code of practice for the investigation of sexual crime*[75] and relevant parts of the Victoria Police Manual.[76]

In Victoria police receive child sexual abuse allegations through a number of channels. SOCITs receive most reports from DHHS under the Protecting Children Protocol. Child sexual abuse may also come to the notice of police through referrals from Centres Against Sexual Assault (CASAs) and schools. Some children will also attend police stations with their families to make a report to police.[77]

In Victoria, the response is largely led by police and the police consult with other agencies as they consider appropriate. Ms Leanne Miller, Director of Child Protection in West Division, DHHS, told our public roundtable on multidisciplinary and specialist policing responses that in Victoria reports are received through various 'intake points' rather than through a centralised unit, as in the JRU approach in New South Wales. Ms Miller said that reports could come through police, CASAs or from other agencies, and child protection services do not necessarily have any involvement.[78]

The foreword to the Victoria Police *Code of practice for the investigation of sexual crime* states in relation to SOCITs:

> Victoria Police has come a long way in improving responses to sexual offences.

> We have transitioned to a specialist model of investigation, through our Sexual Offences and Child Abuse Investigation Teams (SOCITs) where specially selected and trained detectives are dedicated to investigating these crimes.
>
> We continue to improve our responses through world-class education and training and collaborative partnerships.[79]

SOCIT MDCs combine SOCIT with child protection expertise from the DHHS and counsellors and advocates from CASAs. An MDC enables these services to be co-located. Police investigators, child protection workers and sexual assault counsellors or advocates, with strong links to forensic medical personnel, work collaboratively in one location to provide responses to adult and child victims of sexual assault and child physical abuse.

However, they provide a co-located response rather than a joint response. Ms Helen Bolton, Chief Executive Officer of the Barwon Centre Against Sexual Assault, provided an overview of the co-located approach in Victoria:

> We've been co-located in the Barwon MDC since 2012. Prior to moving into the MDC, we didn't really have a great relationship with police and child protection in terms of a lot of our victims wouldn't report. We would give them the details of the police and we knew that they would disengage from our services and not report.
>
> Moving into the MDC in Barwon, we have 30 counsellor advocates, we have approximately 16 SOCIT detectives, two sergeants and a senior sergeant and we have seven child protection staff ...
>
> The way that we work together is that if a victim presents to CASA – there are many entry points, but I will talk about the CASA entry point – we will do an assessment and ask them if they would like to report to police, or if they have. We will then literally walk down the hallway, knock on the SOCIT door and say, 'Can you come and give an options talk?'
>
> So a detective will come into the counselling room and talk to that person about, 'These are the range of options that you have in reporting to police.' If it's a child, we can immediately go to child protection and SOCIT. We've had a number of cases where we have said, 'We've just had a disclosure of sexual abuse of a child. We need you now to take action and investigate this.' So we work very closely together ...
>
> Being in the one building, proximity has been a great benefit, and also the level of trust and understanding about the way that each entity operates has been fundamental in improving victims' access to the range of services that they deserve. The model really wraps around the victim from that point of first disclosure through to criminal prosecution.[80]

The foreword to the Victoria Police *Code of practice for the investigation of sexual crime* states in relation to MDCs:

> We [Victoria Police] are a key partner in Multi-Disciplinary Centres, where we work from a single location alongside staff from Centres Against Sexual Assault, DHHS–Child Protection and other partners to provide victims a coordinated and comprehensive response.[81]

The policies and procedures of Victoria Police, including SOCITs, have been considered in a number of case studies, including:

- **Case Study 30:** In Case Study 30 on Victorian state-run youth training and reception centres, Victoria Police Assistant Commissioner Fontana gave evidence about the systems, policies and procedures of Victoria Police between 1960 and 1993 to respond to allegations of child sexual abuse in the centres; and the current systems, policies and procedures of Victoria Police in relation to allegations of sexual abuse of children at youth justice centres.
- Case Study 38: In the second week of Case Study 38 in relation to criminal justice issues, one of the matters considered involved allegations of child sexual abuse in a residential home in Victoria. The case study considered the response of Victoria Police.

3.4.5 Queensland

Structure of police response

The Queensland Police Service's response to child sexual abuse is structured as follows:

- **Child Protection and Investigation Units (CPIUs):** CPIUs investigate criminal matters relating to child abuse if the complainant is still a child at the time of the report and investigation. CPIUs are spread across Queensland, with 37 offices and three satellite offices. CPIUs receive reports from local police, child protection services (including through mandatory reporting), non-government institutions and others. CPIUs provide the police representative on Suspected Child Abuse and Neglect (SCAN) teams.
- **Child Safety and Sexual Crime Group:** The Child Safety and Sexual Crime Group is part of State Crime Command. It includes the Child and Sexual Crime Investigation Unit, Task Force Argos (which investigates computer-facilitated crimes against children) and the Child Protection Offender Registry.
- **General duties police:** General duties police will often provide the first response to victims and survivors. Regional services are supported by specialist units, including CPIUs and criminal investigation branches.

Suspected Child Abuse and Neglect (SCAN) teams

SCAN teams are established under the *Child Protection Act 1999* (Qld). They combine expertise from child protection, health and education agencies and from the Queensland Police Service. They include Aboriginal or Torres Strait Islander representatives for matters concerning Aboriginal or Torres Strait Islander children.

CPIUs provide the Queensland Police Service members of SCAN teams.

SCAN teams respond to familial child abuse. However, familial abuse includes abuse in out-of-home care (other than residential out-of-home care), so it includes some institutional child sexual abuse within the meaning of the Royal Commission's Terms of Reference.

SCAN teams coordinate between the key state agencies where it is established that a child is in need of protection under the Child Protection Act. If a matter fits within the SCAN criteria, it will be referred to a SCAN team. SCAN representatives represent their services in any ongoing decision-making process around the needs of the child.

3.4.6 Western Australia

Structure of police response

Western Australia Police's response to child sexual abuse is structured as follows:

- **Child Abuse Squad:** The Child Abuse Squad (CAS) investigates matters including sexual abuse of a child under 13 years of age outside of the family setting where the offender is known, sexual abuse of children within the care of the child protection department when the offender is linked to the department, and sexual abuse of a child where the alleged offender is a person in authority.
- **Sexual Abuse Squad:** The Sexual Abuse Squad investigates matters including reports of sexual penetration of a child under 13 outside of the family setting and where the offender is unknown, reports of sexual penetration of a child who is over 13 and under 16 outside of the family setting, and reports of sexual offences committed against incapable persons.
- **ChildFIRST Assessment and Interview Team (CAIT):** CAIT is a multidisciplinary response from the Department for Child Protection (DCP) and Western Australia Police. CAIT assesses all new referrals of child sexual abuse in Western Australia (where the complainant is still a child) and conducts interviews with children. CAIT was established in 2009 in response to the introduction of mandatory reporting legislation. CAIT receives reports locally or through referral from child protection. If a report is made at a police station, the attending officer makes a record in the Incident Management System, which generates an automatic notification to CAIT if child abuse is involved. When CAIT receives a complaint of child abuse, police and DCP hold a strategy meeting where decisions are made based on the needs of the child. In making decisions, CAIT takes into account the child's welfare and the operational needs of the police investigation.

Multi-agency Investigation and Support Team (MIST)

The Multi-agency Investigation and Support Team (MIST) is a joint services team that responds to child sexual abuse cases. It was established in 2015 at the George Jones Child Advocacy Centre in Perth.

MIST includes a police investigation team, child protection workers, specialist child interviewers, medical services, psychological therapeutic services and two Child and Family Advocates. The MIST model is operating as a trial with Parkerville Children and Youth Care, a not-for-profit organisation.[82]

Mr Basil Hanna, Chief Executive of the George Jones Child Advocacy Centre, told the public roundtable that MIST is based on the methodology of 'child advocacy centres', which emanated from Scandinavia and the United States.[83] MIST is designed to formalise existing arrangements where the George Jones Centre may provide support to children who are interviewed by police.

MIST is currently operating as part of a three-year trial, which will be evaluated by the University of South Australia. It is designed to provide holistic services to both the child and their family.[84]

In relation to preliminary results of the operation of MIST, Mr Hanna told the roundtable:

> The interim report from the research was released only two weeks ago. That report speaks of far more positives than challenges and we're very enthusiastic about that. The final report will be issued in March to April of next year. We are hoping that we can continue this relationship with the police.[85]

Mr Hanna also described the key benefits of MIST as follows:

> Fundamentally, what a not for profit provides that is different is the child and family advocates, who are very much the linchpin between what we do as professionals, as police or DCP [Department of Child Protection], to talk [to] the family who are in a terrible state, really lack a lot of volition, don't know what's going on, and to be able to guide them through the process so they know what's happening when the police are interviewing their child and they know what the next steps are. We take this family right through from that tertiary, high acuity element, right through into secondary, until they are ready to be discharged.
>
> To have immediate access to a psychologist – we have 19 psychologists that work with us, so the child can be referred to a psychologist who, once again, provides services until they are not needed any more. We think that's a great model for the child and the family.[86]

In considering whether MIST-style responses should be available throughout Western Australia, the size of the state may create particular challenges. Detective Inspector Mark Twamley of the Sex Crime Division, Western Australia Police, told the roundtable:

> It might not be wise to have a bricks and mortar response to issues in the Kimberley, but more a mobile response.
>
> My colleagues based in Broome currently have what is called the Kimberley response team, which is a group of detectives and child interviewers who, whilst centred in Broome, operate throughout the Kimberley and visit our indigenous centres and our indigenous communities throughout the Kimberley, West Kimberley and East Kimberley, and they provide, to the best of their ability, the level of service that we try to provide down in Perth at our centralised office. Of course, one of the challenges for them is to try to harness the abilities of family and child advocates, psychologists and other health services to go along with them.[87]

3.4.7 South Australia

SAPOL manages its investigation of sexual offences using a tiering system. Tier 1 offences are investigated by Local Service Area crime scene investigators (CSIs) and tier 2 offences are investigated by the Sexual Crime Investigation Branch (SCIB) and Forensic Response Section (FRS). SAPOL makes decisions on which tier a matter falls into using criteria such as whether the offender is unknown, the age of the victim, the extent of the offending and the nature of the offending.

SAPOL's response to child sexual abuse is structured as follows:

- **Local Service Areas (LSAs) and Criminal Investigation Branches (CIBs):** CIBs are generally responsible for responding to an allegation of a sexual offence. They can seek advice from the local Family Violence Investigation Section (FVIS) or the Sexual Crime Investigation Branch (SCIB).
- **Family Violence Investigation Section:** FVIS is responsible for family violence but also provides advice on child abuse and child protection matters.
- **Sexual Crime Investigation Branch:** SCIB provides a specialist criminal service for the prevention, detection and investigation of sex-related crimes. SCIB also provides specialist advice and assistance on these crimes to LSAs. SCIB has three multidisciplinary teams with specialist skills in:
    - victim management (responsible for medical examinations, statements, interviews and the health and welfare of victims)
    - sexual crime investigation
    - child exploitation investigations (including online offending, targeting and investigation of persistent, systematic or predatory abuse/exploitation of children)
    - investigations involving HIV criminal offending.
- **Child Protection Services (CPS):** CPS conducts interviews with victims under the age of seven, which are observed by police.

SAPOL receives reports from a number of channels, including direct reports to police, reports to the Families SA Child Abuse Report Line (including mandatory reports) and reports from other agencies.

SAPOL's policies and procedures have been considered in a number of case studies, including:

- **Case Study 9:** Case Study 9 considered the responses of the Catholic Archdiocese of Adelaide and SAPOL to allegations of child sexual abuse at St Ann's Special School. We heard evidence about SAPOL's approach to the disclosure of information from 1991 until 2001 and about how SAPOL would respond to such allegations now (or at least at the time of the hearing in March 2014).[88]
- Case Study 38: In the second week of Case Study 38 in relation to criminal justice issues, one of the matters considered involved allegations of child sexual abuse against a school bus driver in Adelaide. The case study considered SAPOL's response to the allegations.

3.4.8 Tasmania

Tasmania Police does not have a specialist child abuse unit or squad. Criminal Investigation Branches throughout Tasmania have dedicated Victims Units that respond to allegations of sexual assault, including those alleged to have been committed upon children. The Tasmania Police Fraud & e-Crime Investigation Services unit investigates online child sexual abuse, child exploitation material and bestiality matters.

Tasmania Police has cross-agency agreements relating to joint investigations, including a memorandum of understanding between Children and Youth Services in the Tasmanian Department of Health and Human Services and Tasmania Police.

3.4.9 Australian Capital Territory

In ACT Policing, first response to child abuse and sexual assault matters is generally the responsibility of patrol teams. Criminal Investigations (CI) teams may perform this role, for example, in response to referrals from client agencies.

The Sexual Assault and Child Abuse Team (SACAT) includes the Adult Sexual Assault Team (ASAT) and the Child Abuse Team (CAT). ASAT responds where the victim is 16 years and over, and CAT responds when the victim is under 16. In addition to sexual abuse, CAT also investigates physical assaults upon children under 10 years of age. All child sexual abuse investigations are led by SACAT or a nominated CI member.

There are no cross-agency specialist investigation units. However, we understand that there are memoranda of understanding between the Australian Federal Police (AFP) (which provides ACT Policing) and relevant health and medical services.

In the second week of Case Study 38 in relation to criminal justice issues, one of the matters considered involved allegations of child sexual abuse by a respite carer in Canberra. The case study considered the response of ACT Policing.

3.4.10 Northern Territory

The Child Abuse Taskforce (CAT) is a joint initiative between Northern Territory Police, the Department of Children and Families (DCF) and the Australian Federal Police. CAT investigates allegations of serious and complex child abuse and neglect and refers less complex allegations to local police officers. Investigators from the Northern Territory Police Major Crime section and DCF work together on CAT investigations. Northern Territory Police receives reports either locally or through the DCF.

In Case Study 17 on the Retta Dixon Home, one of the matters examined was the response of the Northern Territory Police in 1975 and 2002 to allegations of child sexual abuse at the home.

3.4.11 Commonwealth

The AFP has implemented Joint Anti Child Exploitation Teams (JACET) in most states and territories. JACET co-locates AFP members with state and territory sex crime squads (or equivalent) and they respond jointly to online child exploitation matters.

The AFP Child Protection Operations team investigates offences under the *Criminal Code Act 1995* (Cth) with a focus on online child exploitation material and offenders who travel offshore and commit sexual offences overseas.

3.5 Possible principles for initial police responses

3.5.1 Introduction

We have received many accounts from victims and their families and survivors about their experiences of police responses, particularly initial non-specialist police responses.

We consider that there may be value in identifying principles which focus on general aspects of initial non-specialist police responses that are of particular importance or concern to victims and survivors and that might help to inform police responses.

Of course, police agencies may consider that they already act, or aim to act, in accordance with such principles. However, there may be benefit in stating them so that they continue to receive priority in police responses.

This is particularly important in non-specialist police responses. As discussed in section 3.4, many police agencies have introduced specialist responses either for child complainants or for all complainants of sexual abuse. However, even where there is a specialist response available, victims and their families or survivors may have initial contact with a non-specialist police response.

3.5.2 Aspects of initial police responses

Based on the information we have and our consultations to date, we consider that the following general aspects of police responses, particularly non-specialist responses, are of particular importance to victims and survivors:

- training in child sexual abuse issues
- referral to support services.

Training in child sexual abuse issues

When coming forward to report child sexual abuse, a victim's or survivor's first contact with the criminal justice system is likely to be with the police.

There is likely to be a strong link between this first contact with police and the level of satisfaction of a victim or survivor's overall experience with the criminal justice system. In his submission in response to Issues Paper 8, Mr Michael O'Connell APM, the South Australian Commissioner for Victims' Rights, stated:

> As the first point of contact, the police are in an ideal position to set a positive tone for the entire criminal justice system …
>
> Victim surveys in modern industrialised countries consistently show that the attitude of the first police officer with whom a victim first has contact can be a major determinant of victim satisfaction.[89]

This is consistent with what we have heard from survivors in private sessions and in submissions in response to Issues Paper 8.

In some of the accounts we have heard, contemporary child sexual abuse is reported soon after the abuse is first disclosed and while the victim is still a child. These accounts suggest that, generally, victims and their families are quickly referred to specialist responses where these specialist responses are available.

However, it seems that some adults who come forward to report historical abuse may still face poorer responses, particularly where specialist responses are not available for them.

In Case Study 38 in relation to criminal justice issues, we heard evidence from Mr Sascha Chandler about sexual and physical abuse he suffered from 1990 to 1992 while he was a student at Barker College in Sydney. Mr Chandler gave the following evidence about his experience of reporting the abuse to police:

> In February 2006 I attended the Hornsby Local Area Command and spoke to a police officer at the front counter. An intimidating uniformed police officer took me to a room and I didn't know where to start. The same officer took a two-paragraph statement from me over a period of half an hour. I was then told that someone would be in touch with me shortly.
>
> I walked out of the police station and over the railway crossing and contemplated throwing myself into the path of a train. I thought to myself, 'I have just done the hardest thing I have ever done and that was the response?' This short discussion and rapidly constructed statement was well below what I had expected and left me feeling as though the police didn't care and that nothing more would eventuate. There was no information about the process of reporting sexual assault provided to me at this time. It was like I was reporting a stolen wallet. The only thing that stopped me committing suicide was the thought of my children.[90]

Mr Chandler was later contacted by detectives at Hornsby Local Area Command and attended the station. He gave the following evidence:

> The interview lasted about three or four hours. It was a horrific experience. The environment was cold, sterile and unfriendly and I became emotional when I began retelling the details of my abuse. One of the detectives responded by telling me that I would need to toughen up or I wouldn't be up to the barrage that was expected from the defence. I found this interview quite stressful and poorly handled. The detectives emphasised the unlikelihood of getting the matter to trial let alone having McIntosh prosecuted …[91]

Mr Chandler attended for a further interview. He gave the following evidence in relation to the period following the further interview:

> A short time later I was advised by one of the detectives that McIntosh had previously been convicted of paedophile offences and was on parole when he offended against me. My initial thought was great, at least they will believe me.[92]

Ultimately, the offender was convicted of 24 offences of child sexual abuse relating to Mr Chandler.[93]

Mr Chandler now assists the NSW Police Force, including by delivering a presentation in detective training sessions. During his presentation he tells his story and discusses matters he has identified as imperative for investigators interacting with survivors.[94]

In its submission in response to Issues Paper 8, Survivors Network of those Abused by Priests (SNAP) Australia stated:

> While many survivors report as adults, in many ways recounting our experiences forces us to become temporarily a terrified child, and we deserve the same consideration of our trauma and specialised needs as a child witness.[95]

A number of personal submissions in response to Issues Paper 8 identified better training for police in understanding child sexual abuse as a necessary area for reform.

In our *Redress and civil litigation report*, in relation to the process of providing redress, we stated:

> How survivors feel they were treated and whether they were listened to, understood and respected are likely to have a significant impact on whether they consider that they have received 'justice'.[96]

As one of the general principles for providing redress, we recommended that:

> All redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors.[97]

In relation to this principle, we stated:

> All of those involved in redress, and particularly those who might interact with survivors or make decisions that affect survivors, should have a proper understanding of these issues and any necessary training.[98]

In relation to direct personal responses provided by institutions, we also recommended that:

> Direct personal responses should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors, including cultural awareness and sensitivity training where relevant.[99]

These considerations are likely to arise just as strongly in criminal justice responses as they do in providing redress.

Reporting to police is likely to be daunting for many victims and survivors. Victims and survivors will need to tell police about an event or events which are likely to have caused them trauma and they may be at risk of being re-traumatised in the reporting process.

Further, 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, or of what information or levels of detail police need from them. 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 police agencies; and people in authority, including police officers. They may have difficulty asking questions or giving their opinions without appropriate support.

In its consultation paper, *The role of victims of crime in the criminal trial process,* the VLRC defined 'victim support' with reference to the Victorian *Victims' Charter Act 2006* (Vic) as encompassing 'the respectful treatment of victims by all actors in the criminal justice system, the provision of information and the referral to and delivery of, therapeutic and psychological assistance, protection and practical help'.[100] The provision of support for victims is 'closely linked to victims' perceptions of the criminal trial process as fair and to their confidence in the criminal justice system'.[101]

In their 2010 report, *Family violence: A national legal response*, the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSW LRC) stated:

> It is clear that the most positive experiences of the criminal justice system for victims arise when they are 'treated respectfully ... listened to, believed and taken seriously' as well as being provided with timely and accurate information. In addition it is said that 'ensuring the complainant is well informed and well supported can improve not only their wellbeing and experience as a witness but their capacity to testify confidently'.[102] [References omitted.]

Provision of information and support are discussed further below. As to the need to treat victims with respect more generally, police will require a level of understanding of the complex trauma victims have experienced and the impact it may have had on them.

In its submission to Issues Paper 8, knowmore recommended that police and prosecution agencies adopt trauma-informed practices in dealing with survivors of childhood institutional sexual abuse. It submitted this would benefit both survivors and police and prosecution agencies by ensuring the wellbeing of complainants during the stressful process of interacting with police and prosecutors, while enhancing the ability of the criminal justice system to make offenders accountable for their criminal conduct.[103]

Similarly, the Victim Support Service in South Australia recommended that complex trauma, sexual assault and institutional abuse training be introduced for all police, prosecutions staff, the judiciary, court staff and any other workers likely to come into contact with survivors during the process.[104]

In line with the general principle we recommended for the provision of redress and the recommendation in relation to training for those delivering direct personal responses, it may improve police responses if all of those who may come into contact with victims and survivors have received some basic training about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular.

Of course, specialist police who are trained to provide a specialist response to sexual abuse or child sexual abuse are likely to have received considerably more than basic training.

Referral to support services

Regardless of how good the initial police response is, reporting to police is likely to be a very difficult experience for victims and their families and for survivors.

Families of younger victims that are dealing with an early disclosure of current abuse are likely to be concerned to understand what has happened to their child and the implications of the abuse and also to ensure that action is taken to stop the alleged perpetrator and protect their own and other children who may be affected. Case studies 2, 9 and 38 provide a number of examples of the needs of such victims and families.

Survivors who are reporting as adults may also have significant support needs. In Case Study 38, Mr Chandler gave evidence that the initial disclosure to police particularly triggered his feelings of self-destruction and suicidal impulses.[105]

In his submission to Issues Paper 8, the South Australian Commissioner for Victims' Rights, Mr O'Connell, outlined the role for police in providing access to appropriate support services:

> Police officers, as 'crisis interveners', therefore should assist by attending to victims' safety and security needs and also victims' immediate medical and other practical needs. They should also assist victims locate and mobilise their support resources (for example, family, acquaintances); and, help victims to begin to reorganise and / or regain some control over their lives.[106]

Police have an opportunity to ensure that victims and their families and survivors are made aware of available support services so that support can be provided to them as early as possible in the criminal justice response.

We are aware that some police agencies already have arrangements in place to provide referrals to support services.

For example, in Victoria, CASAs provide a variety of services for victims and survivors of recent and historical sexual crimes, including immediate crisis care, longer-term counselling and support and advocacy in relation to dealing with police, lawyers, courts and other aspects of the criminal justice system. The Victoria Police *Code of practice for the investigation of sexual crime* states that all victims and survivors have a right to these services and in all cases police should provide information about accessing these services.[107]

In Case Study 38, in relation to criminal justice issues relating to child sexual abuse in an institutional context, Detective Sergeant David Crowe of SACAT within ACT Policing in the Australian Federal Police gave evidence in relation to 'wraparound referrals' in operation in the ACT:

> A wrap-around referral is a system we have in place where the – it is what we call a wrap around form, we fill in with the consent of the victim or, in this case, the victim's parents. It goes to our victim liaison officers area and they have access to a wide range of services, including the Canberra Rape Crisis Centre, Domestic Violence Crisis Service and a lot of different counselling services that are available. They try and work out the best ones suited for the victim or the parents and the support gets arranged that way.[108]

Effective referrals to support services – and ongoing support from those services – may help to maintain victims' and survivors' willingness to continue to participate in the police investigation and any prosecution.

3.5.3 Possible principles for initial police responses

Taking account of these general aspects of initial non-specialist police responses discussed above, the following could be considered as possible principles to inform initial police responses:

- A victim or survivor's initial contact with police is important in determining their satisfaction with the entire criminal justice response and in influencing their willingness to proceed with a report and to participate in a prosecution.
- All police who may come into contact with victims or survivors of institutional child sexual abuse should be trained to:

- have a basic understanding of complex trauma and how it can affect people who report to police, including those who may have difficulties dealing with institutions or persons in positions of authority (such as the police)
- treat anyone who approaches to police to report abuse with consideration and respect.

3.6 Encouraging reporting

3.6.1 Introduction

Police cannot respond to allegations of institutional child sexual abuse unless they know about those allegations. Given that police are the entry point into the criminal justice system, reporting to police is usually a necessary first step in obtaining any criminal justice response.

Reporting may be important not only in securing a criminal justice response for the particular victim or survivor but also in preventing further abuse by the perpetrator.

An important part of the criminal justice system's response to the issue of child sexual abuse needs to be directed to encouraging victims, their families, survivors and third parties to report the abuse to police.

We discuss possible offences for failures to report child sexual abuse in Chapter 6. We also discuss the issue of blind reporting to police by third parties, particularly institutions and survivor advocacy and support groups, in section 4.3.

Steps and procedures that may encourage reporting of institutional child sexual abuse include:

- providing an effective police response to initial contact from victims, their families and survivors, as discussed in section 3.5
- making information available to victims, their families and survivors about what will happen when they report to police and how they retain the right to decide not to proceed
- making available as many different channels as possible for reporting to police
- taking particular steps to encourage reporting from Aboriginal and Torres Strait Islander victims, their families and survivors
- taking particular steps to encourage reporting from prisoners and former prisoners.

It is also likely that ensuring that the criminal justice system as whole – including police and prosecution responses – provides an effective response to reports of institutional child sexual abuse would also encourage further reporting. Effective responses demonstrate to victims and survivors who have not yet come forward that it may well be worth reporting to police. Effective responses may also encourage survivor advocacy and support services to have more confidence in the criminal justice system and to convey this greater confidence to other victims and survivors who seek their support and advice. This may in turn encourage more victims and survivors to seek a criminal justice response by reporting to police.

3.6.2 Aspects of encouraging reporting

The under-reporting of child sexual abuse

As noted in section 2.3, sexual offences, including child sexual abuse, have particularly low rates of reporting.

In our *Interim report* we identified under-reporting as a significant barrier to victims and survivors accessing justice.[109]

We have heard a number of reasons why a victim or survivor may not report to police. Personal submissions in response to Issues Paper 8 give accounts of survivors feeling too much shame or fear to report. In some cases, survivors may not be aware that the abuse they suffered was a crime.[110]

In its submission in response to Issues Paper 8, knowmore stated:

> Some survivors are concerned that they do not possess the resilience to proceed with what they are told will be a lengthy and often difficult and stressful process, possibly further traumatising them.[111]

Reporting may not be a good option for all survivors. Dr Cathy Kezelman AM, representing the Blue Knot Foundation, told our public roundtable on reporting offences:

> We would like to make the point that obviously everyone is an individual and we acknowledge that for some reporting can be very re-traumatising and the whole process of the system, but for others it can be quite empowering and part of the healing process. We help survivors to explore their motivation in reporting and their expectations from doing so, as well as providing information regarding the challenges of reporting that may not lead to prosecution, that prosecution may not lead to a conviction and that the sentence being handed down may not meet their expectations.[112]

While respecting that some survivors may not wish to report, it may be important to ensure that, as much as possible, the response of the criminal justice system as a whole, and police responses in particular, do not themselves discourage reporting.

The consequences of under-reporting may be significant, not just for the survivor or victim but also for others who may be at risk from the abuser.

In its submission in response to Issues Paper 8, knowmore stated:

> Low reporting rates of childhood sexual abuse, for whatever reason, are of concern as they are likely to result in offenders escaping identification and conviction, and in some cases, maintaining contact with children and persisting in their offending.[113] [Reference omitted.]

Reporting to police may also assist other victims and survivors of the same perpetrator. At the public roundtable on reporting offences, Dr Wayne Chamley from Broken Rites observed that, in his experience, survivors are more likely to come forward and remain in the system if there are others who can be helped:

> Yes, that's right. And then they become motivated – I've heard them time and time again – that they don't want this to happen to any other person, what happened to them.[114]

Respecting victim and survivor choices not to proceed

Many victims and survivors, and survivor advocacy and support groups, have told us that a significant impediment to reporting is the uncertainty a victim or survivor may have about the consequences of reporting to police.

Some victims and survivors are concerned that, once they report to police, they will have no choice but to continue to participate in the criminal justice system right through to being the complainant in a prosecution, even if they do not wish to do so. Other victims and survivors are concerned about how the police might investigate their report and how disruptive it may be to their lives and the lives of their families.

Dr Chamley from Broken Rites told the public roundtable on reporting offences:

> In relation to what you're saying, it has been my observation that people who don't want the police involved are often disclosing it for the first time to any person and what they're concerned about is the police are going to make a phone call and their wife or somebody takes the call, or they're going to receive a letter where the police in Sydney are on it. I don't think it's that they don't want to engage with the police, they're worried about the process.[115]

Some of these concerns are not well founded, particularly given current police responses.

Victims and survivors will not be forced to be complainants if they do not wish to be. Apart from any other consideration, they are unlikely to be good witnesses if they do not want to participate. Also, most prosecutions will not be able to proceed without their evidence. There will be only a small number of cases, where there might be other evidence (such as photographs or video evidence of the abuse), in which a prosecution might be able to proceed without the active participation of the victim or survivor as the complainant.

Mrs Nicola Ellis from Ellis Legal told the public roundtable on reporting offences:

> [T]hese days, we are able to say to people that the police will respect the choice, that if they will go and talk to the police initially and give a statement and then for some reason, for their wellbeing, they can't continue to give evidence, that the police will respect that.[116]

Current police responses also demonstrate greater sensitivity in the methods police use to investigate reports.

Detective Superintendent Linda Howlett, Commander, Sex Crimes Squad in the NSW Police Force, told our public roundtable on reporting offences about how police would engage with a person who has been identified as a potential victim or survivor but who has expressed concern with engaging with police. Detective Superintendent Howlett said:

> I think it is on a case-by-case basis. Ideally, we wouldn't contact the victim against their wishes. However, depending upon some investigations, we actually have approached victims under the context of possibly having witnessed or having other evidence that might assist a

> prosecution, and we explain that process to them. We certainly don't knock on their door and say, 'We believe you are a victim of sexual abuse'. We approach them under the context that, 'We believe you might have some information that might assist a current investigation.'[117]

Justice McClellan asked Detective Superintendent Howlett how the NSW Police Force would make contact with a survivor of historical child sexual abuse after a significant passage of time. Detective Superintendent Howlett replied:

> It is a case-by-case basis. It depends upon the information and how we actually receive it. Sometimes we get it through counselling services, so what we will do is make contact with the counselling service and actually ask them if we could have an introduction to the victim. We certainly don't do cold-calling, knocking on someone's door, because I've actually had victims collapse in front of me, which is quite – you know, a lot of them have never disclosed to family and friends and their children.[118]

Detective Senior Sergeant Michael Dwyer of the SANO Task Force, Child Exploitation Task Forces, Crime Command, Victoria Police, gave the Victorian perspective:

> We have had the same thing, and we basically do the same – through the counselling services or through a mobile telephone number. Obviously, we don't speak to a third party. We make sure that the person on the other end of the phone is the person who has been identified. Some people want to talk to us and some don't.[119]

Given the greater sensitivity and understanding in current police responses, the issue now appears to be ensuring that victims and survivors receive accurate information about what reporting to police will entail and how police will respond.

Ms Karyn Walsh from Micah Projects told the public roundtable on reporting offences:

> Wherever there has been a positive and constructive conversation with a police person who is able to explain the process in a very objective way, cannot make promises, you know, can explain people are really positive about that …[120]

Also, under current police responses, it is more likely that a survivor will be able to report, even if they do not wish to pursue the matter at that time, on the basis that they will be willing for police to contact them in future if other survivors of abuse by the same perpetrator come forward.[121] This may be particularly relevant for reports of institutional child sexual abuse, where a survivor may know or suspect that they were not the only person abused by a perpetrator who had access to many children.

Publishing information for victims and survivors

One of the ways in which police can assist victims and survivors to receive accurate information about what reporting to police will entail and how police will respond is by publishing clear information for victims and survivors. This information can be published online on police websites, but it can also be produced in a format that would enable survivor advocacy and support groups and institutions to provide it to victims and survivors who approach those groups for support.

Detective Senior Sergeant Dwyer of the SANO Task Force in the Crime Command of Victoria Police told the public roundtable on reporting offences that, following the Betrayal of Trust report, he recognised that Victoria Police needed a pamphlet to give people options for reporting to police.[122]

Detective Senior Sergeant Dwyer provided the Royal Commission with a copy of the pamphlet *Reporting sexual assault to police*. It gives information about the importance of coming forward and advice about the process and access to support services. It also explicitly discusses the option of not continuing with an investigation. This information is also provided on the Victoria Police website. The information in the Victoria Police pamphlet and website is reproduced in Appendix B.

We have also heard that police will proactively engage with the wider community to encourage victims, survivors and witnesses to come forward. While we have been advised that police will not tend to 'cold call', they will publicise investigations that are taking place and call for other witnesses or victims to come forward, particularly where a suspect appears to have been involved in a pattern of offending.[123]

We have also heard that police should ensure that the advice they provide about reporting covers what is relevant for survivors who are reporting historical abuse, not just for victims and their families who are reporting current abuse.

Ms Walsh told the roundtable that it was important for survivors to receive information about the criminal justice system, not just about reporting options but also about what use is made of information and how it is managed, how historical abuse and current abuse allegations are handled and differences between them, and how the different processes work together.[124]

Ms Carol Ronken, representing Bravehearts, expressed support for Ms Walsh's comments. She told the roundtable that it is crucial to make sure that victims know where to go for support and that they are supported throughout the system. Ms Ronken said that not knowing what is going to happen at every step can be a huge barrier to going forward with a report to the police. Ms Ronken referred to a brochure entitled *Loud and clear*, which was published some years ago by Bravehearts, the Queensland Police Service and the Queensland Law Society. She said the brochure gave adult survivors step-by-step guidance as to what was going to happen from the time they report to police.[125]

In preparing or updating guides, police agencies might wish to seek input from survivor advocacy and support groups to ensure that the guides are as useful as possible for victims and survivors and help them to understand their options and obtain appropriate support. It might also help police to understand the fears that victims and survivors might have in reporting to police so that they can allay those fears if possible in the material they prepare.

A number of participants at our public roundtable on reporting offences stated that very few survivors refuse to report to police if they are well supported.[126] Given the role that support services often play in receiving survivors' initial disclosures, helping them to understand their options and ultimately perhaps supporting them in reporting to the police, it might be important for support services to have a good and up-to-date knowledge of how police respond to reports.

Ms Walsh told the roundtable:

> the role of supporting people through all of the police options is really complicated and there needs to be better training for NGOs about what that is, how the decision is made, for example, about whether, even in making a complaint, it goes forward or it doesn't go forward, that's a very confusing time, whether the evidence is considered relevant, you know, enough evidence to proceed or as people sometimes interpret it, is it good enough to go forward or do they believe me or not believe me, particularly with all the historic cases.[127]

If the police keep survivor advocacy and support groups reasonably well informed of options for reporting and police approaches to responding to reports, this might assist survivor advocacy and support groups to help survivors and to provide them with the best possible advice and support in considering reporting to the police.

Providing a range of channels for reporting

One way of maximising reporting is to provide as many different options for reporting as possible.

If victims and survivors have a range of options, it can assist more victims and survivors to come forward.

Detective Superintendent Howlett, Commander of the Sex Crimes Squad, told our public roundtable discussion on reporting offences about the reporting options available in New South Wales.[128] Detective Superintendent Howlett said that the NSW Police Force encourages all victims of any crime – including sexual assault – to report the matter to the police so that police can investigate it.

Detective Superintendent Howlett said that the Sexual Assault Reporting Options (SARO) questionnaire enables members of the public to make confidential reports of sexual assault to the NSW Police Force through its website, which is maintained by the Sex Crimes Squad. The website has an option for the victim to remain anonymous or to indicate that they wish to be contacted by the police. If a victim indicates that they wish to be contacted by the police, the police will contact them to discuss whether they are providing the information on an intelligence basis or for investigation. They will encourage the victim to seek counselling or support services and to report the matter to the police. Detective Superintendent Howlett said that some victims make an initial report online and then come back some time later to report more formally and make a statement when they are in a better position to do so.

Detective Senior Sergeant Dwyer of the SANO Task Force in the Crime Command of Victoria Police gave the following information to the public roundtable on the current approach of the Victoria Police.[129] Detective Senior Sergeant Dwyer said that they have a nationwide toll-free '1800' telephone number where victims can leave their details and he will ring them back. He asks them to send him an email with the circumstances of the abuse, and they can tell him right at the start whether or not they want to proceed with an investigation. If they wish to proceed, an investigator will contact them. Otherwise, the information they provide will be converted into an intelligence report on the Victoria Police system.

Detective Senior Sergeant Dwyer told the roundtable that, while they may have had some three to five hang-ups, all of the other hundreds of people who have called the 1800 telephone number have left a number and that it has been 'enormously successful'. He also said that it enables people to call late into the night, in early hours or on weekends, when the police would not be expected to answer

the calls. He said that he responds to the calls the next day, and the investigator gets in touch within 72 hours. If the victim does not have access to email, the investigator will go to see them.[130]

It is likely that, by providing options to make reports online or through specialist telephone numbers, more victims and survivors will be encouraged to report to police.

Aboriginal and Torres Strait Islander victims and survivors

Additional barriers to reporting

Aboriginal and Torres Strait Islander victims and survivors may face additional barriers to reporting institutional child sexual abuse to police.

The following barriers have been raised in private sessions, private roundtables and submissions in response to Issues Paper 8:

- **Mistrust of the police and the criminal justice system:** The relationship between police, the broader criminal justice system and Aboriginal and Torres Strait Islander communities may be informed by past experiences, leaving many victims and survivors of child sexual abuse afraid of being disbelieved or ridiculed, or not treated fairly, if they report abuse. We have been told that prior negative experiences with police was one of the key factors that influenced survivor reluctance to report. We heard this was especially problematic for people in rural and remote areas, who may know of many people or family members who, over time, have had negative experiences with police and other government institutions.
- **Fear of children being removed:** Some parents fear that if they report child sexual abuse then their children may be removed from their care. This may be felt acutely because many Aboriginal and Torres Strait Islander families have been affected by the forcible removal of one or more children. We have been told that some parents fear that if they report child sexual abuse then they will be blamed for not protecting their children.

  In its response to Issues Paper 8, knowmore submitted:

  > Indigenous children today remain over represented in the numbers of children removed from their natural families. For survivors who now have their own children, there is often a natural reticence to draw themselves to the attention of authorities in fear that their own children may be removed; there may also be a fear that the effects of their trauma as a survivor would be seen as making them unsuitable to raise their own children.[131]

- **Legal issues:** Aboriginal and Torres Strait Islander survivors who have criminal records may be particularly reluctant to report the abuse they suffered to police. They may be reluctant to have any further dealings with police or may be concerned that their allegations will not be believed because of their criminal record. We heard that some survivors had outstanding court fines or infringements enforced when they tried to report sexual abuse to police. We also heard that some survivors did not report because they expected they would not be believed on the basis of prior criminality or other behaviours that have attracted police attention, such as being drunk in a public place.

- **Kinship connections:** We heard that kinship connections between the victim and support workers or police – or between the perpetrator and support workers or police – can make reporting difficult, especially in rural and remote locations.
- **Pressure not to report:** Victims or survivors may be pressured by family or community members not to report the abuse to police or not to proceed with their complaint. We have been told this may be a particular problem where the alleged perpetrator holds a position of authority in the community.
- **Shame:** We have heard in private sessions and in private roundtables that some Aboriginal and Torres Strait Islander survivors attach shame to reporting. Shame can be exacerbated where the perpetrator is well known in the community and by how the community finds out about the abuse. We also heard that it can be shaming to expect a woman survivor to tell a male police officer, or to expect a male survivor to tell a female police officer, what has happened to them.
- **Remoteness:** A victim of child sexual abuse in a remote community may not have ready access to appropriate police or other services in order to report the abuse.
- **Confidentiality:** Particularly in rural or remote communities, it may be difficult for victims to make a report if they cannot be confident that the report will be kept confidential. If police are present in the community, they may have particular contacts with other community members, making approaches to the police difficult for victims.
- **Religion in the Torres Strait:** We have heard that some Torres Strait Islander survivors of child sexual abuse in religious institutions may not report because Christianity predominates their cultural system. Protecting the church, or not betraying the church, may be seen as more important than prosecuting an offender of child sexual abuse.

Options for more effective responses

We have been told that police and other services should take steps to develop good relationships with Aboriginal and Torres Strait Islander communities in general to ensure that Aboriginal and Torres Strait Islander victims and survivors will not be reluctant to report child sexual abuse, including institutional child sexual abuse, when it arises.

In response to Issues Paper 8, the Victorian Aboriginal Child Care Agency Co-Op Ltd (VACCA) submitted:

> Today there is still a serious lack of trust in authority and police in particular due to the intergenerational experiences of Aboriginal people, where even today there are incidences of serious rough handling and assault by those who are involved with general duties police. The SOCIT [Sexual Offences and Child Abuse Investigation Teams] policing squads established to sensitively and appropriately deal with sexual and other child abuse issues are still challenged to engage with Aboriginal children and young people due to the almost innate mistrust the Aboriginal community have in police. There is a need for partnerships between Aboriginal services and police to ensure the child or young person feels culturally safe.[132]

In addition to establishing good relationships more generally, Aboriginal and Torres Strait Islander stakeholders and survivors have identified a number of particular strategies that might improve

relationships between Aboriginal and Torres Strait Islander communities and police. We have heard about some of the existing programs, policies and initiatives which strengthen relationships with mainstream services.

We have been told that Aboriginal police officers can assist in filling the cultural gaps between police and victims and survivors.

Australian states and territories employ Aboriginal police officers, Aboriginal and Torres Strait Islander liaison officers, police liaison officers or Aboriginal police aides. These officers, often in conjunction with the usual operational duties of a police officer, have special duties relating to resolving issues concerning Aboriginal and Torres Strait Islander people in their local area. In the Australian Capital Territory, Aboriginal and Torres Strait Islander liaison officers have a role in educating other police officers about Aboriginal and Torres Strait Islander culture and encouraging other police to develop better ways to interact with Aboriginal and Torres Strait Islander people.[133]

Some of the current initiatives and approaches we have been told about include:

- Aboriginal and Torres Strait Islander liaison officers in police units in New South Wales
- the involvement of Aboriginal staff in some decisions affecting Aboriginal children and families made by JIRTs in New South Wales[134]
- the Aboriginal Community Liaison Officers Program in Victoria
- Community Constables in South Australia
- Aboriginal Community Police Officers in the Northern Territory.

Detective Inspector Twamley of the Sex Crime Division, Western Australia Police, also told our public roundtable on multidisciplinary and specialist policing responses about Operation RESET in Western Australia, which focused on establishing relationships with community elders. He said that teams of child abuse investigators and interviewers had gone into regional and remote Aboriginal and Torres Strait Islander communities to try to establish relationships with community elders.[135]

We have also been told about a program called the Indigenous Police Recruiting Our Way Delivery (IPROWD) training program – a specialist program developed by the NSW Police Force and TAFE NSW. The IPROWD program assists Aboriginal and Torres Strait Islander students to gain a qualification and develop skills and confidence to succeed in applying for a career with the NSW Police Force.

Some Aboriginal and Torres Strait Islander survivors have told us in private sessions that they were encouraged to report historical child sexual abuse because they knew that there was an Aboriginal police officer or liaison officer, and they had better experiences of reporting (often in their second attempt to report) when they could report to an Aboriginal officer.

Aboriginal and Torres Strait Islander victims and their families and survivors may also be encouraged to report to police if they will have access to culturally appropriate support at later stages in the prosecution process.

Two of the current initiatives and approaches we have been told about are:

- the establishment of the Thursday Island Court Support Project – a joint government and non-government initiative that enrols community members to provide culturally appropriate court support for children and young victims of crime on Thursday Island in Queensland
- the introduction of Aboriginal witness assistance officers in the Office of the Director of Public Prosecutions (ODPP) in New South Wales.

We have also heard from Aboriginal and Torres Strait Islander stakeholders that Aboriginal and Torres Strait Islander people could be embedded in mainstream services as cultural advisors. This is especially important in professional services where Aboriginal and Torres Strait Islander people may be under-represented.

We heard that Aboriginal and Torres Strait Islander cultural advisors could:

- act as a bridge between Aboriginal and Torres Strait Islander people and community and the mainstream service system
- liaise with communities and ensure that service delivery is culturally appropriate and responsive to community need
- bring an alternative cultural lens to the service to reflect Aboriginal and Torres Strait Islander family, culture and community.

In addressing some of the barriers to reporting for Aboriginal and Torres Strait Islander victims and survivors, it may also be important to ensure that the range of channels provided for reporting to police include options for reporting outside of the community, such as telephone numbers and online reporting forms. Good information about these options would need to be readily available in Aboriginal and Torres Strait Islander communities.

Survivors who are prisoners or have criminal records

Particularly through the private sessions we have conducted in prisons, we have heard about the barriers to reporting faced by survivors who are currently in prison. Through private sessions and public hearings, we have also heard that survivors who have criminal records may also face barriers to reporting.

For some, their abuse occurred in institutions such as juvenile detention centres or in other situations where they had already had negative experiences with the criminal justice system. For others, being prisoners made them reluctant to engage with police. Being in prison or having a criminal record may make police doubt their credibility or may make survivors fear that they will not be believed or will not be treated with respect. In addition, survivors who are in prison may risk being labelled informants within the prison system if they engage with police.

Police have told us that police responses now recognise that a person's criminal history may have been a consequence of the abuse they suffered and that a survivor's criminal record will not inhibit police in pursuing a prosecution.[136]

There may be a need for particular channels for reporting, or the provision of particular support services, to ensure that current and former prisoners can report their abuse safely. Current prisoners

need reporting channels that do not require them to attend a police station and that will not risk them being labelled an informant.

3.6.3 Possible approaches to encourage reporting

Given the issues identified above, the following could be considered as possible approaches to encourage reporting:

- To encourage reporting of allegations of institutional child sexual abuse, police should:
    - take steps to communicate to victims (and their families or support people where the victims are children or are particularly vulnerable) that any charges relating to abuse that they have suffered will not proceed unless they want them to – that is, victims retain the right to withdraw at any stage in the process and to decline to proceed further with police and/or any prosecution
    - provide information on the different ways in which victims and survivors can report to police or seek advice from police on their options for reporting or not reporting abuse – this should be in a format that allows institutions and survivor advocacy and support services to provide it to victims and survivors
    - make available a range of channels to encourage reporting, including specialist telephone numbers and online reporting forms, and provide information about what to expect from each channel of reporting.
- To encourage reporting of allegations of institutional child sexual abuse among Aboriginal and Torres Strait Islander victims and survivors, police should take steps to develop good relationships with Aboriginal and Torres Strait Islander communities. They should also provide channels for reporting outside of the community (such as telephone numbers and online reporting forms).
- To encourage prisoners and former prisoners to report allegations of institutional child sexual abuse, police should provide channels for reporting that can be used from prison and do not require a former prisoner to report at a police station.

3.7 Police investigations

3.7.1 Introduction

We have heard from many victims and their families and survivors who reported to police about their experiences in the police investigation. Some reported positive experiences, some reported negative experiences and some reported a mix of positive and negative experiences.

We consider that there may be value in identifying principles which focus on general aspects of police investigations that are of particular importance or concern to victims and survivors and which might help to inform police responses.

Of course, police agencies may consider that they already act, or aim to act, in accordance with such principles. However, there may be benefit in stating them so that they continue to receive priority in police responses.

Again, these principles may be particularly important in non-specialist police responses, where officers may have less understanding of the particular needs of victims and survivors.

3.7.2 Aspects of police investigations

Based on the information we have received and our consultations to date, we consider that the following general aspects of police investigations, particularly in non-specialist responses, are particularly important to victims and survivors:

- continuity in staffing
- regular communication
- issues involving credibility of survivors.

Continuity in staffing

A number of personal submissions in response to Issues Paper 8 told us of survivors' positive experiences in being able to have ongoing contact with a single police officer throughout the investigation of their report. For some survivors, the ongoing contact provided reassurance and a sense of security about the progress of the investigation and enabled trust to be built.

On the other hand, other survivors expressed their frustration and disappointment at not having any continuity in staffing. As well as missing out on the opportunity to build trust and rapport with one officer, survivors would often need to recount their experience of abuse on multiple occasions, which could be re-traumatising for some.

We recognise the complexity of police staffing, rosters and resources. Investigations of institutional child sexual abuse may take years in some cases, particularly in cases of historical child sexual abuse. It may be very unlikely that the same officer could have carriage of an investigation over such a long period of time.

However, it might be possible for police agencies, recognising the importance for victims and survivors of consistency in police staffing, to try to facilitate continuity in staffing for child sexual abuse investigations.

Regular communication

In some cases, the issue of regular communication with victims, survivors and their families is related to the issue of continuity in staffing. We have heard from many survivors that ongoing communication from police has been a key aspect of their positive experiences of police responses.

In his submission in response to Issues Paper 8, the South Australian Commissioner for Victims' Rights, Mr O'Connell, stated:

> [V]ictims who report crime often believe the case to be 'their' own. Thus, victims expect to be kept informed and have some input into their cases. They also expect to be consulted on decisions that affected them.[137]

However, in private sessions and in personal submissions in response to Issues Paper 8, we have also heard many accounts of poor or no communication. For example, survivors have told us:

- they experienced long gaps – such as three weeks – between making an initial report to police and then being contacted to make a statement
- when they sent requested information to the police officer, they heard nothing further from them
- they found that police officers failed to inform them of the progress of the investigation, despite promising to do so
- they only received any update when they called the police officer, and they sometimes had to call on a number of occasions before they received a response.

Some police agencies, particularly in their specialist responses, now recognise the importance of maintaining regular communication – even where, from the police perspective, nothing much might be happening. For example, the Victoria Police *Code of practice for the investigation of sexual crime* emphasises the need to engage in regular communication with the victim, including for the investigator to provide regular status updates.[138]

Credibility of the survivor

We know that the impacts of child sexual abuse can include:

- social isolation and homelessness
- lower earnings and socio-economic status and difficulty maintaining employment
- imprisonment.[139]

Experiences of addiction and mental health problems are common, and some survivors may have prison records by the time they are able to report the abuse they suffered as children to police.

In its submission in response to Issues Paper 8, knowmore submitted that an experience of child sexual abuse is strongly associated with a subsequent diagnosis of mental illness. Mental illness may make reporting the abuse a challenge for the survivor; in particular, it may affect their ability to give a concise account of their experience.[140]

Particularly when police are investigating cases of historical abuse, it is important that the police conducting the investigation are non-judgmental towards the survivor and that they focus on the credibility of the survivor's allegations.

Criminal records and periods of addiction and mental health problems may often be regarded as undermining a survivor's credibility in the criminal justice system, but it is important that police investigations of historical abuse recognise that these factors may reflect the impact of the abuse.

3.7.3 Possible principles for police investigations

Given the issues identified above, the following could be considered as possible principles to inform police investigations:

- While recognising the complexity of police rosters, staffing and transfers, police should recognise the benefit to victims and their families and survivors of continuity in police staffing and should take reasonable steps to facilitate, to the extent possible, continuity in police staffing on an investigation of a complaint.
- Police should recognise the importance to victims and their families and survivors of police maintaining regular communication with them to keep them informed of the status of their report and any investigation unless they have asked not to be kept informed.
- Particularly in relation to historical allegations of institutional child sexual abuse, police who assess or provide an investigative response to allegations 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.

If police investigations are improved in accordance with these principles, it might also encourage increased reporting of institutional child sexual abuse, including from groups that are harder to reach, such as Aboriginal and Torres Strait Islander victims and survivors, survivors who are in prison or survivors who have criminal records.

3.7.4 Information about mandatory reporters

The ALRC and NSW Law Reform Commission (NSW LRC) considered the effectiveness of information-sharing provisions in their report *Family violence: A national legal response*.

In the report, the ALRC and NSW LRC considered provisions within child protection laws that make it an offence for a person to disclose the identity of a person who makes a report to a child protection agency or to disclose information in the report which could establish the reporter's identity, except in the course of official duties or where the reporter has consented.

While the ALRC and NSW LRC suggested that there may be some doubt within individual jurisdictions as to the extent to which the details of the reporter could be provided to the police, some jurisdictions submitted that, to ensure that reporting is not discouraged, it is important to protect the identity of reporters.[141]

However, the ALRC and NSW LRC pointed to the disclosure provisions in section 29 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Section 29(1)(f) of the Act prevents the disclosure of the identity of the reporter other than with that person's consent or with the leave of the court. However, section 29(4) allows disclosure in spite of section 29(1)(f) if the prohibition on disclosure would prevent the proper investigation of the report. Further, sections 29(4A) to 29(4C) provide a regime for allowing disclosure of the identity of the reporter to a law enforcement agency

– defined to mean the NSW Police Force, the AFP or the police force of another state or territory – if each of the following requirements is satisfied:

- the identity is disclosed in connection with an investigation of a serious offence alleged to have been committed against a child
- the disclosure is necessary to safeguard or promote the safety, welfare or wellbeing of any child
- a senior officer of the law enforcement agency has certified that obtaining the reporter's consent would prejudice the investigation or the disclosing body has certified that it is impractical to obtain the reporter's consent.

In addition, the disclosing body must notify the reporter of the disclosure unless either:

- it is not reasonably practicable in the circumstances to do so
- the law enforcement agency has advised the disclosing body that notifying the reporter would prejudice the investigation.

The ALRC and NSW LRC formed the view that, while it is important that child protection legislation contain adequate safeguards for reporters, information should be provided to law enforcement agencies when exceptional circumstances exist.

The ALRC and NSW LRC recommended that state and territory laws should be amended to authorise a person to disclose to a law enforcement agency — including federal, state and territory police — the identity of a reporter, or the contents of a report from which the reporter's identity may be revealed, where both of the following requirements are met:

- the disclosure is in connection with the investigation of a serious offence alleged to have been committed against a child or young person
- the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person, whether or not the child or young person is the victim of the alleged offence.

The ALRC and NSW LRC also recommended that the information should only be disclosed in either of the following situations:

- the information is requested by a senior law enforcement officer, who has certified in writing beforehand that obtaining the reporter's consent would prejudice the investigation of the serious offence concerned
- the agency that discloses the identity of the reporter has certified in writing that it is impractical to obtain the consent.

The ALRC and NSW LRC also recommended that, where information is disclosed, the person who discloses the identity of either the reporter or the contents of a report from which the identity of a reporter may be revealed should notify the reporter of this as soon as is practicable unless to do so would prejudice the investigation.[142]

Many allegations of child sexual abuse that are made through mandatory reports to child protection agencies will involve abuse outside of an institutional context. However, some mandatory reports may involve institutional child sexual abuse.

Given that the ALRC and NSW LRC have identified that reforms to the protections against disclosing the identity of mandatory reporters may assist police investigations, we wish to hear whether interested parties consider that we should support the ALRC and NSW LRC recommendations in the context of institutional child sexual abuse.

3.8 Investigative interviews for use as evidence in chief

3.8.1 Introduction

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

We discuss these special measures in more detail in Chapter 9.

One of the significant special measures introduced, particularly for complainants in child sexual abuse matters who are still children, is the use of a prerecorded investigative interview, often conducted by police, as some or all of the complainant's evidence in chief.

Using a prerecorded investigative interview as a child complainant's evidence in chief is likely to assist the complainant by reducing the stress of giving evidence for long periods in the witness box. It may also improve the quality of the evidence the complainant gives because the interview can be conducted quite soon after the abuse is reported to police, which may be many months before the trial begins.

However, because the prerecorded interview is likely to be used as the complainant's evidence in chief, the quality of the interview is crucial. It is likely to constitute most, if not all, of the prosecution's direct evidence about the alleged abuse.

Research we commissioned suggests that, while using prerecorded investigative interviews for evidence in chief has significantly reduced the levels of stress that complainants experienced[143] and they generally improved both the reliability and completeness of evidence,[144] there is room for improvement in the conduct of these interviews.

3.8.2 Complainants' Evidence Research

In 2014, the Royal Commission engaged Professor Martine Powell, Dr Nina Westera, Professor Jane Goodman-Delahunty and Ms Anne Sophie Pichler to conduct a research project on:

- how complainants of child sexual abuse are allowed to give evidence for use in court in each Australian jurisdiction

- how evidence is in fact being given
- the impact that different means of taking evidence from a complainant have on the outcome of the trial.

The research includes analyses of prerecorded investigative interviews used as the complainant's evidence in chief, court transcripts and surveys of criminal justice professionals.

The research report, *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants' Evidence Research), is published on the Royal Commission's website.

In this section 3.8, we draw on the parts of the Complainants' Evidence Research that focus on the investigative interview conducted by police and used as the victim's evidence in chief. Other parts of the report are discussed in Chapter 9.

Given the time it takes to complete a prosecution, we recognise that the police policies and practices reflected in the material analysed in the Complainants' Evidence Research may have changed.

3.8.3 Aspects of effective investigative interviews

Effective interviewing techniques

The Complainants' Evidence Research reports that criminal justice professionals identified the use of a prerecorded investigative interview as the complainant's evidence in chief as one of the most effective and frequently used special measures.[145]

The prerecorded investigative interview is very important in the child sexual abuse prosecutions in which it is used because it forms all, or a significant part of, the complainant's evidence in chief.

The benefits of using prerecorded investigative interviews include:

- a reduction in the risk of deterioration in the complainant's evidence because of a loss of memory brought about by delay. Prerecorded investigative interviews are conducted much earlier in the process, generally when the abuse is first reported to police
- a reduction in the risk of deterioration in the quality of the complainant's evidence because of anxiety and stress. While investigative interviews are likely to be stressful, they may not be as stressful as giving evidence in the formal court environment.[146]

However, the Complainants' Evidence Research reports that, if the prerecorded investigative interview is not well conducted, the interview may adversely affect the jury's view of the complainant's reliability and credibility, particularly if it includes many peripheral details – this may lead to extensive cross-examination on inconsistencies that are not central to the offences charged.[147]

The Complainants' Evidence Research identifies particular interview techniques and approaches that are well supported in the academic literature as important factors in achieving the best evidence in interviews.[148] These approaches have been adopted in guidance published by the Ministry of Justice

in England and Wales, *Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*.[149]

The Complainants' Evidence Research includes 17 different studies. The studies of particular relevance for police investigative interviewing are as follows:

- The transcripts of 118 police interviews of complainants in matters that went to trial in New South Wales, Victoria and Western Australia were assessed against the 'best-practice' techniques and approaches identified in the academic literature, generally drawing on a developmental science or psychological perspective, and which have been adopted in the English and Welsh guidance. The assessment found that many of the practices recommended in the academic literature and English and Welsh guidance are not being used well in the interviews.
- The transcripts of trials relating to 85 complainants whose prerecorded investigative interviews were used as some or all of their evidence in chief were reviewed to identify any issues raised during the trial about the prerecorded investigative interviews. Issues raised included problems with structure, lengthy duration and questioning errors.[150]

The Complainants' Evidence Research finds that there is room for significant improvement in how police conduct interviews, particularly in the use of open-ended narrative questioning styles and avoiding specific questioning on unnecessary and poorly remembered peripheral details. This generally coincides with the views the Complainants' Evidence Research reports that criminal justice professionals expressed about the problems with police interview practice.[151]

Open-ended rapport building

The Complainants' Evidence Research cites studies showing that the rapport between interviewer and interviewee was a key factor in achieving interview outcomes. It reports that a highly effective way to build a relationship between interviewer and interviewee is through a practice narrative on an everyday matter, where the interviewee undertakes a free narrative.[152] While in 51 transcripts investigators asked general questions about the complainant's life, only four interviews did so using a free narrative.[153]

Clear and simple ground rule instructions

The Complainants' Evidence Research finds that short, concise instructions early in the interview (such as an instruction to answer 'I don't know' if the complainant did not know an answer) give instructions about the communicative expectations of the interview and highlight the interviewee as the expert in the interview.[154] The Complainants' Evidence Research found that in 57 per cent of the transcripts at least one ground rule was given, while in 43 per cent of the transcripts no ground rule was given at all.[155]

The use of open questions

The Complainants' Evidence Research finds that open questions should be used to elicit a narrative account. Specific questions which narrow the child's response options – for example, cued recall, forced choice or yes/no questions – should be minimised.[156]

The researchers report the benefits of open-ended questions to be that they:

- elicit longer responses
- elicit more detailed responses
- elicit more accurate responses
- maximise victim credibility
- maximise narrative language
- increase the number of temporal and contextual attributes provided, such as references to sequencing, dating, number of occurrences, duration and frequency
- improve witness perceptions of being heard and not judged
- assist in detecting deception.[157]

The researchers suggest that there is no specific ratio of questions that should be open, but they identify that they should be prioritised and used almost exclusively during the early stages of the interview.[158] They suggest that typically some 3 to 20 per cent of questions asked by an untrained interviewer would be open-ended questions, while 40 to 70 per cent of questions asked by a well-trained interviewer would be open-ended, depending upon context.[159] They also reviewed the form of open questions.

The Complainants' Evidence Research finds that the mean proportion of open questions in New South Wales, Victoria and Western Australia was 13 per cent, 18 per cent and 10 per cent respectively and that, while the beginnings of the interview would often commence with open questions, investigators would quickly resort to closed questions.[160]

The Complainants' Evidence Research also finds that the lack of opportunity interviewers provided to the complainant to give narrative detail was compounded by the high proportion of questions that restricted the response to yes/no or to a choice of response option.[161] The researchers note that younger children are more prone to error in response to specific questions but that there was no significant difference in the (high) number of specific questions asked of children of different ages.[162]

Avoiding leading questions

The Complainants' Evidence Research notes findings from earlier studies that leading questions – defined as questions that presume or include a specific detail that was not previously mentioned by the child – increase the risk of the child's evidence incorporating incorrect details that were set out in the question. These errors can then be raised in cross-examination to damage the child's reliability or credibility. They suggest that leading questions should be minimal in police interviews, if not completely absent.[163]

The Complainants' Evidence Research finds that, on average, 11 per cent of all questions asked were leading. The researchers found that only one interviewer did not use any leading questions. The average number of leading questions per interview was 18.49 (range 1–88).[164] Young children, who the researchers identify as being highly susceptible to leading questions, were asked the same proportion of leading questions as older children.[165] The researchers report that Victorian

interviewers asked significantly more leading questions than New South Wales and Western Australian interviewers.[166]

Avoiding non-verbal aids

The Complainants' Evidence Research discusses previous findings that the use of non-verbal aids (such as anatomical dolls) should be avoided unless absolutely necessary and that, in any case, they should not be relied on until open-ended questioning has been exhausted.[167] Non-verbal aids are said to increase the level of reporting of inaccurate information, and they can lead to a reliance on non-verbal tools over interviewing skills and encourage interviewers to follow up non-verbal reports with inappropriately leading questions.[168]

The researchers found no use of anatomical dolls in the transcripts reviewed; however, on 73 occasions, other forms of non-verbal aids (such as free drawing and body diagrams) were introduced, and this was done very early in the questioning process.[169] The researchers report that these were most common in New South Wales, where children were frequently asked to draw a map of a location or a room or house layout. They were all introduced towards the start of the recollection of each occurrence of abuse, when the interviewer interrupted the child's narrative to ask specific questions.[170]

Keeping interviews short

The Complainants' Evidence Research does not suggest a particular duration for interviews, noting the different developmental stages of children and the respective degrees of complexity of the cases themselves. However, the researchers suggest that, generally, the length of an interview should decrease as the age of the interviewee decreases.[171]

The average interview time across all three jurisdictions was approximately one hour. The longest interview went for three hours and 20 minutes, with only one 15-minute break.[172] The Complainants' Evidence Research found that there was no relationship between interview length and a child's age, concluding that interviewers did not adjust the length of the interview to suit the child's age and attention span.[173]

The researchers also considered whether any of the questions asked potentially could have been omitted to make the interview shorter. One of the researchers, Dr Powell, was involved in a study conducted in 2012–2014 involving prosecutors from most Australian jurisdictions.[174] The study made suggestions about how much information should be sought in police interviews about details relevant to the offence while avoiding peripheral details that are not easily remembered or necessary to prove the offence.[175] The study suggested that specific questions should be asked only to the following extent:

- **Identity of accused:** If the accused is known to the child, the interviewer should seek only the information required to demonstrate the child's basis or grounds for recognising the accused. Descriptive information is required if the child does not know the accused.
- **Nature of offence:** If a child uses a colloquial term to refer to genitalia that would be understood by a layperson, the interviewer does not need to ask the child to define the term. Children do not

need to be asked for the direction in which the accused or child was facing or the position their bodies were in.

- **Timing of offence:** An exact date, day and time is not required. If the child can give a time frame of up to two years, that is sufficient for prosecution of child sexual abuse offences.
- **Location of offence:** If the child knows recognises the location where the offence took place, the interviewer should confirm the grounds for the child's recognition of the location. If the child does not know the location then the interviewer should seek a comprehensive description of it.[176]

The Complainants' Evidence Research assessed the transcripts of police interviews and calculated:

- the percentage of interviewers who attempted to elicit information in four categories: identity of accused; nature of offence; timing of offence and location of offence
- the percentage of these attempts that were assessed as being consistent with what the earlier study suggested was required.

The results are set out in Table 3.1.[177]

Table 3.1: Interviews consistent with study of prosecutors' views on unnecessary questions

Category	Interviewers who attempted to elicit information (%)	Attempts consistent with earlier study's suggestions (%)
Identity of accused	92	56
Nature of offence	83	7
Timing of offence	81	33
Location of offence	82	36

Labelling

In another study, the Complainants' Evidence Research examined the 'labels' that were used to describe specific incidents of sexual abuse (for example, 'the time at the holiday house' or 'the first time'). It identified the person who introduced these labels (for example, the complainant, the police interviewer or the defence counsel) and whether the incident was given a different label at different stages of the criminal justice process.[178]

The labelling of incidents of sexual abuse is discussed in more detail in Chapter 9. It is worth noting here that the Complainants' Evidence Research cites research to the effect that, ideally, labels should be created at the police interview and used consistently thereafter.[179] Also, particularly for children, if the child can generate the label in their own words and from their own perspective or recollection of events, it is more likely that unique and meaningful labels will be created.[180] It is important that labels are used consistently because it helps to ensure that errors are avoided and also because labels can have an important memory function: they allow a more accurate and detailed recall.[181]

The research analysis, which included an analysis of labels generated during the trial, showed that only 25.99 per cent of labels were generated at the stage of the police interview.[182]

Skills and training for effective investigative interviewing

Review of police organisational practices

The Complainants' Evidence Research includes a review of police organisational practices in interviewing based on organisational practices as they existed in late 2014.[183] The researchers sought to answer the following questions:

- What systemic factors, if any, account for a lack of police adherence to evidence-based practice in interviewing complainants of sexual assault?
- How, if at all, can police organisations improve their practice?[184]

The researchers focused on assessing whether each police agency had:

- an interview framework that focuses on maximising narrative detail about the alleged offending
- a skills development regime that adopts an incremental approach to learning skills
- a quality assurance regime that includes a process to monitor the competence of individual interviewers and organisational performance in interviewing and investigations
- an evidence-based framework that prioritises complainant interviews for video recording and extends access to video recorded interviews to a wider variety of complainants based on need.[185]

While the Complainants' Evidence Research found that police agencies generally promoted narrative-based interview methods, only two police agencies – in Western Australia and the Northern Territory – had particularly strong organisational practices as at December 2014. These included providing:

- instruction on how to apply different types of open questions to elicit narrative responses
- guidelines for what questions are and are not evidentially relevant
- an incremental approach to learning spaced over time to develop skills
- trainees with expert feedback to promote ongoing skill development after their initial training
- quality assurance on individual adherence to best practice using objective measures
- a system that allows the efficient tracking of case progress and outcomes.[186]

The Complainants' Evidence Research identifies key elements for teaching interviewing skills, particularly teaching questioning sub-skills before interview skills.[187]

The Complainants' Evidence Research particularly criticises police training as follows:

> current training courses often spend the majority of training time imparting knowledge to trainees on law and policy, the science behind the interviewing methods, communication skills and the interview process. For example, in one child interviewing course, three days out of four-and-a-half are devoted to learning knowledge, with only one two-hour session on question types, and no examples of how to apply these methods.[188]

The researchers are also critical of the absence of evidence-based quality assurance systems in most jurisdictions.[189] The best evidence-based approach seems to involve a combination of case-tracking, regular evaluation of individual interviewer performance against a standardised measure, and assessment of organisational performance.[190]

Training in understanding child sexual abuse

Although the Complainants' Evidence Research emphasises the importance of improving skills training and practice rather than imparting knowledge,[191] we have also been told of the importance of ensuring that police who investigate child sexual abuse have a good understanding of the nature of child sexual abuse.

Without a good understanding of the nature of child sexual abuse, there is a risk that police will draw a number of negative, and incorrect, inferences on matters such as why the survivor or victim did not resist; did not disclose; or maintained an ongoing relationship with the perpetrator. Police who do not have a good understanding of child sexual abuse may conduct interviews with victims and survivors in which they focus on issues that conform to their incorrect understanding of the nature of child sexual abuse and fail to cover issues of considerable relevance to understanding the alleged abuse.

If police understand the impact of child sexual abuse then they should have a greater understanding of how memory can be affected by traumatic events and in turn encourage effective, non-leading, open-ended questions to obtain the best available evidence.

The Complainants' Evidence Research's analysis of survey responses from criminal justice professionals about their experiences with special measures for giving evidence found that, when asked about their recommendations for additional training on child sexual abuse, the highest proportion of responses (25 per cent) recommended additional training to increase understanding of complainant behaviour and child development.[192] In relation to these participant responses, the Complainants' Evidence Research states:

> Responses emphasised training to understand complainants' psychological responses to trauma, how memory can be affected in child sexual abuse cases, and how to respond sensitively to child complainants throughout trial proceedings.[193]

An understanding of memory is important in light of the Complainants' Evidence Research findings on cross-examination strategies and tactics. These are discussed further in Chapter 9. Some of these strategies and tactics involved focusing on poor memory for minor details or inconsistencies in some details to suggest overall inaccuracy or deception.[194] However, the researchers state:

> From a human memory perspective, inconsistencies are a common occurrence for details that are easily forgotten (such as memories of what one was wearing on a specific date two years ago), but inconsistencies are less likely when it comes to remembering whether an entire event occurred or not.[195] [Reference omitted.]

The researchers also discuss the impact of delay on memory recall:

> Memory deteriorates over time. The greater the delay between the offence and the report, the less complete a complainant's memory of the abuse is likely to be. Time also creates

opportunities for memory to become contaminated from other sources, such as conversations with other people (including family members, teachers, counsellors, and friends) and complainants become more vulnerable to suggestion, reducing the accuracy of information they report.[196]

In Case Study 30, we heard evidence about how the Victoria Police have revised their training approach to the investigation of allegations of sexual offending. The revised approach was designed to address previous issues with training that gave little understanding of the complexity of sexual offences, victims and their experiences.

The SOCIT course includes components that relate to the investigation of child sexual abuse, including:

- child development, victimology and memory
- counterintuitive victim behaviour
- sexual exploitation of children in residential care
- victim story of childhood sexual abuse.[197]

The revised training emphasises the 'whole-story' approach to investigating and conducting interviews in relation to sexual crimes. The whole-story approach looks at the entire relationship between an offender and a victim and considers how the relationship was crafted over time.[198]

This is an important aspect of child sexual abuse allegations, as it helps to provide an overall understanding of how the abusive relationship was established, how it continued and why the survivor or victim acted the way they did throughout the abuse. This may be important for the police investigation and ultimately for the complainant's evidence in a trial.

Ongoing skills training and quality assurance

A number of police agencies have given us information about their current training and skills development, particularly for specialist sexual abuse or child abuse investigators. However, they do not generally appear to adhere to what the Complainants' Evidence Research has identified as evidence-based best practice in terms of teaching questioning sub-skills before teaching interview skills; and maintaining ongoing skills training to counteract the quick loss of skills post-training.

We recognise that it is unlikely to be easy to change police training, particularly given the number of police officers likely to be involved in training relevant to child sexual abuse.

Despite these challenges, it would appear that there is a strong view that not only does there need to be effective training for officers who are responsible for investigating child sexual abuse but also training needs to be ongoing to ensure that skills are refreshed and that officers do not lose skills they acquire in training over time.

Quality assurance may be most effective where experts – rather than the interviewer's supervisor – are able to review prerecorded interviews that the interviewer has conducted and provide feedback using objective measures.

Using actual interviews might mean waiting until any prosecution in the matter is completed. However, it would seem to be the best way of providing quality assurance and practical feedback while also helping trainers to understand problems in the field so that they can improve training.

There could also be a role for prosecutors in providing feedback, particularly if matters of detail were pursued in the interview that were not necessary for the prosecution. However, the feedback might depend on the experience of the prosecutor and might vary between prosecutors, and feedback from prosecutors is unlikely to be an adequate substitute for feedback from experts who assess the interviews using objective measures.

There may be legislative obstacles to allowing evaluation of interviews. For example, video recorded evidence in Victoria may only be used in particular criminal proceedings.[199] The privacy of the complainant or other witness needs to be protected, but it is also important that the individual police officer who conducted the interview has the opportunity to improve their interviewing skills to help other victims and survivors. It may be that exceptions could be provided in legislation so that prerecorded investigative interviews can be used for training and feedback for the police officer who conducted the interview. It may not be appropriate for interviews to be used in more general training.

Police investigative interviews that are later used as the complainant's evidence in chief are very important in prosecuting child sexual abuse cases involving child complainants. Based on what we have heard to date, it seems likely that improving training and quality assurance in investigative interviewing could lead to significant improvements in the criminal justice system's response to child sexual abuse, including institutional child sexual abuse.

Technical aspects of recording interviews

The Complainants' Evidence Research also includes a study of 65 prerecorded police interviews and 37 recordings of closed circuit television (CCTV) evidence in New South Wales and Victoria. The study reviewed the recordings of the police interviews for overall quality of the recording, audio clarity, image clarity, camera perspective, screen display conventions, features of the physical setting, and impressions of the complainants' evidence.

The results rated 23 per cent of the recordings as being of high quality, 51 per cent of the recordings as being of moderate quality and 26 per cent as being of substandard quality. In a small minority of recordings, sound and video display were not synchronised.[200]

Ratings of audio and image resolution quality were reported as set out in Table 3.2.[201]

Table 3.2: Audio and image quality of recorded interviews and CCTV evidence

Quality	Audio (%)	Image (%)
High	57.7	39.4
Moderate	25	44.3
Poor/substandard	17.3	16.3

The researchers also assessed the display and camera angles used in the prerecorded interviews and CCTV recordings. The display composition was rated as set out in Table 3.3.[202]

Table 3.3: Display composition of recorded interviews and CCTV evidence

Display composition	Percentage of recordings
Face only	10.6
Face and upper body	44.2
Entire body	26.9
Entire body and entire room	17.3
No image of complainant	1

The camera's proximity to the complainant's face was rated as set out in Table 3.4.[203]

Table 3.4: Camera proximity to face in recorded interviews and CCTV evidence

Camera proximity to face	Percentage of recordings
Too close	18.3
Expressions visible	53.8
Too distant	27.9

The Complainants' Evidence Research concluded that wide disparities in the image and audio quality of the recordings demonstrate the need for best-practice standards that address these features. The researchers found that many recordings failed to capture images of the complainant that allowed an adequate assessment of demeanour because they only showed the complainant's face or because the camera was too far away from the complainant so that the complainant's facial expressions were not adequately displayed.[204]

While the police have no control over the quality of CCTV recordings, these results suggest that there is room for improvement in technical aspects of prerecorded police investigative interviews.

Interpreters and intermediaries

A key aspect of ensuring that victims and survivors can provide their accounts of the abuse they suffered effectively is ensuring they can communicate in a language which they feel comfortable using. This places a high importance on the availability of suitably qualified and certified interpreters, including for Aboriginal and Torres Strait Islander victims and survivors and other witnesses who are not comfortable using English.

There will also be occasions where victims and survivors and other witnesses will have particular needs in order to communicate. In those situations, it may be appropriate to provide for specialised intermediaries who can provide assistance to both police and the victim to facilitate communication.

In New South Wales, a pilot scheme allows for intermediaries to assist children to communicate in police interviews and in court. The NSW Police Force has told us that intermediaries are being used effectively at the police interview stage.

We discuss interpreters and intermediaries further in Chapter 9.

3.8.4 Possible principles for investigative interviews

Given the issues identified above, the following could be considered as possible principles to guide police investigative interviewing:

- All police who provide an investigative response (whether specialist or generalist) to child sexual abuse should receive at least basic training in understanding sexual offending, including the nature of child sexual abuse and institutional child sexual abuse offending.
- All police who provide an investigative response (whether specialist or generalist) to child sexual abuse should be trained to interview the complainant in accordance with current research and learning about how memory works in order to obtain the complainant's memory of the events.
- The importance of video recorded interviews for children and other vulnerable witnesses should be recognised, as these interviews usually form all, or most, of the complainant's and other relevant witnesses' evidence in chief in any prosecution.
- Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:
    - a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses
    - skill development in planning and conducting interviews, including use of appropriate questioning techniques.
- Specialist police should undergo refresher training on a periodical basis to ensure that their specialist understanding and skills remain up to date and accord with current research.
- From time to time, experts should review a sample of video recorded interviews with children and other vulnerable witnesses conducted by specialist police for quality assurance and training purposes and to reinforce best-practice interviewing techniques.
- State and territory governments should introduce legislation to remove any impediments, including in relation to privacy concerns, to the use of video recorded interviews so that the relevant police officer, his or her supervisor and any persons engaged by police in quality assurance and training can review video recorded interviews for quality assurance and training purposes. This would not be intended to require legislative authority to allow the use of video recorded interviews for general training purposes.
- Police should continue to work towards improving the technical quality of video recorded interviews so that they are as effective as possible, from a technical point of view, in presenting the complainant's and other witnesses' evidence in chief.

- Police should recognise the importance of interpreters, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses.
- Intermediaries should be available to assist in police investigative interviews of children and other vulnerable witnesses.

3.9 Police charging decisions

3.9.1 Introduction

The decision to charge is one of fundamental importance to victims and survivors, police and the accused.

In private sessions, many survivors have told us about their experiences of police declining to lay charges for various reasons. In some cases, where there was no evidence of the abuse other than the victim's or survivor's evidence – a 'word against word' case – survivors have told us that police said a conviction was unlikely and not worth pursuing.

We have also heard evidence about situations where police laid charges, but the charges were subsequently withdrawn or downgraded by the prosecution agency. We discuss prosecution decisions in relation to charging in section 7.5.

We are aware that many police agencies have protocols in place governing the process and approvals required for laying charges in child sexual abuse matters. We are also aware of the range of challenges police face in dealing with allegations of child sexual abuse. However, such protocols need to recognise the particular features of child sexual abuse offending.

In this section we discuss the challenges for police in deciding when to charge and which charges to lay. We also discuss the role that corroboration plays in allegations of child sexual abuse, and the prospect of costs orders against police where a prosecution is unsuccessful.

3.9.2 Aspects of police charging decisions

Police decision to charge

Police may charge a person where they know or reasonably suspect that a person has committed an offence. This decision will generally be based on the information that the complainant provides, frequently in an investigative interview.

Given the importance of the charging decision, it is obviously important for sound decisions on the appropriate charge to be made as early as possible in the process.

The issues facing police in deciding when to charge and what offences to use may be different depending on whether they are dealing with allegations of recent child sexual abuse or allegations of historical child sexual abuse. We have heard in our private roundtables that, in responding to allegations of current abuse, police are very mindful of the need to protect the victim and other children and that police will generally charge as soon as they believe they have sufficient evidence to charge.

In these circumstances, the imperative to act may outweigh the potential benefits of taking additional time to consider the most appropriate set of charges and to seek prosecution advice on the proposed charges. There may also be a need to take action before police are confident that they have received all the relevant evidence from a child or children and therefore before a comprehensive and considered view can be taken on the most appropriate set of charges.

In these circumstances, there may still be a role for obtaining charge advice from the Director of Public Prosecutions (DPP), even after charges have been laid. Survivors can find it very distressing when charges are discontinued or downgraded. Also, while there may be good reasons for proceeding as soon as possible against some suspected offenders, it is important to ensure that victims and survivors have realistic expectations about the nature of the charges to be prosecuted against the alleged offender.

However, where the allegations are of historical abuse, unless the offender still has access to children or is a flight risk, there may be an opportunity to seek advice from prosecutors on appropriate charges.

This may be particularly important given the complexity of charging for historical child sexual abuse. In this area of the law there have been frequent changes to the type of conduct the subject of an offence and the description of such conduct. As it is very rare for new offences to have retrospective application, some care must be taken to research the appropriate charge to apply to the conduct based on when it took place. This can be further complicated by the fact that survivors may have difficulty in precisely dating the offending conduct, and it may stretch across periods where different offences applied.

We discuss in Chapter 7 the range of factors prosecutors consider in deciding whether to continue a prosecution. The primary considerations are whether there is a reasonable prospect of conviction and whether the prosecution is in the public interest. Prosecutors also have the advantage of considering the charges once a full police investigation has concluded. There is potential for tension between a police decision to charge and a subsequent DPP decision not to prosecute.

Given that many cases of child sexual abuse will be serious matters prosecuted by the DPP rather than police prosecutors, it may be useful, where time permits, for police to seek advice as early as possible from the DPP on the appropriate charges to lay, or settle upon, based on the available evidence. We discuss possible models for this charging advice in Chapter 7.

Corroboration

Many survivors have told us that police have declined to pursue charges on the basis that there was no corroboration of the complainant's story.

As discussed in section 2.3, child sexual abuse offences are generally committed in private with no eyewitnesses, and there is often 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.

If police decline to lay charges merely because there was no evidence to corroborate the survivor's account, survivors may be denied a criminal justice response.

We have heard that police attitudes to corroboration have changed in many jurisdictions in recent years. As discussed in Chapter 7, in preparing for our public roundtable on DPP complaints and oversight mechanisms, we heard from the DPP in England and Wales that in sexual assault matters they have shifted focus to the credibility of the complaint rather than the credibility of the complainant. We heard in the public roundtable that there has been a similar shift in approach by DPPs in Australia.

The Western Australian DPP, Mr Joseph McGrath SC, stated in this context 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.[205] We have also heard from representatives of Victoria and Western Australia that police prosecutors in those jurisdictions now consider the credibility of the complaint.

While many police agencies may no longer be requiring corroboration where none could be expected, it may be appropriate for police guidelines on child sexual abuse to provide that an absence of corroboration, of itself, is not a sufficient reason to discontinue an investigation or prosecution.

Costs orders

We have been told of legislative provisions in Victoria which allow full discretion to magistrates to award costs in criminal proceedings in the Magistrates' Court or the Children's Court.[206]

We understand that the intention of these provisions is to indemnify defendants in matters where the charges are not made out.

However, unless there is some element of malevolence or negligence, it is difficult to see why police should bear the court costs of any defendant who is found not guilty. There is a risk that the threat of a costs order may discourage police from laying charges or pursuing a prosecution.

Prosecutions of child sexual abuse offences are challenging for a variety of reasons, including the likely lack of evidence other than that of the complainant. To have these challenges compounded by the threat of having costs awarded merely because charges do not meet the criminal standard of proof is to risk denying criminal justice to many victims and survivors.

There may be scope to retain a power to award costs where the police have pursued the prosecution inappropriately. For example, the *Criminal Procedure Act 1986* (NSW) provides that costs may only be awarded in favour of the accused person in any committal proceedings where the magistrate is satisfied of any one or more of the following:

- the investigation of the alleged offence was conducted in an unreasonable or improper manner
- the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner
- the prosecution unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought

- because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs.[207]

3.9.3 Possible principles for police charging decisions

Given the issues identified above, the following could be considered as possible principles to guide police charging decisions:

- It is important to complainants that the correct charges be laid as early as possible so that charges are not significantly downgraded at or close to trial. Police should ensure that care is taken, and that early prosecution advice is sought where appropriate, in laying charges.
- In making decisions about whether or not to charge, police should not:
    - expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available
    - rely on the absence of corroboration as a determinative factor in deciding not to charge, where the victim or survivor's account does not suggest that there should be any corroboration available, unless the prosecution service advises otherwise.
- If costs can be awarded against police, this power should be removed or costs should be capped.

We welcome submissions that discuss the issues raised in Chapter 3.

In particular:

- we welcome submissions on the possible principles and approaches we discuss, including on whether it is sufficient to address these issues by setting out general principles or approaches or whether we should consider making more specific recommendations – and, if we should consider making more specific recommendations, what should they be
- we welcome submissions on whether we should support the Australian Law Reform Commission and New South Wales Law Reform Commission recommendations for reforms to the protections against disclosing the identity of mandatory reporters in the context of institutional child sexual abuse
- we seek the views of state and territory governments on the possible principles for investigative interviews, including:
    - whether it is sufficient to address this issue 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
    - any resourcing or implementation difficulties that might arise

- we seek the views of state and territory governments and other interested parties on:
  - whether costs are imposed on police for prosecutions that do not result in convictions
  - whether there should be limits on cost orders against police and prosecutors
  - if limits are set, what those limits should be.

4 Police responses and institutions

4.1 Introduction

Many of the issues we discussed in Chapter 3 arise in relation to police responses to child sexual abuse generally, including institutional child sexual abuse. In many respects, on these issues, the police response to institutional child sexual abuse is likely to be similar to the police response to other child sexual abuse.

However, there are some features of institutional child sexual abuse that may call for a different or additional police response.

'Current allegations' of institutional child sexual abuse – where the alleged perpetrator is or has recently been working or volunteering at the institution – are likely to raise particular concerns for police and child protection agencies, the institution, the parents of children involved in the institution, and the broader community. The institutional setting may have provided the alleged perpetrator with access to many children, and there may be concern about how to identify all affected children and to respond urgently and appropriately to their needs and the needs of others involved with the institution.

Both current and historical allegations of child sexual abuse may raise the issue of blind reporting to police. 'Blind reporting' refers to the practice of reporting to police information about an allegation of child sexual abuse without giving the alleged victim's name or other identifying details. The information reported typically would include the identity of the alleged offender and the circumstances of the alleged offence, to the extent they were known.

Blind reporting arises in relation to institutional child sexual abuse in particular because institutions may receive many allegations of abuse that include the victim or survivor's details. Institutions may face issues of whether to provide a victim's details to police even if the victim does want their details to be provided, and the police may have to determine how to respond to any blind reports.

In this chapter, we discuss:

- police communication and advice to institutions, children, families and the community
- blind reporting to police.

4.2 Police communication and advice

4.2.1 Introduction

In many cases involving allegations of institutional child sexual abuse, a response will be sought or required from both police and the institution.

Case Study 2, which examined YMCA NSW's response to the conduct of Mr Jonathan Lord, is a particularly relevant example. We discuss it in detail in section 4.2.2.

Case Study 9, which examined the responses of the Catholic Archdiocese of Adelaide and the South Australia Police (SAPOL) to allegations of child sexual abuse at St Ann's Special School, is also relevant. In that case study, we heard evidence about SAPOL's approach to the disclosure of information from 1991 until 2001 and about how SAPOL would respond to such allegations now (or at least at the time of the hearing in March 2014).

In June 2016, we convened a public roundtable on multidisciplinary and specialist policing responses. The roundtable discussed what institutions, parents and the community need from police in terms of information, direction and advice when current allegations of institutional child sexual abuse are made. It also discussed what police are able to provide to institutions, parents and the community and any limitations on the information that institutions can provide to parents and the community arising from privacy or defamation law.

It is likely to be important for us to be able to give clear guidance to institutions on how they should respond to allegations of institutional child sexual abuse.

This issue arises where 'current allegations' of institutional child sexual abuse are made. Current allegations – where the alleged perpetrator is or has recently been working or volunteering at the institution – are likely to raise particular concerns for police and child protection agencies, the institution, the parents of children involved in the institution, and the broader community. The institutional setting may have provided the alleged perpetrator with access to many children, and there is likely to be concern about how to identify all affected children and to respond urgently and appropriately to their needs and the needs of others involved with the institution.

Our work to date on how institutions should respond to current allegations of institutional child sexual abuse, and our case studies, make clear that, in many cases, institutions – and victims, families and the broader community – will either seek or would benefit from assistance from police in implementing some aspects of the institution's response. This may range from clear guidance, in a particular case, on what the institution should or should not do in relation to the alleged perpetrator through to managing communications with staff, victims and their families and the broader community.

4.2.2 Case Study 2: YMCA NSW and Mr Jonathan Lord

This section outlines the matters most relevant to the issue of police communication and advice that we examined in Case Study 2. The full report, *Report of Case Study No 2: YMCA NSW's response to the conduct of Jonathan Lord* (Report of Case Study 2), is available on the Royal Commission's website.

In August 2009, Mr Lord joined YMCA NSW as a casual childcare assistant for its outside school hours care services in Caringbah in Sydney. Mr Lord went on to work in several roles over the next two years, including as a coordinator at two of the five local YMCA centres.

On 30 September 2011, Mr Lord was suspended because of allegations that he had sexually abused a child on an excursion that day. His employment was terminated in November 2011.

By early 2013, Mr Lord had been convicted of 13 sexual offences involving 12 children.

One of Mr Lord's victims disclosed his abuse on 30 September 2011. His parents immediately spoke to YMCA Caringbah and then to police at Miranda. YMCA NSW responded quickly: it suspended Mr Lord and removed him from his role in providing care to children at its centres. It also sought guidance from the NSW Police Force on how best to handle the incident.

On 10 October 2011, the Department of Family and Community Services (FACS) helpline received a second notification about another child being abused by Mr Lord.

On 13 October 2011, the Joint Investigation Response Team (JIRT) published a media release stating that it was investigating reports that two children were indecently assaulted while in 'child care organised by a Caringbah-based community organisation'. JIRT also set up a hotline that afternoon to prioritise the flow of information from families, parents and caregivers.

YMCA NSW sought guidance and advice from JIRT on what they could and could not communicate to staff and parents. The police advised that, although YMCA NSW could not disclose Mr Lord's name, the names of children or the practices of JIRT, it could decide what else it communicated to staff, parents and the community.

The reasons for limiting disclosure, especially to avoid compromising evidence for future criminal proceedings, were made clear. The Local Court made a suppression order on 25 October 2011, which prohibited publishing or otherwise disclosing information that might reveal the identity of Mr Lord, the victims, witnesses or any other party to the proceedings.

YMCA NSW and the State of New South Wales made submissions about the adequacy or otherwise of the police communication with and advice to YMCA NSW. These are summarised on pages 77 and 78 of the Report of Case Study 2.

The Royal Commission found that it was not unreasonable for YMCA NSW to interpret the police advice in a conservative way and to limit the information it shared with parents, schools and the community about the Lord incident.

The police and JIRT procedures are discussed on pages 79 to 83 of the Report of Case Study 2.

The timing of the establishment of the hotline was discussed. It was established after the second child came forward – over a week after the first child disclosed abuse. Police and the State of New South Wales asserted that JIRT needed enough evidence, in the form of a disclosure that could then lead to a charge, before communicating with the community. That evidence came on 10 October, and the hotline opened on 13 October.

The State of New South Wales submitted that, in each case, 'a judgment must be made which balances the needs of the investigation and future prosecution with the need to inform the community'. It asserted that, importantly, the risk of Mr Lord having access to other children was significantly mitigated when he was stood down from his position on 30 September.

JIRT produced a draft protocol, which was subsequently adopted by JIRT agencies as the JIRT Local Contact Point Protocol. This is discussed in section 4.2.4.

JIRT did not attend YMCA NSW's information session for parents. Police gave evidence of the risk of contaminating evidence at an early stage of the investigation. Also, the following processes were already in place to inform YMCA NSW and the affected community about what was happening:

- The police issued media releases on both 13 and 17 October.
- YMCA NSW emailed parents about the allegations on 13 October.
- JIRT and FACS jointly set up the hotline on 13 October as a point of contact for families.
- Families had direct access to the police in JIRT, and counselling services were available.
- The police had many discussions, by telephone and email, with YMCA NSW.

Several parents of children who had been groomed or abused by Mr Lord criticised JIRT for the way it communicated with them and managed the interviews with their children. In summary, the criticisms were as follows:

- **Pre-interview:** A mother of one of the children felt she did not know what to expect from the JIRT interview or how she should prepare her son for it.
- **Interview:** Some parents were unhappy that they were not allowed to sit in during their child's interview as a support person and that they were not given a copy of the interview's video recording or transcript, so they did not know the full nature of their child's disclosures.
- **Other disclosures:** Some parents felt JIRT was not interested in, or did not act on, information they provided after the initial interview, including further disclosures.
- **Prosecution:** Some parents felt that they were not properly informed of developments in the criminal case against Mr Lord.

A number of parents recommended that the Royal Commission examine whether JIRT can improve the way it informs parents about:

- the investigation and interviewing of their children
- the criminal process itself after charging
- whether or not a support person is provided.

They suggested that a liaison officer act as a single point of contact. However, the parents accepted that there were challenges in 'a live and large and pressured investigation' and said that they did not seek any criticism of the JIRT officers involved.

In relation to providing the video recording or transcripts of a child's interview, the State of New South Wales observed that the police decide whether to provide interview transcripts on a case-by-case basis, depending on factors like whether the content is considered child abuse material or evidence in court proceedings; and parents can see video recordings in the JIRT offices. However, it emphasised that the police can never provide electronic copies of recordings. The risk of circulation, particularly through social media, is too great.

4.2.3 Assisting institutions

Cooperation between police and institutions

In many cases involving allegations of institutional child sexual abuse, a response will be sought or required from both police and the institution. As illustrated by Case Study 2, in many cases allegations may be made effectively at the same time to both the institution and to police.

Our work to date makes it clear that, in many cases, institutions – and victims, families and the broader community – will either seek or would benefit from assistance from police in implementing some aspects of the institution's response. This may range from clear guidance in a particular case on what the institution should or should not do in relation to the alleged perpetrator to managing communications with staff, victims and their families and the broader community.

A number of submissions to our consultation paper, *Best practice principles in responding to complaints of child sexual abuse in institutional contexts: Consultation paper*, which was released in March 2016, raised issues about interactions between institutions and police when they are responding to allegations.

For example, in its submission The Salvation Army stated:

> Advice received from Police in such matters [the role of institutions in not prejudicing police investigations] over time has been inconsistent, and varies from State to State. The Salvation Army would benefit from guidance from the Royal Commission as to how it should manage any person of interest it comes into contact with, where that person of interest is the subject of a covert investigation by Police and where The Salvation Army is mindful not to prejudice that investigation in any way, i.e. how would The Salvation Army (or any other institution in similar circumstances) manage the risk of that person of interest's attendances within its fellowships, without letting that person know that the Police are covertly investigating them. From discussions with other institutions this is a vexed and common issue of concern.[208]

Scouts Australia submitted that police are often reluctant to give updates on their investigations. It stated:

> Whilst Scouts Australia agrees that more should be done to keep victims and their families informed, in reality this can sometimes be difficult. This is because the integrity of the police investigation process needs to be protected. Our own experience also suggests the Police are reluctant to provide updates on cases until matters are concluded. Nor are they bound to share information with us.[209]

In many cases, in order to provide an adequate response to the victim, the victim's family and the broader community, it is critical to ensure that police and the relevant institution are very clear about what the institution should or should not be doing and that the institution's information sharing and communication is managed in a manner that is consistent with the police investigation.

Achieving clarity and appropriate coordination in these areas should also assist police, particularly in ensuring that any institutional response does not interfere with or undermine the police investigation.

At the public roundtable representatives of institutions spoke about what they require from police in terms of guiding their response.

Mr Paul Davis, Director of the Office for Safeguarding and Professional Standards in the Catholic Diocese of Parramatta, told the roundtable that institutions hold information that might be relevant to police and should be more involved in the JIRT process.[210] Mr Davis suggested that institutions could have greater involvement in the review and development of protocols and processes relating to the operation of JIRT so that their voice is heard.[211]

Ms Trish Ladogna, Director of the Child Wellbeing Unit in the New South Wales Department of Education, spoke about the importance of police providing information, including when police form the view that a prosecution will not occur. Ms Ladogna noted that, while a matter may not result in a prosecution, the Employee Performance and Conduct Unit within the Department of Education would conduct an investigation, and information that became available during the criminal investigation would be of considerable use for department's investigation.[212]

Ms Ladogna also told the roundtable that the implementation of the JIRT Local Contact Point Protocol (discussed in section 4.2.4) has facilitated the exchange of information, but it could be improved by having greater awareness that such protocols are in operation.[213]

Ms Carol Lockey, Senior Manager at Barnados, noted the importance of the police providing information in a timely manner given that Barnados will have an ongoing involvement with the child and family on a day-to-day basis.[214] Ms Lockey went on to state the importance of being informed by police of the outcomes of any criminal investigation:

> I suppose sometimes it is the communication of the outcomes as well, because obviously from the police, the JIRT point of view, they will have concluded, and we may not have been necessarily party to that decision-making process ...[215]

Mr Luke Geary, Managing Partner of Salvos Legal, representing The Salvation Army, spoke about how important it was that police advise the institution of the outcomes of investigations, noting that the institution would need to undertake its own investigation:

> Where an investigation doesn't result in a conviction or isn't otherwise the subject of a finding at a criminal standard, the investigators appointed by the institutions still have to make findings to their own standards determining whether or not a volunteer or an employee will continue to be able to function in their capacity.[216]

Mr Geary also told the roundtable:

> So I guess from the organisation's perspective, we would be grateful, with the New South Wales JIRT protocol, of being informed about conclusions of investigations and having explained to an organisation why that might happen [where an investigation does not result in a conviction or a finding at a criminal standard].[217]

The NSW Deputy Ombudsman, Mr Steve Kinmond, spoke at the public roundtable about the Ombudsman's reportable conduct jurisdiction and the assistance his office provides to police in helping institutions to manage their own response.[218] He spoke about what would happen in the case of a teacher suspected of abuse. He said that the Ombudsman would look at whether the

matter had been reported to the correct agencies, and the Ombudsman would review the information held by police and child protection as well as its own holding. The Ombudsman may identify additional risks and will communicate with police and child protection agencies. Mr Kinmond also said:

> It's critical that the institutions are involved and are briefed on what's taking place and that of course consideration is also given, on certain occasions, when the parents ought to be advised and the nature of that advice.[219]

Ms Beth Blackwood, Chief Executive Officer of the Association of Heads of Independent Schools, spoke positively of the assistance that can be provided by a central point of contact, such as that provided in New South Wales by the NSW Ombudsman. Ms Blackwood told the roundtable:

> In discussions with our members, there is significant praise for the Ombudsman approach within New South Wales, and the strength that is seen there is a contact with an agency that gives immediate response and can provide advice for the school on a range of matters or at least a referral process on a range of matters.
>
> Other States didn't feel that they had that same access to advice, whether it would be advice on HR-related matters or advice on advocacy for the child, whatever the issue was. They felt that in New South Wales there was one point of contact that they had nothing but positive comments about.[220]

Limitations on disclosure

Privacy and defamation issues

We have been told that privacy and defamation laws may limit what institutions can disclose when they are responding to current allegations of institutional child sexual abuse.

The *Privacy Act 1988* (Cth) applies to federal agencies and the private sector. It is principles-based legislation which prohibits the disclosure of personal information for a purpose other than that for which the information was collected, unless certain exceptions apply. It requires judgment calls to be made. Mr Jacob Suidgeest, Director of the Regulation and Strategy Branch of the Office of the Australian Information Commissioner, told the public roundtable that Commonwealth legislation contains a number of exceptions, and what is permitted will depend on all of the circumstances.[221]

Mr Suidgeest told the roundtable that what is important is knowing what the purpose of disclosure is – for example, whether it is to assist police to get information or to assist children that might be affected:

> if it gets out on Facebook or with the parents, you know, or around the media, then obviously what is reasonable changes in terms of what the school could disclose changes, and they might have to respond in some way.[222]

Mr Suidgeest told the roundtable that it is important to be as sensitive as possible to the privacy considerations of the alleged victim and the alleged perpetrator:

> Particularly in relation to police matters, and even your own investigation, there is an exception there around using and disclosing for your own investigation or to inform law enforcement. So I couldn't imagine it, but if a school or private school or childcare centre needed to do something to assist the police, then there is that exception there as well.[223]

State and territory legislation generally allows information to be provided for law enforcement or child protection purposes and protects against liability arising from the disclosure.

For example, in New South Wales the *Privacy and Personal Information Protection Act 1998* (NSW) is also principles based. Section 18 prohibits the disclosure of personal information held by a government agency other than in certain circumstances. Under section 18(1)(c), disclosure is permitted if:

> (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

The exemption provided by paragraph 18(1)(c) may assist institutions to exchange information; however, the threat to the life or health must be both serious and imminent. There are situations of institutional child sexual abuse where such a threshold may not be met, such as when a suspect is in detention or no longer involved with the institution. Even if the threshold is met, disclosure to a broad group of people involved with the institution might not be regarded as necessary to prevent or lessen the threat.

Division 3 of the Act also provides exemptions to the privacy principles. For example, section 23 contains exemptions which relate to law enforcement. Section 25 allows agencies not to comply with section 18 if the disclosure is for law enforcement purposes. The exemptions to the restrictions on disclosure are narrower for 'investigative agencies' such as the NSW Ombudsman. Section 24 allows investigative agencies to disclose personal information in the following circumstances:

- compliance with the non-disclosure principle (among others) might detrimentally affect or prevent the proper exercise of the agency's complaint-handling functions or any of its investigative functions
- the disclosure is to another investigative agency
- the information concerned is disclosed to a complainant, and the disclosure is reasonably necessary for the purpose of reporting the progress of an investigation of the complaint made by the complainant or providing the complainant with advice on the outcome of the complaint or any action taken as a result of the complaint.

While these provisions appear broad, there may be instances where they do not clearly allow an exchange of information. In Case Study 38, the Deputy NSW Ombudsman, Mr Kinmond, gave evidence that legislative reform had been implemented to authorise the communication of information about the outcomes of investigations in relation to reportable allegations or reportable convictions for the purposes of Part 3A of the *Ombudsman Act 1974* (NSW).[224]

The NSW Privacy Commissioner, Dr Elizabeth Coombs, told the roundtable that privacy legislation tries to provide both clear guidance and sufficient flexibility when the privacy principles need to be

modified.[225] She confirmed that at the date of the public roundtable there was not information available from her office relating to possible privacy concerns of institutions in this area.[226]

Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) contains broad information-sharing provisions for certain purposes related to the safety, welfare or wellbeing of children. Broad information-sharing provisions may assist agencies and institutions covered by them to share information with each other, but they may be of no assistance in communicating more broadly – for example, with children and families, the broader community or the media.

It may be that law enforcement agencies, particularly the police and perhaps in some cases child protection agencies, may have authority to communicate more broadly than institutions in these circumstances.

Prohibitions on disclosure in relation to criminal proceedings

We understand that legislation in some jurisdictions may limit communication by police to institutions as well as parents and the broader community. Legislation may prohibit the publication of any particulars that may identify the victim of a sexual offence.

In South Australia, legislation appears to go further in protecting disclosure of information about the accused. In South Australia, section 71A of the *Evidence Act 1929* (SA) prohibits a person from publishing without the consent of the accused person:

- any evidence given in proceedings against a person charged with a sexual offence (whether the evidence is given in the course of proceedings for a summary or minor indictable offence or in a preliminary examination of an indictable offence)
- any report on such proceedings
- any evidence given in, or report of, related proceedings in which the accused person is involved after the accused person is charged but before the relevant date.

The 'relevant date' is defined in s 71A(5) as:

> (aa) in relation to a charge of a major indictable offence for which the Magistrates Court is to determine and impose sentence – the date on which a plea of guilty is entered by the accused person; or
>
> (a) in relation to a charge of any other major indictable offence or a charge of a minor indictable offence for which the accused person has elected to be tried by a superior court – the date on which the accused person is committed for trial or sentence; or
>
> (b) in relation to a charge of any other minor indictable offence or a charge of a summary offence – the date on which a plea of guilty is entered by the accused person or the date on which the accused person is found guilty following a trial; or
>
> (c) in any case – the date on which the charge is dismissed or the proceedings lapse by reason of the death of the accused person, for want of prosecution, or for any other reason.

It is not currently clear to us whether provisions prohibiting the disclosure of the identity of victims – or the accused – are causing difficulties by preventing police or others from providing information to institutions, parents or the broader community.

Current guidance for providing assistance

The NSW Police Force has adopted Standard Operating Procedures for Employment Related Child Abuse Allegations (NSW SOPS). The NSW SOPS guide the police and institutions on the information and assistance police can provide to institutions where a current allegation of institutional child sexual abuse is made. A copy of the NSW SOPS is in Appendix C.

We understand that jurisdictions other than New South Wales do not have policies or procedures governing police responses to current allegations of institutional child sexual abuse.

The NSW SOPs reference the reportable conduct jurisdiction of the NSW Ombudsman under Part 3A of the *Ombudsman Act 1974* (NSW) and the information-sharing provisions under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

The NSW SOPS include the statement:

> As an agency is unable to conduct its own investigation until police have either rejected the matter or completed their investigation, it is important that the agency is kept informed of the police investigation and any action that can be undertaken by the agency while police are conducting their own investigation.[227]

The NSW SOPs provide that, if the matter will be investigated by police, the agency (that is, the institution) should be given:

- the investigating officer's contact details
- expected time frames for updates of information
- advice about whether the employee can be advised of the nature of the allegations and/or the police investigation
- any information to assist the agency as permitted under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).[228]

Institutions may also seek the assistance of police where the police investigation has not resulted in any charges being laid and where the responsibility for responding to the allegations effectively reverts fully to the institution. The institution may be concerned to know why the police investigation has not proceeded further or whether there is any information from the police investigation on which the institution can rely in pursuing its own response.

This may be particularly important in cases where the police investigation does not proceed further because of issues that do not necessarily cast doubt on the allegations and the alleged perpetrator is still involved with the institution. Charges might not be laid where, for example, sufficiently clear disclosures could not be obtained from very young children in interviews, or children or their families chose not to participate in a prosecution.

If the institution is left with an outstanding allegation or complaint, it will need to resolve the matter in a way that protects children while also complying with legal requirements, including any industrial or contractual arrangements. The institution may seek information from the police, including any statements or material that it could use for its own response.

The NSW SOPs provide that, if an investigation is discontinued before the laying of charges, police are to inform the agency within 48 hours of deciding to discontinue the investigation and are to provide any information to assist the agency as permitted under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

4.2.4 Assisting victims, families and the broader community

What assistance is needed from police

All jurisdictions appear to have policies in place to deal with communication with victims and their families. However, where current allegations are made of abuse in an institutional context, communication may be required with a group of people that is much broader than those who are identified as victims. It may include potential victims and their families, other concerned families, staff and volunteers at the institution, the management of the institution, and the broader community.

Our discussion of Case Study 2 in section 4.2.2 provides an example of the sort of assistance and information that might be sought by people beyond those who are already identified as victims and their families.

Ms Ladogna, Director of the Child Wellbeing Unit in the New South Wales Department of Education, told the public roundtable of the challenges associated with local schools being responsible for developing the material that will be distributed to the broader school community to advise them of the abuse allegation. She said that the police may be in a position to provide more guidance, and that it would assist schools if police or another agency could sign off on the communication.[229]

Ms Blackwood of the Association of Heads of Independent Schools told the public roundtable that schools would benefit from advice on management of the media, particularly when information is in the media before the school has had an opportunity to inform the school community. She said it would assist to have advice on when to inform the school community.[230]

The public roundtable discussed how parents can be properly informed and gain the necessary skills to talk to their children once another child at the institution makes an allegation.[231]

Ms Amanda Paton, Director of the George Jones Child Advocacy Centre, Western Australia, provided an outline of the programs they use. Ms Paton said:

> You want to provide the parents with enough information without causing hysteria and panic in parents. It's very easy for parents to run home and kind of shake their child and tug them and say, 'Has so-and-so touched you and what has gone on?' I think by providing parents with the space, time, psychoeducation and information about child abuse and what might be appropriate conversations to have with children without causing panic, without putting words into children's mouths and those types of things, that's important.

> Having a space and a service that families can come back to, making sure that local school communities and the counsellors, the psychologists and the chaplains within school communities are well aware of that information I think is the key.[232]

Current police approaches

The public roundtable heard information about police approaches to providing information to children and families involved in an institution following current allegations of institutional child sexual abuse.

New South Wales

In relation to how the NSW Police Force communicates with parents about parents communicating with their children, Detective Superintendent Greig Newbery, Commander of the Child Abuse Squad, NSW Police Force, said:

> One of the points you talked about there, talking about the New South Wales local contact protocol – the letters that we send out, as part of the template for that, we put a sentence in there, 'If you have observed or are aware of any concerning behaviours by your children or you would like some assistance in having a conversation with your child', we have a point there that you can contact to ask questions about that.[233]

Detective Superintendent Newbery told the public roundtable that the police will give parents of the victim as much information as they can without compromising the criminal investigation.[234]

New South Wales also has the JIRT Local Contact Point Protocol, which is discussed below.

Victoria

The approach taken in Victoria was outlined by Detective Senior Sergeant Craig Gye, Dandenong Sexual Offences and Child Abuse Investigation Team, Victoria Police:

> The approach we would take in terms of what the parents could tell the children would be along the lines of, 'If you want to have a conversation with your child, then keep it as simple as you possibly can. If there's any suspicion of a disclosure, stop there and either contact the police or contact the counselling service, CASA [Centre Against Sexual Assault].'
>
> We had a situation arise in Victoria not that long ago … Word got out very quickly, as it does. There was a community meeting called. So we went to the community meeting, but we took with us CASA and some other representatives. At that community meeting, our sole focus was to allay the fears of the parents as much as we could.
>
> CASA were able to talk about their services and the best methods to perhaps discuss with the children what had happened.
>
> It wasn't ideal, but it actually worked out okay for us. In an ideal world, if we had the opportunity to plan, I think to have CASA or one of our partners within the MDC do some work around protective behaviours with the children would take some of the responsibility away from the parents, I guess. It would give the parents some comfort that children were being

> spoken to and that, if they had been sexually abused, the likelihood is that they would disclose in those circumstances.[235]

Queensland

Acting Detective Superintendent Garry Watts, Child Safety and Sexual Crime Group, State Crime Command, Queensland Police, raised the importance of ensuring that parents do not directly discuss the abuse with their child:

> [N]ot to jeopardise an investigation, we cannot release information, and then instruct them – and, again, it depends on the age of the children – on what we'd ask they don't discuss with their child as well, because we do not want to jeopardise any forensic interview.[236]

Acting Detective Superintendent Watts explained how contact with parents is maintained:

> Again, it depends on the circumstances and it depends on the number of investigating officers we do have, but we do have a variety of referral systems that we can implement in Queensland. It started off as CRYPAR, but it's now known as Police Referrals. So if there are specific referrals or specific support that the parents may need, we're able to refer the parents to those.
>
> With the CPIU [Child Protection and Investigation Unit] officers, we certainly like to involve them with the liaison with the parents on an ongoing basis.
>
> Once we've made an arrest or a charge has been made, we can then bring in another organisation called PACT, which is Protect All Children Today, and they take over and assist child victims and child witnesses through the court processes.[237]

Western Australia

In relation to the specific ways that advice is delivered to parents, Detective Inspector Mark Twamley, Sex Crime Division, Western Australia Police, advised that the direct reaction by police will vary depending on the time, place and circumstance that police are responding to:

> In the past, we've done things like set up telephone hotlines within our office so that concerned parents can call through and speak to an experienced detective on what might or might not have happened and also to talk about some of the issues in terms of how to speak to their child and what they may have observed of their child's behaviour in the past or into the future.
>
> On other occasions, we have run a forum at the school and sent people, as Amanda [Paton, Director, George Jones Child Advocacy Centre] says, therapists and educationalists as well as police, out to a school site.[238]

In relation to providing information to the broader community, Detective Inspector Twamley said that the police can tell the community only what they are legislatively able to tell them. He said that Western Australia Police would tell the community:

> We are conducting inquiries. At this point in time, we have a victim who we're caring for and talking to. There may be other victims. If we know of other victims and if you are connected with that victim, we will come and communicate with you.[239]

South Australia

In Case Study 9, which examined the responses of the Catholic Archdiocese of Adelaide and SAPOL to allegations of child sexual abuse at St Ann's Special School, we found that SAPOL did not inform the broader school community of the sexual allegations against Mr Brian Perkins (the perpetrator), despite being aware that other former students with intellectual disabilities and limited verbal capacity may have had contact with him.[240] This concerned the period from 1991 until 2001.

Detective Superintendent Damian Powell, Officer in Charge of the Sexual Crimes Investigation Branch in SAPOL, provided an affidavit setting out the current policy of SAPOL in disclosing information. The Royal Commission's report on Case Study 9 provides the following summary:

> Once a suspect of child sexual abuse has been identified, an assessment is made about whether that person has access to children. Investigators will then identify a relevant person within an organisation or school and inform that person. SAPOL will also give that person advice on how not to impede an investigation. There may be situations where police stress the desirability of not disclosing the information widely until further investigations are complete …
>
> As the investigation progresses, it may be that genuine lines of inquiry are exhausted and the known evidence that can be obtained spontaneously has been collected. At that time, a decision is made to make a more generalised disclosure to a particular community.
>
> There is no single form for such a disclosure. *The South Australian Royal Commission 2012–2013: Report of Independent Education Inquiry* identified the use of letters to parents as well as meetings with relevant parents as two appropriate means for facilitating disclosure.
>
> If the allegations against Mr Perkins were investigated today, the Sexual Crime Investigation Branch stated that it would:
>
> - request from the school a list of names and addresses of all students who had contact with Mr Perkins
> - undertake an immediate assessment regarding the alleged offending
> - contact all parents of students who had contact with Mr Perkins
> - inform parents of the nature of the investigations and the suspected role of their child
> - the children would be interviewed
> - once all of the genuine inquiries are undertaken, consider making a general disclosure to the broader school community to ensure that the broader school community was aware of the allegations.[241] [References omitted.]

In South Australia, the Independent Education Inquiry (the Debelle Inquiry) reported in 2013. It recommended procedures that should be put in place to manage allegations of sexual misconduct

made against members of staff at schools. The inquiry looked at the extent to which the school had an obligation to advise the broader community that there was an ongoing investigation. A number of recommendations were made, including that a specialist multi-agency committee should be appointed to advise on the content of the letter and the sort of information that is in it, and that committee should include advocates from the sexual assault sector, the education section, the police and others.

The Debelle Inquiry recommended that, where a person employed in any capacity at a school is arrested and charged with a sexual offence, the Department for Education and Child Development should conduct a risk assessment to determine whether there is a reasonable suspicion that at that school there might be children other than the alleged victim who might also be victims.[242] It also recommend that, where other children might be affected, the department should arrange a meeting of parents and appoint a qualified expert, such as a psychologist, to address the meeting and provide information to parents.[243]

Mr Michael O'Connell APM, the South Australian Commissioner for Victim's Rights, told the public roundtable that:

> [The Debelle Inquiry's recommendations has now resulted in] the head of the State Education Department having to correspond with all people who attend that school within certain contexts, and for the purpose of determining the appropriateness of that correspondence there is a specialist multi-agency committee that has been appointed that advises on the content of the letter, what sort of information, and that committee includes an advocate from the sexual assault sector, the education sector, the police and others.[244]

Current guidance for providing assistance

In Case Study 2, Detective Superintendent Maria Rustja, then Commander of the Child Abuse Squad, NSW Police Force, gave evidence about the preparation of a new JIRT protocol.[245] After the hearing, the New South Wales Government provided us with a copy of the JIRT Local Contact Point Protocol, which was adopted in 2014. A copy of the protocol is in Appendix D.

The objects of the JIRT Local Contact Point Protocol are stated to be:

- to provide clear operational guidelines for staff (defined to be JIRT staff, local community services staff, Helpline, health staff and relevant stakeholders) on what matters warrant enactment of the protocol and when and how to establish a Local Contact Point
- to outline the function and role of the protocol in the provision of information and support to parents and concerned community members and to broader community groups and relevant stakeholders.[246]

The primary objective of the protocol is the provision of information and support to parents and concerned community members where there are allegations of child sexual abuse involving an institution. It also allows for the collection of information that may lead to the identification of other victims. The decision to activate the protocol is made collaboratively by JIRT and the institution. Together, JIRT and the institution plan the details of the protocol and the institution's communication with parents.

During Case Study 39 on sporting clubs and associations, FACS provided a summary of the 13 occasions on which the protocol was activated between July 2014 and March 2016.[247] It states that:

> [The summary] shows varying levels of community response to information regarding allegations of child sexual abuse within their community. There may be a combination of factors that could account for varying levels of community response and these include:
>
> - Police media statements – Although activation of some of the LCP Protocols has lead [sic] to the identification of other victims, local and international experience has demonstrated that publicity following charges is a more powerful trigger for other victims to come forward.
> - The amount and intensity of contact between the Person of Interest (POI) and the child/children – Those in settings such as family day care where the offender contact is by nature more intimate to provide care generate enquiries …
> - The age of the child/children involved – It appears that if the LCP Protocol is activated in relation to younger children it receives higher levels of community engagement than activations for adolescent children.
> - Other actions taken by agencies to address immediate concerns – These might include meetings or information sessions which require single or multiple JIRT agency input or attendance.[248] [References omitted.]

Communication with the media

At the public roundtable on multi-disciplinary and specialist police responses, police and institutions raised issues about communicating with the mass media and social media.

Detective Superintendent Newbery of the NSW Police Force told the roundtable that, In New South Wales, police may prepare a holding statement for the media that provides very basic information that investigations are currently being conducted. Detective Superintendent Newbery said there were difficulties because of the risk of identifying people, particularly the victim, but that when they issue a media release after charging people it sometimes encourages other victims to come forward.[249]

When asked about what they would do if a story was circulating in the local community, in the press and on social media, Detective Senior Sergeant Gye of Dandenong SOCIT in the Victoria Police told the roundtable that they would seek the assistance of their media unit, which would prepare a media release.[250]

4.2.5 Possible approach to police communication and advice

Based on what we have heard to date, it seems likely that, in cases of institutional child sexual abuse, in addition to a police response, allegations against a person currently or recently involved with the institution are likely to require:

- an institutional response in terms of communicating with staff and volunteers, children, parents and the broader community during a police investigation

- a longer-term institutional response, including a risk assessment of the circumstances alleged and possibly involving an institutional investigation of the allegations and disciplinary or other action (if the criminal justice response does not resolve the matter).

It may assist if all police agencies develop procedures or protocols to guide the police and institutions on the information and assistance they can provide to institutions when a (current) allegation of institutional child sexual abuse is made. The NSW SOPs are an example of a possible approach.

It may also assist if all police agencies, and/or multidisciplinary responses, develop procedures or protocols to guide the police, institutions and the broader community on the information and assistance they can provide to children and parents, the broader community and the media when a (current) allegation of institutional child sexual abuse is made. The NSW JIRT Local Contact Point Protocol is an example of a possible approach.

4.3 Blind reporting to police

4.3.1 Introduction

The issues of reporting and blind reporting raise a number of potentially competing objectives and different perspectives, including:

- the desire to encourage victims and survivors of child sexual abuse to disclose their abuse so that they can receive any necessary support, including therapeutic and other support services and potentially compensation
- the desire to recognise and respect the wishes of victims and survivors so that it is their decision whether and to whom they disclose their abuse
- the desire to maximise reporting to police of child sexual abuse so that criminal investigations can be conducted and offenders can be prosecuted
- the desire to maximise the provision of information to police and other regulatory authorities about child sexual abuse so that any available regulatory measures can be taken to keep children safe.

In Chapter 6, we discuss 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. The third-party offences of particular relevance to blind reporting are offences that require reporting of child sexual abuse to police.

Blind reporting has been a particularly controversial issue in New South Wales because of the offence under section 316(1) of the *Crimes Act 1900* (NSW) of concealing a serious indictable offence. We discuss this offence in more detail in section 6.3.3.

In June 2015 the New South Wales Police Integrity Commission released its 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. The commission expressed

the view that there is an urgent need for a reconsideration of blind reporting and the offence, including whether the offence should be repealed or substantially amended.

The Royal Commission's recommendations on redress and how a redress scheme should operate also raised issues in relation to blind reporting.

On 20 April 2016, we convened a public roundtable to discuss reporting offences. The first part of the roundtable focused on the issue of blind reporting, including:

- the controversy around whether, or the extent to which, blind reporting is inconsistent with the obligation to report serious indictable offences under section 316(1) of the *Crimes Act 1900* (NSW)
- whether or not blind reporting should be permitted or encouraged
- how the competing objectives of respecting survivors' wishes and maximising effective reporting of child sexual abuse should be balanced.

4.3.2 Police Integrity Commission's Operation Protea

In June 2015, the New South Wales Police Integrity Commission released its report on Operation Protea. Operation Protea considered police misconduct in relation to blind reporting of child sexual abuse and the New South Wales offence of concealing a serious indictable offence.

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'.[251]

The commission described blind reporting as 'controversial' and stated that there are arguments for and against it.[252] The commission summarised the arguments in favour of blind reporting that emerge from the evidence. They included:

- the importance of respecting the wishes of victims who do not want the information they have given in confidence to be communicated to police
- not discouraging victims from making complaints to institutions about sexual abuse
- not reducing the flow of information that police receive through blind reporting (because of victims being discouraged from making complaints)
- that blind reporting does not prevent the police from asking for more information in particular cases or asking the institution to ask the victim again if they would be willing to talk to police
- blind reporting helps the police to get as much information as possible out of institutions and there is an advantage to police in receiving intelligence reports even without the victim's name, particularly in the cases of serial offenders and offenders who move around to different locations
- blind reporting keeps open the possibility of further communication with victims in future.

Difficulties with the section 316(1) offence were also discussed in evidence, including concerns about suggesting the victim, or their friends or relatives, might be prosecuted for failures to report.[253]

The commission concluded that, in general, blind reporting contravenes section 316(1) of the *Crimes Act 1900* (NSW) and that:

> [Whether a particular case of blind reporting contravened section 316(1)] would depend on the circumstances of the particular case, including whether the conditions for the operation of s 316(1) are satisfied (such as whether the person alleged to have committed an offence had the necessary knowledge or belief) and whether there was some matter amounting to reasonable excuse.[254]

The commission expressed the view that there is an urgent need for a reconsideration of blind reporting and the New South Wales offence, including whether the offence should be repealed or substantially amended.

4.3.3 Royal Commission's recommendations on redress

Institutional representatives may often come to know about child sexual abuse, including allegations of historical child sexual abuse, when they receive:

- an allegation from a victim or survivor, or on their behalf
- the findings of an investigation of the allegation
- an admission by the alleged perpetrator.

Any redress scheme that is established to accept applications for redress for institutional child sexual abuse is also likely to receive many allegations of child sexual abuse. In the Royal Commission's *Redress and civil litigation report*, we discussed what a redress scheme should do in terms of reporting to police. We expressed the following view:

> In our view, if a redress scheme receives allegations of abuse against a person in an application for redress and the scheme has reason to believe that there may be a current risk to children – for example, because the scheme is aware that the person is still working with children – the scheme should report the allegations to police. Our present view is that, if the applicant does not consent to the allegations being reported to police in these circumstances then the scheme should report the allegations to the police without disclosing the applicant's identity.
>
> However, this matter has not yet been the subject of detailed consideration or consultation. We will consider further the issue of reporting to police – including 'blind reporting' where the survivor's identity is not disclosed – in our work on criminal justice issues. Until we complete our consideration of this issue, and subject to any recommendations we make in relation to it, we are satisfied that blind reporting should continue in circumstances where an applicant for redress does not consent to the allegations being reported to police.[255]

We made the following recommendations, including the note to recommendation 73 concerning blind reporting:

> 73. A redress scheme should report any allegations to the police if it has reason to believe that there may be a current risk to children. If the relevant applicant does

not consent to the allegations being reported to the police, the scheme should report the allegations to the police without disclosing the applicant's identity.

Note: The issue of reporting to police, including blind reporting, will be considered further in our work in relation to criminal justice issues.

74. A redress scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants.

75. A redress scheme should encourage any applicants who seek advice from it about reporting to police to discuss their options directly with the police.[256]

4.3.4 Current approaches

In our public roundtable discussion on 20 April 2016, we heard from a number of participants about their current approach to blind reporting.

Current police approaches

We heard from representatives of the NSW Police Force and Victoria Police at our public roundtable.

New South Wales

Detective Superintendent Linda Howlett, Commander of the Sex Crimes Squad, told our public roundtable discussion on 20 April 2016 about some of the reporting options available in New South Wales.[257] We discussed these in section 3.6.

The NSW Police Force, through the Sex Crimes Squad in State Crime Command, has adopted a process for managing historical physical and sexual abuse allegations (that is, allegations that do not relate to victims or survivors who are still children).

Detective Superintendent Howlett told the roundtable that she introduced this process after she took command of the Sex Crimes Squad to formalise the provision of information from non-government organisations. Detective Superintendent Howlett said that the Sex Crimes Squad redesigned the format of information required from non-government organisations to ensure that the police obtained as much information as possible. The information the Sex Crimes Squad provides to other parts of the NSW Police Force and to non-government institutions about this process is in Appendix E.

The information provides for the steps to be taken in three different situations:

- where the identity of the victim is not known, including by the non-government organisation
- where the identity of the victim is known and the victim is willing to speak to the police
- where the identity of the victim is known, but the victim does not wish to speak to the police.

The issue of blind reporting arises in the third situation.

Where the identity of the victim is known, but the victim does not wish to speak to the police, the information provides for the following steps to be taken:

- The non-government organisation is to advise the victim that they can change their mind and speak with the police at any time in the future. If the victim is receiving counselling, the counsellor may advise the victim that they can report to police through the Sexual Assault Reporting Options (SARO) process.
- The non-government organisation is to:
    - preserve all available evidence in case the victim changes their mind
    - conduct any necessary investigation to deal with any internal disciplinary matters
    - confirm what steps have been taken to assess any current or ongoing risks arising from or similar to the circumstances of the suspected crime being reported
    - send through to the relevant Local Area Command: first, a preliminary notification to confirm that an investigation will be undertaken and that the victim has been advised of the continuing option for speaking with the police and of appropriate counselling services; and, later, a more detailed report once the investigation is concluded
    - confirm what other notifications the non-government organisation has made – for example, to the NSW Ombudsman, the Office of the Children's Guardian or FACS.
- The police will (at a minimum):
    - acknowledge receipt of the information and provide a Computerised Operational Policing System (COPS) reference number
    - take action as appropriate if there is any disclosure on a SARO form
    - assess any immediate or ongoing risk to any persons, including children, and take action or provide advice if necessary
    - record the information on COPS as an Information Report or Event.[258]

The form that non-government organisations use to make a report includes a statement that 'This form is not to be completed if you have a current child victim – use existing mandatory reporting child at risk protocol'.[259]

Mr David Shoebridge MLC, Greens member of the Legislative Council in the New South Wales Parliament, told the roundtable that about 1,400 blind reports were made to the Sex Crimes Squad between 2010 and mid-2014, after which most reports have been made to individual Local Area Commands rather than the Sex Crimes Squad.[260]

Mr Kinmond, the NSW Deputy Ombudsman, told the roundtable that, when the NSW Police Force issued the guidelines to non-government organisations, a number of agencies told him they were concerned that the guidelines seem to permit blind reporting even though the agencies did not seek the right to blind report.[261]

Mr Kinmond and Detective Superintendent Howlett also supported the approach of providing the victim's name with an indication that they did not want to be contacted by police. Detective Superintendent Howlett suggested that the police could approach the person as a witness rather than an as a victim. How the police approach a victim would depend on the circumstances, and they may go back through a counselling service if they have received the information from the counselling service. Detective Superintendent Howlett said they do not 'cold call' or 'doorknock' a potential victim.[262]

Detective Superintendent Howlett indicated that, even without any identifying information about a victim, the police can act on information, either by going back to the person who made the blind report to obtain further details or by investigating the alleged offender.[263] However, Mr Shoebridge said that the NSW Police Force protocols make it clear that, where there is a blind report, they do not investigate. If Local Area Commands have been told not to investigate a blind report, Mr Shoebridge suggested that they will not commence an investigation when they get a blind report.[264] Detective Superintendent Howlett told the roundtable that some of the victims who fill out blind report forms indicate that they do wish to report to the police, and those matters are investigated.[265]

Victoria

Detective Senior Sergeant Michael Dwyer of the SANO Task Force in the Crime Command of the Victoria Police told our public roundtable on reporting offences about some of the reporting options available in Victoria.[266] We discussed these in section 3.6.

Detective Senior Sergeant Dwyer outlined how Victoria Police could investigate information provided in a blind report without being given information about the victim. Generally, Victoria Police does not 'cold call' victims.[267]

Current survivor advocacy and support group approaches

Representatives of a number of survivor advocacy and support groups told the roundtable of their current approaches to blind reporting.

Dr Cathy Kezelman AM, representing the Blue Knot Foundation, gave the roundtable the following information about the foundation's approach.[268] Dr Kezelman said that most of the callers to the foundation's Blue Knot Helpline are adult survivors. The foundation does not actively encourage survivors to report to police, but it provides information and supports survivors if they are considering reporting. The foundation often provides a single occasion of service, and it encourages survivors to seek face-to-face support with health professionals or makes referrals to other services.

Dr Kezelman told the roundtable that, if there was a situation of current sexual abuse of an adult, the foundation would report the abuse to police if the caller was unable or unwilling to do so and the foundation had sufficient information to make the report. If a caller has concerns about current risk of significant harm or abuse to a child, the foundation reports to the relevant government agency and encourages callers to make a report themselves.

As to blind reporting, Dr Kezelman told the roundtable that counsellors endeavour to make reports with the consent of the caller if there is ongoing abuse of an adult and the caller is unable or

unwilling to report to police. The foundation would override an adult caller's wish not to have their name disclosed to police if the foundation was aware that the alleged perpetrator of child sexual abuse that the caller named may pose an ongoing risk to children because, for example, they are still working as a schoolteacher.

Ms Carol Ronken, representing Bravehearts, gave the roundtable the following information about Bravehearts' approach.[269] Ms Ronken said that Bravehearts staff are mandatory reporters, so they will make mandatory reports when children and young people disclose sexual abuse. Bravehearts also encourages adult survivors to speak out.

Ms Ronken told the roundtable that, in 2000, Bravehearts developed the Sexual Assault Disclosure Scheme (SADS) with the Queensland Police Service, the Queensland Director of Public Prosecutions, Queensland public defenders and the Queensland Crime and Misconduct Commission to allow adult survivors to make anonymous reports of child sexual abuse to police. Initially the scheme operated by written forms and it is now online. If a survivor does not want to have their details provided to police, Bravehearts makes a blind report to police for intelligence purposes. Survivors are also given options of being contacted by police either directly or through Bravehearts.

Ms Ronken told the roundtable that, if a survivor ticks the box that indicates they are not willing to provide their details to police, Bravehearts contacts them and discusses the possibility of Bravehearts supporting them to speak to police. If police contact Bravehearts to say they would like to speak to the survivor, Bravehearts will contact the survivor. Ms Ronken said that it is only 'very rarely' that they have had anyone refuse to speak to the police.

Bravehearts makes it clear to survivors that, if they do speak to the police, they can say at any time that they do not want an investigation to go forward and the choice is always with the survivor. Ms Ronken told the roundtable that some survivors are happy to talk to the police and give them further information, but they do not want their case to proceed.

Mrs Nicola Ellis, representing Ellis Legal, gave the roundtable the following information about Ellis Legal's approach.[270] Ms Ellis said that, if a client who comes to Ellis Legal has not yet been in contact with the police, Ellis Legal encourages the client to report to the police. Ms Ellis said that they encourage clients to report to the police if they know that the perpetrator is still alive or if they do not know whether the perpetrator is still alive.

Mrs Ellis said that Ellis Legal has never had to blind report because they are able to tell clients that the police will respect their choice. Ms Ellis told the roundtable:

> We've had numerous people who have taken those first steps and then, often because of the length of time that the matter takes to come to court and other things happening in their lives, with an opinion from their psychologist or therapist that really in terms of their wellbeing it would be better to pull out, then they have done that, but that has always been with the support of the police. I haven't had anybody who has said, 'I'm being pressured to stay in and I really don't want to'.[271]

Dr Wayne Chamley, representing Broken Rites, gave the roundtable the following information about Broken Rites' approach.[272] Dr Chamley said that Broken Rites abides by the wishes of the survivor and it will not report if the survivor does not want to report. However, it will work hard to change the survivor's current thinking. There will often be a number of conversations and meetings with the

survivor rather than just one telephone call. Particularly for men who have criminal records, Broken Rites might have to address their distrust of police and encourage them to see that making a police statement is an important thing to do. Broken Rites will accompany survivors to the police station to make a report.

Dr Chamley said that, if a survivor does not want to report to the police, Broken Rites does not give up on the matter. If other survivors of abuse by the same alleged perpetrator come forward, it will inform the survivor so that they can reconsider reporting.

Ms Karyn Walsh, representing Micah Projects in Queensland, gave the roundtable the following information about Micah Projects' approach.[273] Ms Walsh said that, if a disclosure is made that concerns a child under 18 years of age, Micah Projects reports to police. It will talk to the person making the disclosure and accompany them to talk to the police. In other cases, Micah Projects will support the person to understand the role of police and encourage them to have a conversation with the police.

Current institutional approaches

Representatives of two institutions that receive disclosures of child sexual abuse told the roundtable of their institution's current approach to blind reporting. We also heard from Mr Kinmond, NSW Deputy Ombudsman, who administers the reportable conduct scheme in New South Wales (which is described briefly in section 6.3.2). Mr Kinmond outlined the Ombudsman's view of the approach that institutions subject to the reportable conduct scheme should take.

Mr Julian Pocock, representing Berry Street, gave the roundtable the following information about Berry Street's approach.[274] Mr Pocock said that Berry Street has approached this issue in the context of its interim arrangements for an institutional redress scheme. He said that Berry Street will always encourage people to report matters to the police and that it will provide support and assistance to survivors to report to the police.

Mr Pocock told the roundtable that Berry Street makes it clear that it will pursue a policy of blind reporting. If the information Berry Street receives from a survivor, together with any information Berry Street holds, leads it to form a reasonable belief that children or young people may still be at risk, or that a person may be guilty of an indictable offence, Berry Street will provide the information to the police. It will do this by way of a blind report or with the survivor's details if the survivor has consented to their details being given to the police.

Mr Denis O'Brien, representing the Truth Justice and Healing Council, gave the roundtable the following information about the approach under *Towards Health: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia protocol* (Towards Healing).[275] Towards Healing is a set of principles and procedures for a person who wishes to complain of having been, relevantly for this Royal Commission, sexually abused by a priest, religious or other Catholic Church personnel.[276]

Mr O'Brien said that, in New South Wales, blind reports were made until the New South Wales Police Integrity Commission reported on Operation Protea. Following that report, the Professional Standards Office NSW/ACT stopped blind reporting and now provides all information, including the

survivor's details, to police on a reporting form. This occurs even if the survivor says that they do not want their name given to police.

Mr O'Brien said that, under the new arrangements, there had been about 17 police reports and 28 intelligence reports made to police, all of which included the name of the survivor. Mr O'Brien also said that the Professional Standards Office had gone back through previous blind reports made under the earlier practice and had provided updated information to the police, including the survivor's name, in about 250 matters. Mr O'Brien said that individual Catholic dioceses in New South Wales had made full reports – including the survivor's name – to the police for many years in accordance with what was seen as the requirements of section 316 of the Crimes Act.

Mr O'Brien told the roundtable that the position in Victoria is now governed by the new reporting offence (which is discussed in section 6.3.3). However, Mr O'Brien was told that those who had come forward under Towards Healing had all been 18 years or older.

Mr Kinmond told the public roundtable that there should be no blind reporting for those who are still children. In relation to historical allegations of child sexual abuse made by adults, Mr Kinmond said that the Ombudsman's approach is to consider whether there are current risks to children. If an agency provides information to the Ombudsman about a person who potentially presents a current significant risk to children then the Ombudsman would advise that this information should not be the subject of a blind report, regardless of the wishes of the victim.[277]

Mr Kinmond also distinguished between what might be required by the law in terms of criminal offences and what might be good practice in terms of supporting victims, suggesting that institutions should focus on the latter.[278]

4.3.5 Discussion

We discuss reporting offences in section 6.3.

Even if the broadest reporting offence was adopted in all states and territories – modelled on the offence in section 316(1) of the *Crimes Act 1900* (NSW) – there would still be cases where information about child sexual abuse was not covered by the obligation to report to police.

In particular, the information:

- may consist of allegations that are not sufficient to give the person who receives the information 'knowledge or belief' that an offence has occurred
- may relate to offences that are not serious offences
- may not suggest that any child is at risk of harm, so it is not caught by mandatory reporting obligations
- may not relate to a person employed or engaged by the agency, so it is not caught by reportable conduct obligations.

In these cases, it might be better for police to have whatever information an institution or any other person is willing to provide voluntarily rather than to have none of the information.

On the basis that it is better for police to have some information about child sexual abuse rather than none, it might be appropriate for police to accept blind reports of allegations of institutional child sexual abuse from institutions, survivor advocacy and support services or other third parties where the law does not require the relevant third party to make a full report.

Continuing to allow blind reporting where the law does not require reporting might help to address concerns about the risk that some victims and survivors may not come forward to institutions (seeking redress) or to support services (seeking counselling and other support) if they are told that their details will be provided to the police, regardless of their wishes.

However, it seems likely that steps can be taken to address the concerns of many victims and survivors about reporting to police by providing them with information about their options and support.

As discussed in section 3.6, it seems likely that it would be useful for the police in each state and territory to develop a guide that third parties can give to victims and survivors outlining the victims' and survivors' options for reporting to police. The guide could encourage victims and survivors to discuss their options directly with police (including on an anonymous basis if possible) before making a decision not to report. This guide should also be readily available online.

A number of participants at the roundtable stated that very few survivors refuse to report to the police if they are well supported.[279] A number of participants also referred to disclosure being a process of moving from first disclosure through a period of receiving support and then perhaps to being ready to report to the police at a later time.[280]

As discussed in section 3.6, given the role support services often play in receiving survivors' initial disclosures, helping them to understand their options and ultimately perhaps supporting them in reporting to the police, it might be important for support services to have a good and up-to-date knowledge of how police respond to reports.

There remains an issue as to whether blind reporting should ever be an acceptable option for institutions in which the abuse is alleged to have occurred, as it could be for survivor advocacy and support groups.

Mr Shoebridge MLC, Greens member of the Legislative Council in the New South Wales Parliament, told the roundtable that the institution in which the abuse occurred will have a conflict of interest and that there may be a very strong power imbalance between the institution and the victim. He said:

> From our perspective, it seems almost impossible that an institution that is alleged to have abused a victim can in any way assess whether or not they consent or don't genuinely consent to go to the police and indeed, in those circumstances, the accepting of blind reporting by the NSW Police is, in my view, very deeply problematic. There needs to be a circuit-breaker in those circumstances, somebody who can genuinely assess whether or not the victim consents and can actually be someone who doesn't have that power imbalance to talk with the victim and genuinely work through with the victim the benefits and the demerits in going forward.[281]

Mr Shoebridge also told the roundtable that, because of the conflicts of interest and the power imbalance between the institution and the victim, it is impossible to see how the police could accept

an assurance from an institution in which the abuse occurred that the victim does not want to be approached by the police.[282]

One option might be to consider a narrower reporting offence targeted at institutional child sexual abuse, which might be able to capture more allegations in the obligation to report. We discuss this option in section 6.3.4.

As discussed in section 4.3.4, institutions and survivor advocacy and support groups currently take a variety of approaches in deciding whether to report to police (in circumstances where reporting is not required by law) and whether to make blind reports to police.

In circumstances where there remains no obligation to report, there might be benefit in institutions developing and following guidelines for reporting to police. These could clarify the institutions' position, including for the benefit of staff and volunteers, victims and their families and survivors, police and child protection and regulatory agencies.

For example, institutions that are willing to blind report in accordance with survivors' wishes could adopt the following approach.

Where the law requires the institution to report to police and a child protection or other agency, the institution or its relevant staff member or official will report as required.

If the institution receives any allegation or other information concerning child sexual abuse which it is not required by law to report to police or a child protection or other agency, and the allegation or information is provided by or on behalf of the victim or survivor, the institution or its relevant official will ask the victim or victim's representative or the survivor to agree to provide details of the allegation or information to the police. Then:

- if the victim or victim's representative or the survivor agrees, the institution or its relevant official will report the allegation or information to the police
- if the victim or victim's representative or the survivor does not agree, the institution or its relevant official will:
    - encourage the victim or victim's representative or the survivor to report the allegation or information to the police themselves
    - provide the victim or victim's representative or the survivor with any guide that police have developed that outlines the options for reporting to police
    - provide details of the allegation or information to the police but omit details of the victim's or survivor's identity – that is, make a blind report.

If the institution receives any allegation or other information concerning child sexual abuse which it is not required by law to report to police or a child protection or other agency, and the allegation or information is not provided by or on behalf of the victim, the institution or its relevant official will report the allegation or information to the police.

Regardless of whether any further reporting offences are enacted, mandatory reporting obligations should ensure that there is a legal requirement to report to an agency (usually a child protection

agency) if a child is at risk or serious risk of harm, even if the victim or the victim's representative does not agree for the allegation or information to be reported, at least to the extent that relevant institutional staff are mandatory reporters.

There might also be benefit in survivor advocacy and support groups developing and following guidelines for reporting to police. This will clarify their position, particularly for the benefit of victims and their families and survivors, police and child protection and regulatory agencies.

Survivor advocacy and support groups could make clear that they will continue to encourage and support victims and survivors to report to the police.

Survivor advocacy and support groups could adopt the approach of reporting to the police with the agreement of the victim or victim's representative or the survivor, or providing blind reports if the victim or victim's representative or the survivor does not agree to have the matter reported.

Survivor advocacy and support groups could also provide the victim or victim's representative or the survivor with any guide that police have developed that outlines the options for reporting to police; and assist them to consider the different options available to them for reporting.

We welcome submissions that discuss the issues raised in Chapter 4.

In particular, we seek the views of state and territory governments, institutions and other interested parties on:

- whether privacy and defamation laws create difficulties for institutions in communicating within the institution, or with children and parents, the broader community or the media; and possible solutions, including communication by police or child protection agencies or legislative or policy reform
- issues of police communication and advice, including to institutions, children and parents, the broader community and the media
- the adequacy and appropriateness of the NSW SOPS and the NSW JIRT Local Contact Point Protocol as procedures or protocols to guide police communication and advice
- the issue of blind reporting and its interaction with reporting offences discussed in section 6.3.

5 Child sexual abuse offences

5.1 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. There are also Commonwealth child sexual abuse offences which are particularly relevant to 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 to date 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 this chapter, after briefly describing some historical developments, we focus 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 are not currently examining child sexual abuse offences more broadly. However, we 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.

5.2 Development of current offences

There are currently many different offences that are used to prosecute child sexual abuse.[283] 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 a child or exposing a child to indecent material
- child prostitution
- possession and production of child pornography or child exploitation material
- grooming.

Each jurisdiction currently provides for 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.[284]

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 aggravated factors, such as offences that are committed in company (with other people present) or against a child with a cognitive impairment.[285]

An offence will generally be aggravated where the victim was under the authority of the offender. This is particularly relevant to institutional offending 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*,[286] 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 occurring from the early 2000s.[287]

- **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 6.3.2.

Recently introduced offence types 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.[288] There are also recently introduced third-party offences, which we discuss in Chapter 6.

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,[289] which effectively increases 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.[290]

- In Victoria:
  - A 'course of conduct' charge has been introduced for persistent child sexual abuse offences (discussed in section 5.3.4).[291]
  - A much broader range of conduct is now covered by grooming offences (discussed in section 5.4.2).[292]
  - Third-party offences have been introduced to criminalise failures to disclose child sexual abuse[293] and failures to protect a child from sexual abuse (discussed in Chapter 6).[294]
- In Queensland, a broader grooming offence has been introduced (discussed in section 5.4.2).[295]

5.3 Persistent child sexual abuse offences

5.3.1 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.

The accused is entitled to a fair trial, which includes knowing 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.[296]
- Perpetrators of institutional child sexual abuse may have access to a child over a lengthy period of time and may repeatedly abuse the child offender 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.

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*,[297] 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'.[298]

Justice Peek held (with Sulan and Stanley JJ agreeing[299]) that, in order for the jury to agree that the accused committed the same two or more acts of sexual exploitation required 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.[300] [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.[301]

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. *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*.[302] [Emphasis added.]

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 Director of Public Prosecutions (DPP) gave evidence about the Western Australian offence.[303]
- 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.[304]
- In Case Study 33 on The Salvation Army (Southern Territory), the South Australian DPP gave evidence about the South Australian offence.[305]

- 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.[306]

We are considering how these offences can be made most effective for child sexual abuse cases without infringing the accused's right to a fair trial.

5.3.2 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.[307]

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.[308]

Particulars lessen the risk of duplicity, enabling the accused to know the nature of the charges alleged against him or her.[309] 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.[310]

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 ability of the prosecution 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.[311]

All jurisdictions have legislative requirements that particulars be presented on the indictment or other form in which the charge is lodged with the court.[312]

The *sufficiency* of particulars is decided by the court on a case-by-case basis.[313]

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 occurring 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.[314]

As a result, a charge must identify the essential factual ingredients of the offence,[315] which will usually include the time, place and manner of the accused's alleged acts or omissions.[316] The prosecution should provide as much specificity of the time of the alleged offence as is available in the circumstances of the case.[317]

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
- the offence has been repealed
- the age of the complainant is an essential element
- 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*,[318] 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.[319] 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.[320]

5.3.3 Persistent child sexual abuse offences

Background

The High Court's decision in *S v The Queen* gave impetus to legislative reform,[321] 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,[322] followed by Victoria and the Australian Capital Territory in 1991;[323] Western Australia in 1992;[324] Tasmania, South Australia and the Northern Territory in 1994;[325] and New South Wales in 1999.[326] 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',[327] 'persistent sexual conduct with a child'[328] and 'maintaining a sexual relationship with a child/young person'.[329]

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'.[330]

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'.[331]

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) sch 1 (*Criminal Code* (Qld)) was considered by the High Court in 1997 in *KBT v The Queen*[332] (*KBT*).

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'.[333] 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.[334]

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.[335] [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.[336]

Following the decision in *KBT,* Queensland and South Australia made substantive amendments to their persistent child sexual abuse offences.[337]

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.[338]

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.[339]

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.[340]

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.[341]

South Australia[342] and Tasmania[343] 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.[344]

Current persistent child sexual abuse offences

Table 5.1 outlines the current offence in each jurisdiction.

Table 5.1: Overview of current persistent child sexual abuse provisions

Jurisdiction	Title	Legislation	Summary of offence	Jury to agree on occasions	Retro-spective
New South Wales	Persistent sexual abuse of a child	*Crimes Act 1900*, 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	*Crimes Act 1958*, s 47A	3 or more separate occasions engages in conduct that constitutes a sexual offence against a child	Yes (*KBT* applies)	No
Queens-land	Maintaining a sexual relationship with a child	*Criminal Code*, 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	*Criminal Code*, 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	*Criminal Law Consolidation Act 1935*, s 50	2 or more separate occasions engages in conduct that constitutes a sexual offence against a child	Yes (*KBT* applies)	Yes
Tasmania	Maintaining a sexual relationship with young person	*Criminal Code*, s 125A	Maintains an unlawful sexual relationship with a child, involving more than 3 unlawful sexual act	Yes (*KBT* applies)	Yes
Northern Territory	Sexual relationship with a child	*Criminal Code*, s 131A	Maintains a relationship of a sexual nature with a child, involving more than 3 unlawful sexual acts	Yes (*KBT* applies)	No
Australian Capital Territory	Maintaining a sexual relationship with young person	*Crimes Act 1900*, s 56	Maintains a sexual relationship with a child, involving more than 3 unlawful sexual act	Yes (*KBT* 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 offence[345]
- 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)[346]
- the rules of procedural fairness are 'sufficiently flexible to accommodate different degrees of particularisation being required in different circumstances'[347]
- the amendment does not remove the trial judge's power to ensure a fair trial[348]

- 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 defence[349]
- the provision allowing the jury not to agree on two or more unlawful sexual acts does not offend Chapter III of the Commonwealth Constitution.[350]

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.[351]

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.[352] 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.[353]

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.[354]

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.[355] It appears that the draft Bill remains under consideration.[356]

Retrospective operation

Another difference between jurisdictions in persistent child sexual abuse offences is whether or not 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.[357]

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.[358] 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.[359]

Use of persistent child sexual abuse offences

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

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.[360] Across the 283 sentenced matters, the average number of offences per matter was 8.5.[361] However, it is unclear how many indictments with multiple offences had only one victim.[362] 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.[363]

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'.[364]

The New South Wales ODPP referred to the 'widely held notion that there is no particular advantage for the prosecution to use the offence'.[365] 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.[366]

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.[367] 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.[368]

In *R v Fitzgerald*,[369] 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.[370]

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.[371]

Queensland

In Queensland, the persistent child sexual abuse offence is regularly prosecuted. From 2011 to 2015, 365 prosecutions under the provision were finalised as follows.

Table 5.2: Prosecutions under section 229B of the Criminal Code (Qld)[372]

Year	Guilty verdict	Guilty plea	Discontinued	Not guilty*	Total
2011	6	47	16	2	71
2012	10	58	10	8	86
2013	12	41	8	13	74
2014	9	32	10	11	62

2015	9	50	4	9	72
Total	**46**	**228**	**48**	**43**	**365**

The majority (62 per cent) of these prosecutions under the Queensland provision were resolved by a guilty plea as 12 per cent of cases resulted in a jury verdict of guilty. In 12 per cent of matters, 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 it has the advantage where there are repeat occasions of abuse of enabling all the conduct that can be particularised in a general way to be 'caught up' within the charge.[373]

The South Australian Office of Crime Statistics and Research provided us with data on use of the provision.[374]

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.[375] 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.[376] It is not clear whether these decisions, and the November 2015 Court of Criminal Appeal decision in *R v Johnson*[377] 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'.[378]

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.[379]

We understand that the South Australian Government is reviewing its offence.

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.[380] During this period, convictions for maintaining a sexual relationship with a young person constituted 39 per cent (199) of all sexual assault convictions (509).[381] 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.[382] 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.[383]

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.[384] [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.[385] [Reference omitted. Emphasis added.]

5.3.4 The Victorian course of conduct charge

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).[386] The provision does not constitute a substantive offence but gives expression to multiple charges of the same offence on the indictment.[387] The Victorian course of conduct charge was based on a similar provision in England and Wales.[388]

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 incidence 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.[389]

The Victorian course of conduct charge is a charge for an offence that involves more than one incident 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'.[390]

The prosecution must prove beyond reasonable doubt that the incidents of 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.[391] 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.[392]

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.[393]

'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.[394]

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.[395]

A course of conduct charge can be charged regardless of when the incidents of the offence are alleged to have taken place.[396] 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.[397] 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.[398]

There are detailed jury directions that require the trial judge to explain the elements of the charge to the jury.[399]

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.[400] 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.[401]

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).[402]

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.[403] 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.[404]

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.[405] 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.

We are aware of one matter prosecuted under the Victorian course of conduct provision in relation to child sexual abuse, which resulted in a directed acquittal.

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*,[406] 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.'[407]

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.[408]

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'.[409]

5.3.5 Discussion

Commissioners agree with the concern that Sulan and Stanley JJ, of the South Australian Court of Criminal Appeal, expressed about the South Australian persistent child sexual abuse offence: that it is a 'perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence'.[410]

Commissioners are satisfied 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.

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

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.[411] 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, 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 *R v Johnson*[412] – that is, where a complainant cannot identify or distinguish any particular occasion of repeated abuse.

Victims or survivors may give evidence in ways that make charging under the Queensland offence difficult. We have 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.[413] 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.[414]

  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.[415]

- 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.[416]

  He said 'The difficulty is where the child is unable to distinguish details of one act from many others',[417] 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'.[418]

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, we note that the Victorian course of conduct charge is largely untested, and it is unclear how it will operate in practice.

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.[419]

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.[420]

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.

There may also 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.[421] However, the presumption is rebuttable.[422] 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 may be important given what we know about delays in reporting child sexual abuse, including institutional child sexual abuse.[423] Indeed, given the particularly lengthy delays in reporting abuse by a person in authority,[424] 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.

We are satisfied 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. Therefore, we are interested to hear whether the approaches reflected in the current Queensland offence and the current Victorian course of conduct charge can be improved upon and whether the requirement for particulars can be further restricted without causing unfairness to the accused.

5.4 Grooming offences

5.4.1 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'.[425]

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.[426]
- 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.[427]
- 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.[428]

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.[429]

The 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 or not 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).[430] 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.

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.[431]

5.4.2 Current grooming offences

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 the 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.[432]

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.

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 Australia[433] and the Australian Capital Territory[434] have grooming provisions that apply only to conduct that occurs electronically
- Queensland has a specific telecommunication provision as well as a broader grooming provision[435]
- Victoria and the Northern Territory also have provisions that may apply to online conduct.[436]

Many other 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.[437]

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'.[438]

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.[439] 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.[440] [Emphasis original.]

A person may be found guilty of these offences even if it was not possible for sexual activity to have taken place.[441]

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').[442]

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.[443] There does not appear to have been any judicial consideration of the amended provision. It may be that it is rarely used for online grooming because Commonwealth offences are used instead.

Queensland

In 2003,[444] Queensland introduced a specific offence for using the internet to procure a child under 16 years to engage in a sexual act.[445] 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.[446]

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.[447]

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.[448] It was based on the Queensland offence.[449] 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.[450] 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.

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 activity[451]
- grooming a child[452]
- meeting after grooming.[453]

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. The standard non-parole period for the grooming offence is five years, or six years if the child is under 14 years of age.[454]

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

> (3) 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.[455]

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.[456] 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.[457]

Broad grooming offences

Grooming offences that apply to any conduct aimed at facilitating child sexual abuse exist in Victoria,[458] Queensland,[459] South Australia[460] and Tasmania.[461]

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

Victoria

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.[462] Where the grooming conduct occurred online, Commonwealth offences were used.[463]

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.[464] 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.[465]

In 2014, Victoria introduced a specific grooming offence based on the recommendations of the Betrayal of Trust report.[466]

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

> 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 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.[467]

It applies to words or conduct, and it includes electronic communication.[468] 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 the then Attorney-General described the conclusion in the Betrayal of Trust report as being:

> 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.[469]

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.[470]

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.[471]

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'.[472]

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.[473]

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 amendable to a sexual activity'.[474]

The South Australian offence may have a narrower operation that 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.[475] 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.[476]

As with the South Australian offence, the Tasmanian offence applies to 'communication' and not the potentially broader 'conduct' covered by the Victorian and Queensland offences.

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.[477]

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 most of the matters of which we are aware, the grooming conduct could have been charged under narrower grooming offences, including Commonwealth offences. Most matters involve grooming using social media. However, several matters involve grooming conduct outside of the online environment, although only two of these matters do not also include a contact offence.

Queensland

The Queensland DPP has provided us with the data on convicted matters under the broad Queensland offence provision for the two years of 2014 and 2015.[478] The data are shown in Table 5.3.

Table 5.3: Convictions under section 218B of the Criminal Code (Qld) 2014–2015

Year	Guilty – jury verdict	Guilty – plea of guilty	Nolle prosequi	Total
2014	0	9	3	12
2015	2	38	6	46
Total	2	47	9	58

The high proportion of guilty pleas (81 per cent) may indicate that many of the matters involve grooming via telecommunications, which tends to produce strong evidence for the prosecution.

5.4.3 Discussion

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 'accidently' 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.[479]

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.[480]

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.

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 to date, we are inclined to think that there might be 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.

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.

We are also interested to hear 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.

It may be of benefit to include persons other than the child, as the Victorian offence does, in recognition of 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.

Of course, we recognise that grooming offences, including the broader grooming offences, would apply to non-institutional child sexual abuse as well as institutional child sexual abuse.

5.5 Position of authority offences

5.5.1 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.[481]

5.5.2 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.[482]

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 interest – 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 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.[483]

- **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.[484]

- **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. Relationships involving 'care, supervision or authority' are not defined.[485]

- **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.[486]
- **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.[487]
- **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.[488]

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 adult, 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.[489]
- **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.[490]

5.5.3 Discussion

We would like to hear from interested parties about any gaps in the recognition of relationships of authority as aggravating factors in child sexual abuse offences.

We would also like to hear from interested parties 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.

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 or not 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.

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.

5.6 Limitation periods on criminal prosecutions

5.6.1 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.

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 period of 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.[491]

A number of survivors have told us in private sessions of the difficulties they have encountered when they tried to pursue a criminal justice response to the abuse they suffered because of limitation periods. 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. A second step must be taken to enable those previously protected by a limitation period to be prosecuted.

5.6.2 Repeal of limitation periods

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.[492]

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 not clear that New South Wales took the further step of removing any immunity that had already arisen under the limitation period.

We have 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.

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.

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.

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.

5.6.3 Discussion

It seems to us fairly clear that, generally, any remaining limitation periods for charging child sexual abuse offences should be removed and that 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 section 5.2.

Of course, 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 case, 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 particularly 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. Removing them 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.

We welcome submissions that discuss the issues raised in Chapter 5.

In particular, we welcome submissions on:

- persistent child sexual abuse offences, including:
  - how best to enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively
  - whether the approaches reflected in the current Queensland offence and the current Victorian course of conduct charge can be improved upon
  - whether the requirement for particulars can be further restricted without causing unfairness to the accused
  - whether retrospective operation of the offences – as currently allowed in South Australia and Tasmania – is appropriate
- broader grooming offences, including:
  - whether the approaches reflected in the current Victorian and Queensland offences can be improved upon
  - whether grooming of persons other than the child should be included in the offence
- persons in position of authority offences, including:
  - whether there are currently any gaps in the recognition of relationships of authority as aggravating factors in child sexual abuse offences
  - whether all jurisdictions should adopt person in authority offences applying to children up to the age of 18 years, rather than allowing the relationship of authority to be a factor that can vitiate consent for 16- and 17-year-olds
- limitation periods that apply to criminal prosecutions, including whether:
  - any limitation periods or associated immunities remain in operation in any jurisdictions
  - there are any prosecutions that cannot proceed because of limitation periods or associated immunities
  - removing limitation periods and associated immunities would risk reviving any sexual offences that are no longer in keeping with community standards.

6. Third-party offences

6.1 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 6.2.

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 may be 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 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.[493]

After summarising some relevant examples from our case studies, the discussion below considers third-party offences in the following categories:

- failure to report
- failure to protect
- offences by institutions.

6.2 Case study examples

Many of our case studies reveal circumstances where abuse was not reported or where steps were not taken to protect children.

The following examples 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.

6.2.1 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 Mr 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 police[494]
- in relation to the second allegations of sexual abuse, both Mr Christopher Fry and Mr Ian Hunter of the Catholic Education Office, Diocese of Toowoomba (TCEO), should have ensured that the allegations contained in the draft disciplinary letter to Mr Byrnes were reported to the police[495]
- upon receiving allegations of child sexual abuse against Mr Byrnes in September 2007, the steps that Mr Hayes took to monitor Mr Byrnes's conduct were inadequate and inappropriate to

manage the risks that Mr Byrnes posed to children at the school.[496] Mr Hayes should not have allowed Mr Byrnes to continue in the position of student protection contact after he received the allegations against Mr Byrnes in September 2007.[497] 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 Mr Byrnes[498]

- after Mr Byrnes retired from his position effective 27 June 2008, Mr Hayes sought and enabled Mr Byrnes' reappointment as a relief teacher knowing of the allegations of child sexual abuse against Mr Byrnes.[499] Neither Mr Fry nor Mr Hunter reported the allegations of sexual abuse against Mr Byrnes to their supervisor, the assistant director of the TCEO, or to the director of the TCEO. This contributed to Mr 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 KA[500]
- Mr Byrnes was re-engaged as a relief or supply teacher at the school from 30 July 2008.[501] Between 30 July and 14 November 2008, Mr 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 Mr Byrnes was ultimately convicted took place during this period.[502]

6.2.2 Case Study 11: Christian Brothers

In Case Study 11 on four Christian Brothers' institutions in Western Australia, we found that:[503]

- 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.

6.2.3 Case Study 13: Marist Brothers

In Case Study 13 on the Marist Brothers response to allegations of child sexual abuse against Brother Kostka Chute, we found that.

- the Marist Brothers, through a senior Brother or Provincial, knew about Brother Kostka 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 schools[504]
- 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 Brother[505]
- 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 occurred[506]
- 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 1993[507]
- 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.[508]

6.2.4 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 M William Francis ('Frank') Houston:[509]
    - 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 Mr Kenneth Sandilands:[510]
    - Pastor Denis Smith had sufficient knowledge that Mr 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 Mr Jonathan Baldwin, a Youth Pastor at the church:[511]
    - Mr 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 Mr Baldwin and ALA
    - Dr Lehmann spoke to Mr 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 Mr 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. Mr Baldwin was arrested and charged a few days later.[512]

6.3 Failure to report

6.3.1 Introduction

Reporting offences have received recent attention in relation to institutional child sexual abuse, including through:

- Victoria's introduction in 2014 of its new offence of failure to disclose a sexual offence committed against a child under 16, in response to recommendations in the 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 4.3.2.
- 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.

6.3.2 The regulatory context

The criminal law is not the only means by which reporting can be required or encouraged, and it may not be 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.

Mandatory reporting

Mandatory reporting laws, requiring 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*.[513] 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.[514]

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.[515]

Most jurisdictions impose fines as the maximum penalty for failing to make a mandatory report.[516] 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.[517]

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'.[518] He identifies six prosecutions in five Australian jurisdictions.[519]

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.[520]

Victoria and the Australian Capital Territory are also establishing reportable conduct schemes.

6.3.3 Criminal law offences

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*[521] 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 …[522]

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.[523]

Defences to misprision of felony included:

- a limited right against self-incrimination, depending on the severity of the offence[524]
- if the person had a genuine belief that disclosing that information would endanger a third party or themselves[525]
- 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 abuse[526]
- where a person is a lawyer acting under legal professional privilege[527]
- where a person has made an honest and reasonable mistake of fact.[528]

Victims have been convicted of failing to report offences committed against themselves. In the 1959 Victorian case *R v Crimmins*,[529] 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 6.1.

Table 6.1: Date of abolition of misprision of felony by jurisdiction

Jurisdiction	Date of abolition of misprision of felony
Commonwealth	Not adopted in the *Crimes Act 1914* (Cth), which commenced on 29 October 1914[530]
New South Wales	25 November 1990[531]
Victoria	1 September 1981[532]
Queensland	Not adopted in the *Criminal Code* (Qld), which commenced on 1 January 1901[533]
Western Australia	Not adopted in the *Criminal Code* (WA), which commenced on 1 January 1914[534]
South Australia	1 January 1995[535]

Tasmania	Not adopted in the *Criminal Code Act 1924* (Tas) schedule 1 (*Criminal Code* (Tas)), which commenced on 4 April 1924[536]
Australian Capital Territory	22 September 1983[537]
Northern Territory	1 January 1984 – not adopted in the *Criminal Code Act* (NT) schedule 1 (*Criminal Code* (NT))[538]

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.[539]

A serious indictable offence is an indictable offence that is punishable by five years imprisonment or more,[540] which would cover most but not all current child sexual abuse offences.[541] 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.[542] 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.[543] 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.[544]

In *R v Crofts*,[545] 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.[546]

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'.[547]

The New South Wales Law Reform Commission also stated that 'there is very little case law on whether an innocent motive for concealment would provide a reasonable excuse under s 316'.[548]

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.[549]

In *R v Imo Sagoa*,[550] 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.[551] 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*[552] 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 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 chid 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, taken from the last four years in the Local Court and the last seven years in the District Court:[553]

- 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.[554]

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.[555]
- 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.[556]
- 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.[557]
- A woman witnessed a shooting murder by her partner but failed to report it to police.[558]
- 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.[559]
- A man played no active part in an armed robbery committed by friends in his presence and failed to report it to the police.[560]
- 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.[561]
- 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.[562]
- 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.[563]

Mr Daniel Noll, Director, Criminal Law Specialist, Policy and Strategy in the New South Wales Department of Justice, told the public roundtable that there are about 100 prosecutions under section 316(1) annually.[564]

Previous considerations of section 316(1)

The offence of concealing a serious indictable offence has been controversial.

In a report published in 1999, the New South Wales Law Reform Commission reviewed section 316 of the *Crimes Act 1900* (NSW) and questioned its effectiveness in generating information for the police.[565] 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'.[566]

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.[567]

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 a person disclosed to family members sexual offences committed against them as a child, the family members would commit the 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.[568]

No legislative amendments were made in response to the NSW LRC's report.

As discussed in section 4.3.2, 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'.[569] 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.[570]

The Royal Commission is not aware of any review of section 316(1) being conducted in response to the Police Integrity Commission's conclusion.

Victorian offence of failure to disclose a child sexual offence

The offence under section 327(2)

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'.[571]

'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 the public roundtable 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.[572]

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.[573]

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'.[574]

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).[575]

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.[576]

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.[577]

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 rite of confession or similar religious practice, provided that there is no criminal purpose involved in the confession; and information subject to legal professional privilege: section 327(7)(b). Confidential communications by victims to counsellors or medical practitioners are also subject to an exception: section 327(7)(c). Mr Byrne, Special Counsel, Criminal Law Review, 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.[578]

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.[579]

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(2)

As noted above, section 327 is a relatively new offence. 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.[580]

Background and issues in relation to section 327(2)

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.[581]

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.[582]

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.[583]

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.

While the offence in section 327 was enacted in response to both the Cummins Inquiry and the Betrayal of Trust report,[584] 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.[585]

One of the ways in which 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.[586]

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.[587]
- 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.[588]

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.[589]

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.[590]

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.[591] 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 section 6.4.2) and a broader failure to disclose offence.[592]

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.[593]

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.[594]

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.[595]

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.[596]

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.[597]

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.[598]

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.[599]

Ms De Cicco told the roundtable that the concerns raised by Dr Atmore 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.[600] 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.[601]

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.[602]

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.[603] Ireland introduced an offence targeting reporting of child abuse following a number of inquiries into the abuse of children in Catholic Church institutions.

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, then 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 or not 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 offence for priests who have received information about offences through confession.

6.3.4 Discussion

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.

The issue is 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.[604] As Ashworth states, 'loyalty can rarely be more important than bringing a serious offender to justice'.[605]

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), 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.[606]

However, for the reasons referred to in section 6.1, 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 the child sexual abuse offences to the notice of the 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'.[607] The 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[608]

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.[609]

The scope of a criminal offence

There are 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(2) 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.[610]

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.

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

An offence that targets child sexual abuse allows for much greater recognition of some of the complexities associated with child sexual abuse.

As the Victorian offence in section 327(2) 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 discourage from seeking services and support.

However, the discussion in section 6.3.3 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.

An offence targeting the reporting of all child sexual abuse extends beyond the focus of our Terms of Reference, although not to the same extent as the broader offence discussed above. However, it may 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 divert claims of abuse from state authorities.[611] The Cummins Inquiry noted that Victoria no longer has the common law duty to report crime to the police under misprision of felony.[612] 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.[613]

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.

A significant benefit of an offence that targets institutions is 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 that applies to those working or volunteering in institutions in relation to reporting institutional abuse because the people subject to the offence are a narrower category of people who 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 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 as the age at which the victim can decide whether or not they wish the matter to be reported, rather than adopting 18 years so as to cover all children. As discussed in section 5.5, 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.

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, it may 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.

We welcome 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 welcome 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.

Protection for whistleblowers

Another approach which might encourage reporting is protection for whistleblowers who disclose child sexual abuse, particularly institutional child sexual abuse.

The Education and Care Services National Law provides protection from reprisal for certain disclosures. Section 297(1) of the National Law provides:

> A person must not take serious detrimental action against a person in reprisal for a protected disclosure.
>
> Penalty:
>
> $10 000 in the case of an individual.
>
> $50 000 in any other case.

'Protected disclosure' is defined in section 296 of the National Law. It includes a disclosure where the person making the disclosure has a reasonable belief that 'the safety, health or wellbeing of a child or children being educated and cared for by an education and care service is at risk'. 'Serious detrimental action' is defined to include dismissal, involuntary transfer, loss of promotion and demotion.

A person who takes serious detrimental action against a person in reprisal for a protected disclosure is liable in damages, and damages may include exemplary damages: section 298. An injunction or order may also be sought to prevent or remedy detrimental action: sections 299 and 300.

Some jurisdictions have broader public sector whistleblower protection laws that apply to aspects of public administration. For example, the *Public Interest Disclosures Act 1994* (NSW) is designed to protect public officials who make public interest disclosures from detrimental action that is substantially in reprisal for making the public interest disclosure. In some circumstances, this might protect a person who discloses institutional child sexual abuse, although the categories of public

interest disclosure focus on such things as corrupt conduct, maladministration and serious and substantial waste. For example, disclosing the cover-up of child sexual abuse in a government-run institution might be covered.

The *Public Interest Disclosures Act 1994* (NSW) provides for a maximum penalty of 100 penalty units or imprisonment for two years or both for the offence of taking detrimental action against a person substantially in reprisal for the person making a public interest disclosure: section 20. Compensation, injunctions and other protections are also available for the whistleblower.

The need for whistleblower protection has not been raised with us as a significant issue. However, we have heard examples where people – including more junior staff – who worked in institutions and who were aware of allegations of institutional child sexual abuse did not report to the police or any other public authority. Some reported within their institution in accordance with the institution's hierarchy and sought action in relation to the abuse, but they did not report to the police or other public authority, even when the institution did not take action.

A criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action may encourage reporting.

6.4 Failure to protect

6.4.1 Introduction

Some of the concerns raised about what are said to be failures to report under section 316 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 target a failure to protect a child, or a group of children, from abuse, particularly in institutional contexts.

6.4.2 Victorian offence of failure to protect

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 Betrayal of Trust report.[614]

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'.[615] 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.[616]

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'.[617]

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.[618]

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.[619]

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.[620]

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.[621]

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.[622] [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.[623] 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.[624]

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.[625] [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.[626]

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.[627]

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.[628]

6.4.3 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.

6.4.4 Discussion

Many of our case studies, including the examples discussed in section 6.2, 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.

As discussed in sections 6.1 and 6.3.4, third-party offences raise the issue of whether the criminal law should impose positive duties on persons to take action. However, for the reasons referred to in section 6.1, there may be good reasons for the criminal law to impose obligations on third parties – including a duty to protect – in relation to child sexual abuse.

Where there are reporting offences – either the current offences in New South Wales and Victoria or any new offences, including any we recommend – senior staff in institutions may be obliged to report to police. However, these offences will only apply where the required level of knowledge or belief exists. There must also be knowledge or belief that an offence has been committed.

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 could apply to action taken or not taken before it is known that an offence 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.

Also, 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. For example, the guidance provided in the Victorian Government's fact sheet discussed above suggests that removing the person from unsupervised contact with children might be required together with reporting to the appropriate authorities.

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 service by adopting unnecessarily expensive or risk-averse behaviour.

The Victorian offence is targeted quite narrowly. 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 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 welcome submissions on an offence for failure to protect. In particular, we welcome submissions from institutions on whether the Victorian offence is appropriately targeted or whether it might have any unintended adverse consequences for institutions' ability to provide children's services.

6.5 Offences by institutions

6.5.1 Introduction

In July 2015, the Royal Commission published research it commissioned in relation to sentencing for institutional child sexual abuse. In the Sentencing Research, the researchers 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.[629] They note that the new Victorian offence in section 49C of the *Crimes Act 1958* (Vic) – discussed in section 6.4 – applies only to individuals, not to the organisation itself.[630]

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 Case Study 23 on Knox Grammar School, the issue of the culture of the school in relation to child sexual abuse during a certain period of time was raised.[631]

In Case Study 36 on the Church of England Boys School, in opening, Counsel Assisting said:

> The relationships between the five named offenders, and *whether there was a culture within CEBS that facilitated offending against male children* will also be the subject of evidence.[632] [Emphasis added.]

The scope and purpose for the hearing in Case Study 42 on the Anglican Diocese of Newcastle includes the following paragraph:

> The links between any institutional culture at St John's College, Morpeth and the perpetration of child sexual abuse ...[633]

We have not yet reported on these case studies.

6.5.2 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.[634] We addressed similar issues in relation to civil liability[635] and we also note the precedents available, particularly in the Victorian failure to protect offence.

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.[636]

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).[637] [References omitted.]

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.[638] [References omitted.]

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.[639] 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.[640]

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.

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 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.[641] [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.

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.[642] 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.[643] They discuss how compliance programs could be designed to address organisational failures.[644]

6.5.3 Discussion

There may be good reasons of principle why offences targeting institutions should be introduced. As the Sentencing Research states:

> 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' ...[645]

Institutions themselves may be 'criminogenic', in that they are likely to cause or produce criminal behaviour, or they may contribute to offending indirectly.[646] The Sentencing Research also suggests that criminal law is more appropriate than civil law for punishing and deterring wrongdoing because conviction carries with it serious consequences and social stigma,[647] which raises similar considerations to those we discussed in Chapter 2.

The Sentencing Research also points to the factors the Royal Commission identified in its *Interim report* as encouraging or influencing criminal behaviours by opportunistic perpetrators of abuse.[648]

In the *Interim report*, we described two key theories about environmental facts 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.[649] [Reference omitted.]

However, there is also 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 acknowledges 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].[650]

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 as 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.

However, the Sentencing Research also identifies that there might be significant symbolic benefit in criminal offences targeting institutions, even if they are not often prosecuted. The researchers state:

> Although the criminal law may be sparingly used in the future, due to the difficulties of proof and the conceptual problems that inhere in organisational responsibility, the proposed offences, and sanctions, should be valuable because of the moral statement they will make about what the community considers to be right and wrong. The criminal law plays a vital symbolic role in marking the boundaries of acceptable and unacceptable behaviour, whether it be of individuals or organisations.[651]

Independently of considering broad institutional offences, an institutional failure to protect offence (discussed above as negligently failing to remove a risk of child sexual assault) might be of value in supplementing an individual failure to protect offence such as the Victorian offence discussed in section 6.4.

It is possible that some failures to protect that the community would consider deserving of criminal sanction might escape punishment under an offence targeted at individuals because of more diffuse management and control structures within some institutions.

For example, this might arise if the failure to act to reduce or remove a risk arises from a combination of a manager (who does not have power to act) failing to pass on complete information to a management group or board (which does have power to act) which then fails to reduce or remove the risk. It might be difficult to prosecute the manager or the management group or board in these circumstances even though the conduct as a whole might warrant criminal sanction.

In considering institutional offences, it is also relevant to consider our recommendations in the *Redress and civil litigation report* in relation to the civil liability of an institution. In Chapter 15 of the *Redress and civil litigation report*, we discussed the civil liability of institutions for institutional child sexual abuse.[652] 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.[653]

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.[654]

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.[655]

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.[656]

In considering institutional offences, it is relevant to consider whether civil liability of the kind we recommended, 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.

We welcome submissions that discuss the issues raised in Chapter 6.

In particular:

- we welcome submissions on whether there should be a criminal offence in relation to failure to report and, if so, whether it should apply to:
  - all serious criminal offences
  - child sexual abuse
  - institutional child sexual abuse
- we welcome 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
- we welcome submissions as to whether a criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action would encourage reporting
- we welcome submissions on an offence for failure to protect
- we seek submissions from institutions on whether the Victorian offence of failure to protect is appropriately targeted or whether it might have any unintended adverse consequences for institutions' ability to provide children's services
- we welcome submissions on possible institutional offences, including:
  - whether institutional offences are necessary in addition to offences for failure to protect
  - 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.

7 Issues in prosecution responses

7.1 Introduction

Many survivors have told us in private sessions of their experiences in interacting with prosecutors. We have also heard evidence in a number of our public hearings 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.

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 section 2.4.4, 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 on 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.[657]

- In Case Study 33 on 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.[658]

In this chapter, we outline the current 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.

We then discuss each of the following topics, which we consider are of particular importance in ensuring that prosecution responses are as effective as possible for victims and survivors of institutional child sexual abuse.

- **Principles:** We identify 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.
- **Charging and plea decisions:** We outline the current prosecution guidelines on decisions to charge. We then discuss the importance to victims and survivors of charging and plea decisions and discuss how they might be made in a manner that encourages an effective prosecution response for victims and survivors.
- **DPP complaints and oversight mechanisms:** We discuss options for improving the transparency of DPP decision-making and whether complaints or oversight mechanisms might improve the effectiveness of prosecution responses to institutional child sexual abuse.

7.2 Prosecution guidelines in relation to victims

7.2.1 Introduction

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.[659] 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.[660] 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).[661]

7.2.2 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, whether or not 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.[662]

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.[663]

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.[664]

Information is to be given to victims about the following hearing outcomes:

- committal mention
- contested committal
- initial directions hearing
- trial
- plea
- sentence.[665]

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).[666]

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 that there is a general prohibition against publicly identifying the complainant.[667]

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.[668]

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.[669]

Information which the victim is entitled to receive must be provided within a reasonable time after the obligation to give the information arises.[670]

Western Australia

Prosecutors are required to make contact with the victim and provide ongoing information about the progress of the case. In particular, they 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.[671]

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.[672]

Victims must be informed of the outcome of finalised court proceedings in a timely way.[673]

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.[674]

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).[675]

7.2.3 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.[676] 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.[677]

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.[678]

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 7.5.

7.2.4 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 Witness Assistance Service conference, in which the court process and their role as a witness is explained, before they give evidence.[679]

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.[680] 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.[681]

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'.[682] 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.[683]

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.[684]

7.2.5 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, Victoria, 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.

In New South Wales the discretion to give reasons applies to decisions made in the course of prosecutions or of giving advice.

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.

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.

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.

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. 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.

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. The South Australian guidelines do not otherwise include provisions for providing interested parties with decisions.

The Northern Territory guidelines do not make specific provision for the DPP to give reasons for decisions. In relation to discontinuance, the guidelines state that reasons for discontinuance will not normally given. The DPP's consent is required before reasons are disclosed.

The Tasmanian Prosecution Policy and 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.[685] 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.[686]

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.

7.3 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.

7.3.1 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.[687]

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.[688]

The guidelines advise prosecutors that referrals should be made to NSW WAS in every case of substance, including a case of sexual assault.[689] 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.[690]

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.[691] 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
- communicating and coordinating with lawyers.

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 coping 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.[692]

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.[693]

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.[694]

7.3.2 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.[695]

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.[696]

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.[697] 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.[698]

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.[699] 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 them, 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.[700]

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.[701]

7.3.3 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.[702]

The Queensland guidelines require prosecutors to acquaint themselves with the needs of the special witness before the proceeding begins so that they can make an application to the court for appropriate orders about the way the evidence is 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.[703]

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,[704] 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.[705]

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.[706]

In Queensland, 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.[707] 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.[708]

7.3.4 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 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, to reduce the trauma they may experience during their involvement in the prosecution process.[709]

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.[710]

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.[711]

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.[712]

7.3.5 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.[713]

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.[714]

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.[715]

The South Australian WAS was established by the ODPP to ensure that all victims, witnesses and their immediate family members have access to information, support services and are aware of their rights and responsibilities when dealing with the criminal justice system.[716] 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, court 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
- advising victims of their rights, responsibilities and avenues for complaints

- providing education and training to ODPP staff, external agencies, other professionals and members of the community.[717]

7.3.6 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.[718]

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.[719]

7.3.7 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.[720]

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.[721]

7.3.8 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.[722] 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.[723]

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.[724]

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 or 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.[725]

7.3.9 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.[726]

7.4 Possible principles for prosecution responses

We have taken into account the many accounts we have received from victims and their families and survivors about their experiences of prosecution responses and the nature of interactions they may have with those involved in prosecution responses.

We consider 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.

Of course, prosecution services may consider that they already act, or aim to act, in accordance with such principles. However, there may be benefit in stating them so that they continue to receive priority in prosecution responses.

7.4.1 Aspects of prosecution responses

Based on the information we have and our consultations to date, we consider that the following general aspects of prosecution responses are 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.

Training in child sexual abuse issues

In section 3.5.2, 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.

Similarly to the discussion in section 3.5.2 in relation to police, it may improve prosecution responses if all those who may come into contact with victims and survivors have received some basic training about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular.

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 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 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.[727] 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.[728]

The South Australian Victim Support Service's submission 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.[729]

The discussion here focuses on the importance of continuity in the prosecution staff involved in the prosecution to the victim or survivor's experience of the prosecution response. Consistency in prosecution decisions, and early decision-making, are also particularly important not only for victims or survivors but also for the criminal justice system as a whole. This is discussed further in section 7.5 and Chapter 8.

We recognise the complexity of prosecution staffing, resources, and court timetables. 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.

However, it might be possible for prosecution agencies, recognising the substantial benefits for victims and survivors of consistency in prosecution team staffing, to try to facilitate consistency of staff involved in prosecuting child sexual abuse matters. While some team members might change during a prosecution, it might be possible to take steps 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.

Regular communication

We have heard from many survivors about the importance 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.[730]

Keeping complainants informed is likely to be key to complainant satisfaction. The South Australian Commissioner for Victims' Rights submission to Issues Paper 8 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.[731]

The South Australian Commissioner for Victims' Rights also referred to a 2013–2014 survey conducted by staff of the South Australian ODPP's WAS which asked respondents to rank the importance of services provided by the ODPP. The survey, which found a very high level of satisfaction with the ODPP amongst respondents, identified 'being updated' and 'legal process explained' as being of greatest importance to victim witnesses, other witnesses and family members of victims.[732]

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.[733]

Taking appropriate steps to maintain communications is not only important to the victim but it can also be critical for police and prosecutors. As already noted, keeping a complainant informed may help reduce complainant attrition, but it will also 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.[734]

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. It might be worth restating the importance of maintaining regular communication and keeping victims and survivors informed, in spite of these matters be addressed in current prosecution guidelines. Compliance with these aspects of the guidelines could be a worthwhile focus for any DPP oversight mechanisms we discuss in section 7.6.

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.[735]

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.[736]

WP also referred to the support he received from very good counselling services.[737]

The importance of witness assistance officers to successful prosecutions in child sex assault matters cannot be understated. In matters calling for comprehensive level of support, the involvement of a WAS may be essential in obtaining a conviction.[738] 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.[739] 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.[740]

WAS can contribute to a number of the aspects of prosecution responses that are of particular importance to victims, including by:

- contributing a professional understanding of the nature and impact of child sexual abuse to the prosecution response
- 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.[741]

It is also important that witness assistance staff be able to 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.[742]

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.

There might be benefit in emphasising the importance of WAS in keeping victims and survivors informed and in ensuring that they have access to other support services. They need to be properly resourced to perform these tasks, including with staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children, such as those operating in Victoria and Western Australia, could also be considered to assist particularly vulnerable victims.

Credibility of the complaint

As the evidence of the complainant is often the only direct evidence of abuse in institutional child sexual abuse cases, the defence is likely to attack the credibility of the complainant.

As stated in section 3.7.2 in relation to the issue of the survivor's credibility in the police response, we know that the impacts of child sexual abuse can include:

- social isolation and homelessness
- lower earning and socio-economic status, and difficulty maintaining employment
- imprisonment.[743]

We also stated in section 3.7.2 that experiences of addiction and mental health problems are common, and some survivors may have prison records by the time they are able to report the abuse they suffered as children to police.

In these circumstances, focusing on the credibility of the complainant may deny survivors access to criminal justice.

If a survivor's complaint is not 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 – they will be denied justice, even though the factors that count against them were caused by the abuse they suffered.

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 a prerecorded discussion for our public roundtable on DPP complaints and oversight mechanisms, Ms Alison Saunders CB, the DPP for England and Wales, said:

> 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.[744]

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.[745] Similarly, Mr Joseph McGrath SC, 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.[746]

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 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.[747]

However, we heard from representatives of Victoria and Queensland that police prosecutors in those jurisdictions now consider the credibility of the complaint.[748]

There might be benefit in stating the importance of focusing on the credibility of the complaint and not on the credibility of the complainant.

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.

7.4.2 Possible principles for prosecution responses

Taking account of the general aspects of prosecution responses discussed in section 7.4.1, the following could be considered as possible principles to inform 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.

7.5 Charging and plea decisions

7.5.1 Introduction

The most significant decisions that prosecutors make for victims and survivors – and for the accused – are decisions:

- whether or not 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 such circumstances, victims may feel that the seriousness of their personal experience is being downplayed by the justice system. In this section we will give examples of complainant experiences of decisions of this kind and seek submissions on how prosecution practices might be improved.

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'.[749] 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 …[750]

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.[751] She also said she was devastated when the charges relating to the other children were dropped.[752]

It is probably inevitable that in some prosecutions charges will be downgraded or discontinued based on the available evidence. Similarly, where police have not laid charges and the evidence is referred to a prosecutor to decide whether or not 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 under-resourced criminal justice systems 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.[753]

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.[754]

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 Case Study 36 on 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 that had been dismissed in respect of BYC.

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.'[755]

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.[756]

7.5.2 Prosecution guidelines in relation to key prosecution decisions

Australian prosecution agencies' guidelines include significant guidance on 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.[757]

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 or not the prosecution would be perceived as counterproductive – for example, by bringing the law into disrepute
- whether or not 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 or not 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 public interest considerations which only apply in some jurisdictions. These are outlined in Table 7.1.

Table 7.1: Additional public interest considerations in decisions to prosecute

Consideration	NSW	Vic	SA	Qld	NT	WA	ACT	Tas
The obsolescence or obscurity of the law	X	X	X		X	X	X	X
Whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive	X	X	X		X		X	X
Whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances		X		X		X		
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				X		X		
The likely effect on public order and morale			X	X		X	X	
Special circumstances that would prevent a fair trial from being conducted	X	X			X			
Whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory	X				X			
Whether or not the Attorney-General's or DPP's consent is required to prosecute	X				X			
Whether or not and in what circumstances it is likely that a confiscation order will be made against the offender's property	X							
The actual or potential harm occasioned to any person as a result of the alleged offence							X	
The need to give effect to regulatory priorities							X	
Whether the alleged offence is triable only on indictment								X

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.[758]

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.[759]

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.[760]

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.[761]

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.[762]

The decision to discontinue a prosecution

Each jurisdiction's prosecution guidelines contain provisions relating to the discontinuance of 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.[763]

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 and 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 …[764]

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 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.[765]

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 to 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.[766]

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'.[767]

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.[768]

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.[769]

Guidelines in most jurisdictions also provide that charge negotiations must be based on principle and reason, not on expediency.[770]

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.[771]

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.[772] While the wording varies between jurisdictions,[773] 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.[774]

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.[775]

Prosecution guidelines also include other considerations, such as whether the accused person has paid compensation in cases where there has been financial loss.[776] However, these considerations are not relevant to child sex offence 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 he or she is not guilty of an offence he or she is offering to plead guilty to.[777] In South Australia the prosecution is not to entertain a charge negotiation proposal if the accused maintains his or her innocence in respect to a charge or charges to which the accused has offered to plead guilty.[778]

The guidelines contain requirements to consult victims and investigating police officers which are discussed below.

Victim 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.[779] The guidelines in the Australian Capital Territory require consultation with victims where practicable.[780]

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.[781] 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.[782] 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. There does not appear to be a requirement for the recording of those consultations.[783]

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.[784]

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.[785]

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.[786] 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.[787]

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. Victims must also be informed of any subsequent decision to substantially modify the charges.[788] The Western Australian guidelines require that all victims be consulted where practicable.[789] Similarly, the guidelines in Queensland require that the views of the investigating officer and the victim or their relatives to be sought in all cases.[790]

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.[791]

The Tasmanian guidelines do not contain a clear requirement for formal victim consultation on charging decisions. However, 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'.[792] They also state 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.[793]

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.[794]

7.5.3 Discussion

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 discontinuance, 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.[795]

However, the distress experienced by victims the discontinuance of prosecutions or negotiated pleas is understandable.

During consultations for its report on encouraging early guilty pleas, the New South Wales Law Reform Commission (NSW LRC) was told that victims are often left 'feeling confused, distressed and disempowered when a defendant enters a plea of guilty on a charge that the victim feels does not accurately represent his or her experience'.[796]

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, it might be possible to take steps to reduce the risk that prosecutors' decisions to discontinue prosecutions or accept negotiated pleas cause significant distress to victims.

Getting the charges right

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 raise significant concerns. Victims and their families are obviously 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.[797]

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 where 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.[798] 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.'[799]

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:

> 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.[800]

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.[801] 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.[802]

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 of 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.[803]

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.[804] 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.[805] 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.[806]

Thus, early charge advice may assist in setting realistic victim expectations early in proceedings and minimising the number of times that charges are varied. It may also give victims greater confidence about the appropriateness of a charge and its likelihood of being proved in court if they are aware that the charge had been based on a prosecutor's early evaluation of the evidence.

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, an abuse 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.[807]

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.[808] Regardless of what explanation was in fact given to Mr Dodt, Mr Dodt's evidence illustrates how he feels 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.

7.5.4 Possible principles for prosecution charging and plea decisions

Given the issues identified above and based on what we have heard to date, the following could be considered as possible principles to guide prosecution charging and plea 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 the give their opinion on the proposal.

7.6 DPP complaints and oversight mechanisms

7.6.1 Introduction

We had not particularly anticipated finding significant problems in decision-making processes within the ODPPs in any of our case studies. However, two case studies, which we discuss in detail in section 7.6.2, 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 ODPP.[809] Case Study 15 revealed inadequacies in the processes of the New South Wales and Queensland ODPPs and a failure to comply with the Queensland DPP's guidelines on consulting with complainants.[810]

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.[811]

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.

DPPs make decisions that have significant impacts on complainants. As discussed in section 7.5, 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 7.2, 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.[812]

In addition to seeking submissions through this consultation paper, 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.[813]

7.6.2 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.

Case Study 15: Swimming

The prosecution of Mr Scott Volkers was one of the matters examined in Case Study 15.[814]

Mr Volkers 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 Volkers 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 Volkers 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 Volkers.

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 Volkers.

In July 2002, Mr Volkers 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 Volkers 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 Volkers. 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 Volkers; 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 are 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 Volkers 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.

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.[815]

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 house parents, 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 house parent.

In 1973 girls at the home told a house parent that Mr Henderson was sexually abusing boys at the home. The house parent told the superintendent of the home. Mr Henderson stayed on as a house parent. 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, 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.

7.6.3 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),[816] 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.

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.[817]

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.[818]

The CPS explains that the VRR scheme followed the Court of Appeal's decision in *R v Christopher Killick*[819] (*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.[820]

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.[821]

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.[822] 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 …[823]

The VRR scheme was subject to public consultation during its development.[824]

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.[825]

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'.[826] 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.[827]

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.[828]

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.[829]

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.[830] 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 …[831]

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.[832]

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.[833]

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.[834] Ms Boland told us that every lawyer who deals with a charging decision in rape and child abuse cases has to be specialist and must have undergone intensive training. Almost all of the lawyers in the Appeals and Review Unit have undergone this training.[835]

Reviewing prosecutors approach the case afresh to determine whether the original decision was right or wrong.[836] 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.[837]

In response to a question from Justice McClellan on 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.[838]

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.[839]

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.[840] 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.[841]

Ms Saunders told us that these conversations can be very difficult, but they explain all of the circumstances to the victim.[842]

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.[843]

If the victim remains dissatisfied or wishes to challenge the decision, the victim can apply to the High Court for a judicial review.[844] 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.'[845]

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.[846] 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,[847] 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.[848]

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.[849]

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.[850]

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.

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 (HMCPSI).

HMCPSI 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. (HMCPSI 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 HMCPSI 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.[851]

Mr McGinty told us that HMCPSI grew out of an internal audit process with 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.[852]

HMCPSI carries out the following types of inspections:[853]

- **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.[854]
- **Follow-up and reinspection activity:** These activities follow up on progress against previous recommendations made by the Inspectorate.
- **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.[855]
- **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* (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.[856]
- **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.[857] 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.[858]

HMCPSI also responds to specific requests from the Attorney General and the DPP to review specific matters.[859] Ms Saunders told us of one high-profile case in which her predecessor as DPP asked HMCPSI to conduct a review.[860] Mr McGinty told us of one inspection that HMCPSI has done at the request of the Attorney General.[861]

In 2006, HMCPSI was given clearer powers of entry and to obtain documents.[862]

Mr McGinty told us that HMCPSI currently has approximately 33 staff across two offices and includes both business and legal inspectors.[863] It is subject to a budget reduction of 15 per cent, which will require a reduction in staffing.[864]

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 information for itself.[865] 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.'[866]

Ms Saunders described HMCPSI as having been 'very useful'.[867] Ms Saunders told us that they – the DPP and CPS – see HMCPSI as 'a critical friend'.[868]

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.[869]

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.[870]

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.[871] 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.[872] 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.[873]

HMCPSI reports are provided to the Attorney General, other stakeholders and the media.[874]

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.[875] 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.[876]

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:**[877] 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.[878]

- **The Independent Assessor of Complaints (IAC) for the CPS:**[879] 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:**[880] 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.[881]

- **The National Audit Office:**[882] 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.[883]

- **Parliamentary committees:** As noted above, Ms Saunders told us that she speaks to parliamentary committees.[884] 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.[885] 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.[886]

> Mr McGinty told us that the Justice Committee can summons – and has in fact summonsed – him to appear, and that they may speak to him before they take evidence from the DPP.[887]

7.6.4 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.

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.[888]

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.[889]

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.[890]

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, in spite of 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.[891] 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.[892]

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.[893]

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'.[894] Speaking in 2004, Mr Bugg AM QC 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.[895]

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.[896] 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.[897]

- **Attorney-General's power to direct or request:** In all Australian jurisdictions, the relevant Act lists the DPP's functions or powers.[898] Under the Commonwealth,[899] Queensland[900] and Tasmanian[901] 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.[902]

- **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.[903] 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.[904] 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.[905] In Queensland, the Attorney-General has power to issue guidelines to the DPP but only in very limited circumstances.[906] Those guidelines may not be furnished in relation to specific cases.[907]

- **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.[908] In Victoria, the Attorney-General retains the power to discontinue a prosecution by entering a nolle prosequi.[909] 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.[910] In Western Australia and the Northern Territory, the DPP must not act inconsistently with the Attorney-General without the Attorney-General's consent.[911]

- **Annual reporting obligation:** Legislation in each Australian jurisdiction requires the DPP to prepare an annual report for each financial year.[912]

- **Director's Committee:** In Victoria only, there exists a Director's Committee comprising the DPP, chief Crown prosecutor and other lawyers.[913] Before the DPP may make a 'special decision', which includes a decision to discontinue proceedings or issue a no-bill,[914] the Director's Committee must advise the DPP on the decision.[915] 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,[916] and those reasons must be tabled in Parliament.[917] The Director's Committee also has other functions.[918]

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 QC 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.[919]

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 in 1989–1990, particularly in relation to the test for continuing with a prosecution.

Mr Bugg AM QC 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).[920]

Mr McKechnie QC 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 …[921]

7.6.5 Possible reforms

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.

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.[922]

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.[923]

Mr 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 QC 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.[924]

Mr Daryl Coates SC, the Tasmanian DPP, told the roundtable that the Tasmanian polices would be published 'very shortly'.[925]

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.[926]

In relation to the provision of written reasons, Mr Champion SC 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 SC said that he probably issues an average of about 30 letters giving reasons under the policy each year.[927]

Mr 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.[928]

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 made need to have when receiving reasons.

Mr Champion SC told that 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.[929]

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.[930] 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.[931]

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.[932]

Mr John Hinchey PSM, the ACT 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.[933]

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.[934]

At this stage, taking account of the discussion at the roundtable, it seems that all Australian DPPs should be able to implement the measures we identified as possible minimum requirements, if they do not already have them in place. That is, it seems that they should be able to:

- 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.

Given the discussion at the roundtable, it seems likely to be important also to provide an opportunity to discuss the reasons in person, before written reasons are provided, and it may also be important that this is done at a time and in a manner that ensures that the victim is provided with appropriate support, whether through WAS or otherwise.

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.

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 SC 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.[935]

Mr Kimber SC suggested that it is likely that he will move to provide victims with written advice about the review process.[936]

Mr Champion SC 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 SC himself as DPP.[937]

Mr Champion SC 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.[938]

Mr Byrne QC 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 QC as the DPP or his Deputy DPP.[939] Mr Byrne QC said that, if he has any concerns about the matter, he will form his own committee 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.[940]

Mr Byrne QC 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.[941]

Mr Byrne also agreed that the available processes should, and will, be set out in guidelines.[942]

Mr McGrath SC 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.[943]

Mr McGrath SC 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.[944]

Mr Coates SC 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 SC as DPP, and he will then make the decision.[945] Mr Coates SC 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.[946]

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.[947]

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.[948]

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.[949] 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'.[950]

In discussion at the roundtable, Mr Usher suggested that smaller offices allowed 'front-end direct contact' with victims, so that there were no tiers or layers as in the English model.[951] Even in Western Australia, Mr McGrath SC suggested that the smaller population and the smaller prosecution office makes decision-making processes quite different from the position in England and Wales.[952] Mr Jon 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.[953]

In answer to a question about whether the committee system for decision-making adopted in Tasmania might be of use in Victoria, Mr Champion SC 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.[954]

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.[955]

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 NSW 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.[956]

As in the discussion on minimum requirements, some concerns were raised about written reasons in a review process.

Mr Kimber SC 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.'[957]

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.[958]

While the complaints and oversight mechanisms applying 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.[959]

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, at this stage, it appears to us that providing a formalised internal complaints mechanism, allowing 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 – should be available.

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.

Of course, the complaints mechanism itself would probably need to 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.

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 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.

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 view 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. 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.

It seems clear from the roundtable discussion 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.

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.[960] However, as DPPs have been given prosecutorial powers by statute, the justification is now said to stem from the administrative law principles regarding what executive decision-making 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, insusceptible 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.[961] [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.[962] [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*,[963] 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*,[964] 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.[965] [References omitted.]

In the same case, Gaegler 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 insusceptible of judicial review, an insusceptibility recently described as having 'a constitutional dimension'[966]. 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'[967]. 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 with[968]. 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 court[969]. 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'[970].[971]

It follows that, given the constitutional element that has been articulated regarding the insusceptibility of prosecutorial decisions to judicial review, there may be constitutional difficulties with trying to make such decisions reviewable, though 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.[972]

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.[973]

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.[974] These problems arose from defendants seeking judicial review which delayed prosecutions, and he identified the High Court's decision in *Yates v Wilson*,[975] recognising 'the undesirability of fragmenting the criminal process' as putting a stop to the problem.[976]

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.[977] 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'.[978] 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.[979]

Mr McGrath SC, 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.[980]

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.[981]

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'.[982] 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.[983]

Mr Hinchey, the ACT 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.[984]

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.[985]

It seems reasonably clear that judicial review is not favoured, either by the High Court or by DPPs.

However, 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 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.

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.

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 polices 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 QC 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 QC said that the audit would be reported to the executive management team.[986] Mr Byrne QC 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.[987] Mr Byrne QC expressed support for publishing the results, probably through the annual report.[988]

Mr Kimber SC told the roundtable that the South Australian DPP was part way through an audit process looking at whether policies are being complied with.[989] Mr Kimber SC 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.[990]

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.[991]

Mr Champion SC 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 SC said that he did not see a difficulty in making the results of an internal audit public in the DPP's annual report.[992]

Mr McGrath SC 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.[993]

Mr Coates SC 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.[994]

Mr White SC 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.[995]

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 NSW 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.[996]

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 HMCPSI in England and Wales.[997]

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.[998]

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.

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.

Measures not currently being considered

At this stage, we are not 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.[999] Both proposals were controversial, with objections raised as to their potential impact on the independence of the DPP.[1000] Neither proposal proceeded.

The proposed Public Prosecutions Management Board would have overseen management, administrative and financial decisions of the ODPP.[1001] 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 specific matters.[1002]

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 welcome submissions that discuss the issues raised in Chapter 7.

In particular:

- we welcome submissions on:
  - the possible principles for prosecution responses and charging and plea decisions, including 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
  - whether there is sufficient liaison between prosecutors and police in relation to charging decisions
- we seek 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.

8 Delays in prosecutions

8.1 Introduction

Many survivors have told us in private sessions of their experiences in participating in trials. In a number of our public hearings, we have also heard evidence about the experiences of victims and their families and survivors in court processes. A number of submissions to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8) also told us of personal and professional experiences of prosecution responses during the trial stage of the prosecution.

We have heard accounts of both positive and negative experiences from these sources. We will consider issues raised in relation to giving evidence, joint and separate trials, jury directions and sentencing in chapters 9, 10, 11 and 12 respectively.

Regardless of whether the overall experience was positive or negative, many of those from whom we have heard have raised concerns about delays. Even where there the prosecution ultimately results in a successful outcome for the complainant in that the accused is convicted, a number of complainants have told us of the stress and distress they and those close to them suffered, sometimes for years, while the prosecution took its course.

For example, in Case Study 38 we considered the prosecution of Mr Philip Doyle, who was ultimately convicted of 38 child sexual abuse charges against five complainants. We heard evidence from Mr Mark Lawrence, one of the complainants, who stated:

> The total length of time of the criminal proceedings also took its toll on me. It took 10 years from my initial report to police for Doyle to be charged. It then took three years for Doyle to be convicted, and another two years for Doyle's appeals to be dismissed. This it [sic] a total period of 15 years. This prolonged my stress and frustration … The criminal process also had a financial impact on me. I used to own a mechanical workshop in New South Wales which I had to close for months at a time due to all the court hearings. By the time Doyle was finally imprisoned, I was owing tens of thousands in rental arrears. By the time the High Court appeal was over, I had lost my business.[1003]

A number of factors may contribute to the time it takes to complete a prosecution. These include some of the issues we discussed in Chapter 7, including lack of continuity in the prosecution team; and late charge negotiations and guilty pleas. There are also other approaches that may assist to address delay, in terms of both early allocation of prosecutors and case management processes within the courts.

Every state and territory has a different court structure and different procedural rules for dealing with criminal proceedings. The structures and rules affect not only child sexual abuse prosecutions but also all other criminal matters. While child sexual abuse matters are often given priority in the criminal justice system, including by the courts, we appreciate that the system must operate as effectively as possible to deal with all criminal proceedings.

It is probably unrealistic to think that we could recommend particular structures or processes that would be effective in eight states and territories, each with their own different system. However, there seem to be common themes and elements that might contribute to reducing delay and creating more efficient court processes and case management. These warrant further consideration.

We must also appreciate that delays might increase if court processes and case management do not become more efficient or if resources are not increased for the courts, prosecution and defence or both. We have been told that the Royal Commission and particularly our public hearings have encouraged more survivors to come forward and report to police. We have referred some matters to the police and are aware that some of these have resulted in prosecutions.

It is also likely that any recommendations we make on criminal justice, if implemented, will encourage more victims and survivors to seek justice through the criminal justice system. While some of the recommendations we may make might also have the effect of achieving more efficient prosecution responses, we must be alive to the possibility that the courts, prosecution and defence will face increased demands in responding to child sexual abuse.

It would reflect well on the criminal justice system that more victims and survivors are willing to engage with it in seeking justice. It will be important that the criminal justice system does not fail or discourage those who wish to seek justice by not keeping up with demand.

8.2 The extent and impact of delay

In most Australian jurisdictions, courts publish data on backlogs of criminal matters, usually expressed as the number of matters that are yet to be finalised with a life greater than 12 and 24 months. An upward trend in these numbers serves as an indication either that the number of prosecutions initiated in the court outstrip the capacity of the court to dispose of those matters or that the average duration of criminal trials is increasing, or in many cases both. However, these statistics do not give any indication of the length of delays in the court system.

We have considered data from New South Wales and Victoria as examples of delays.

In New South Wales, the Bureau of Crime Statistics and Research (BOCSAR) tracks delay for all matters finalised in the District Court. It records the median number of days between both the date of arrest and the committal hearing in the Local Court, and the committal hearing and the outcome.

BOCSAR statistics show a significant upward trend in delays for matters finalised by trial in recent years, with median delays from committal to outcome recording steady increases from 2010 as follows:

- 2010: 225 days
- 2011: 236 days
- 2012: 241 days
- 2013: 288 days
- 2014: 329 days.

Given that matters in New South Wales currently spend approximately 230 days in the Local Court before the committal process is completed, this suggests that a typical complainant in a District Court matter can expect a wait of more than 18 months from the arrest of the accused until there is an outcome.

In Victoria, the Criminal Division of the County Court provides monthly updates on the indicative time to trial from the initial directions hearing to the commencement of a trial for matters in Melbourne. The initial directions hearing occurs on the next sitting day after an accused is committed for trial, or later the same day if requested and possible. As at May 2016, the time to trial was eight months for all trials in which the defendant was in custody. For other matters, the time to trial ranged from nine months for a matter with an estimated duration of five days to 11 months for a trial with an estimate of 15 days.[1004] Comparable data is not published for regional areas.

We do not have comparable information on court delays for jurisdictions other than New South Wales and Victoria.

The research report *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research) analyses 20 years of data from New South Wales and South Australia. The researchers' analyses show that from 1994 to 2014:

- in the New South Wales higher courts, the average time from committal to finalisation for sexual offences was 9.9 months, with a median time of eight months[1005]
- in the South Australian higher courts, the average time from first appearance to finalisation was 5.8 months, with a median of four months.[1006]

As these periods of delay reflect 20 years of data, they may understate the current time frames.

We understand that the issue of delay may be less significant in smaller jurisdictions, although they may be subject to greater variability, as courts in these jurisdictions may be less able to absorb the impact of a small number of unusually long trials.

The data discussed above shows that delays are significant in Australia's two largest jurisdictions. There are reasons to fear that, without change, it may get worse. As noted by the Victorian County Court in its 2012–2013 annual report, it is probable that more prosecutions of historical child sexual abuse matters will emerge as a direct result of the work of this Royal Commission.[1007]

According to data recorded by the Australian Bureau of Statistics, the number of sexual assault reports in 2015 was the highest in six years.[1008] Support workers and advocates have suggested that, rather than indicating an upward trend in sexual violence, this may be attributable to increased reporting by victims following decades of under-reporting. The Chief Executive of the Sexual Assault Support Service Tasmania, Ms Jill Maxwell, noted that increased public discussion of sexual and family violence through forums such as this Royal Commission appear to have increased victims' confidence in police.[1009]

Given the increased public awareness of child sexual abuse by institutions arising from media coverage of our ongoing work as well as any reforms that governments may adopt based on our recommendations, it seems more likely that Australian jurisdictions will experience an increase rather than a decrease in reports of historical child sexual abuse.

In 2013, the Victorian County Court noted that the criminal trials that arise from such reports are likely to be legally complex and that the current resources of the court were unlikely to match the community demand for speedy disposition of such cases.[1010] We may be able to make recommendations that reduce some of the legal complexity of these cases, but it is likely they will continue to be complex cases for the courts.

Sexual offence matters already make up a significant proportion of court workloads in Australia. In the Victorian County Court, they made up 19 per cent of the court's case load and 41 per cent of trials during the period 2012–2013.[1011] We have heard anecdotal evidence from prosecution agencies that sexual offence matters currently make up some 25 per cent of their case loads.

Under these circumstances, even a moderate increase in reports of child sexual abuse is likely to test court systems and prosecution and public defence agencies. Unless governments are proactive about reducing delays in the criminal justice system, there may be significant consequences for the administration of justice in those jurisdictions where delays are already significant.

In sexual assault cases, a lengthy delay between charge and trial can contribute to complainant attrition – where prosecutions are discontinued based on the victim's wishes.[1012] As noted in Chapter 7, the prosecution guidelines in some jurisdictions state that requests from the complainant to discontinue a sex offence matter are to be accorded significant weight. Even in the absence of such guidance, the nature of many sex offence prosecutions means that there will often be no reasonable prospect of securing a conviction where the complainant is unwilling to give evidence.

A review of the most recent annual reports published by the New South Wales Office of the Director of Public Prosecutions (ODPP) shows that the wishes of the victim were the primary reason why it discontinued proceedings, with some 25 to 36 per cent of matters discontinued after committal for that reason.[1013] While it is unclear what proportion of those discontinuances were attributable to delays, it is likely to have been a factor in some of those matters.

In addition to prosecution outcomes, delays in the court system can have a negative impact on a victim's recovery from crimes.[1014] Informed by distorted depictions of the criminal justice system in popular media, most victims may not have a realistic understanding of how long the process takes, and they may take the perceived unresponsiveness of the system personally.[1015]

Delays can have a 'rollercoaster effect' on complainants: they prepare, under significant stress, for a hearing, only to have the trial adjourned, and they then have to prepare again for the new date.[1016] The criminal justice process may also be counter to the counselling the complainant is receiving, which may involve putting the abuse behind them, while preparing for a trial requires the complainant to remember the abuse in great detail.[1017]

The impact of delays may be amplified for young complainants:

> [There is] a need to see the accused convicted and to thereby receive validation. However this need is at odds with their worst fear that the accused will be exonerated and they will be named a liar. In addition, there is the wish to put the abuse behind them so they can move on with their lives and yet again, until trial, the children must constantly recall details in order to 'remember' as much about [their] sexual abuse experience as possible for their appearance in court. The longer the period between reporting and trial, the longer the child must live with such immense inner conflict.[1018]

Further, delays affect not only the complainants but also their families. In Case Study 38, we heard evidence of the difficulties faced by families in a number of cases when children disclosed abuse and their parents were told not to discuss the matter with them for fear of contaminating the child's evidence.[1019] These difficulties are exacerbated by delays in bringing a matter to trial, as it extends the period where parents feel like they cannot discuss with their children incredibly traumatic experiences that they, reasonably, fear will do their children long-term harm if not addressed.

In Case Study 38, we also examined the prosecution of CDV – a teacher at an independent school in Perth. In 2009 he was charged with 18 child sexual offences against five complainants, including CDX. He was convicted in June 2010 of 13 counts and was sentenced to imprisonment for five years, with a non-parole period of three years. He appealed the conviction and sentence in September 2010. The Western Australian Court of Appeal set aside the convictions for six counts, including those relating to CDX, in December 2011. After a retrial in August 2012, CDV was again convicted on these six counts and the original sentence was not altered.

For CDX, this represented a period of almost three years from reporting to outcome. During Case Study 38, we heard evidence from CDW, CDX's mother, as follows:

> The sexual abuse suffered by [CDX] and the entire legal process has had a dreadful impact on our family. We were unable to discuss aspects of the police investigation and criminal proceedings for fear of corrupting [CDX]'s evidence or jeopardising the case. This was very isolating and destructive for our family relationships at a time when we were most vulnerable and in need of support. I have also suffered deep depression and terrible bouts of guilt for failing to act more decisively on my initial concerns and suspicions. The whole ordeal has put enormous strain on my marriage.
>
> The first trial was scheduled in the middle of [CDX]'s university exams because the DPP misplaced the availabilities we provided when the trial was scheduled. [CDX] was stressed and found it difficult to study which caused further trauma in his life. The re-trial exacerbated the damage and shattered my faith in the legal system.[1020]

In Case Study 12, CDX gave the following evidence under the pseudonym WP:

> It was such a tough time leading up to the first trial because I was confronting something that was hidden for such a long time. Having to be so detailed about the abuse and honest in front of a lot of people in an open courtroom was very intimidating. Then to find out there was going to be an appeal was heartbreaking.
>
> When I had to give evidence at the second trial, it just brought up everything again – all the hurt and bad memories. By that stage, I was ready to leave those terrible facts behind me and move on, but I had to bring it all up again. I almost couldn't go through with it again.[1021]

The Delayed Reporting Research provides a number of case studies which illustrate the extent and impact of delays in prosecutions. For example:

- The Delayed Reporting Research's case study 5 involved a case listed in the District Court. The two male complainants of child sexual offences were required to attend court on a Tuesday. Legal argument about trial severance was expected but could not be heard on the day, as no judge was available. They were told to return the next day, and then again on the next day, due

to the lack of a judge. On the third day, a judge was allocated, legal argument was heard and the trials were separated, with one complainant's trial commencing that afternoon and the other listed seven months later. Both trials resulted in hung juries and prosecutions were discontinued, as neither complainant wished to continue.[1022]

- The Delayed Reporting Research's case study 3 involved delays in a summary matter. Charges of indecent assault of a 16-year-old complainant were prosecuted in the New South Wales Local Court as follows. The report to police was made in September 2013, and the accused was arrested one month later. The first mention at court was one month after the arrest and the first day of the hearing was six months after that, but the complainant did not commence giving evidence. The second day of the hearing was a further six months after the first day of the hearing. While the complainant completed her evidence in chief on that day, the matter was adjourned for a further six months before she could be cross-examined, as the defendant was reported to be unwell. The cause of the delays was simply that those were the first available court dates.[1023] This represents an 18-month period from the first mention in court to the most stressful past of criminal proceedings for complainants: the cross-examination. The complainant's evidence was not completed until six months after she started giving evidence, or 12 months after the first day of the hearing.

Some of the measures we discuss in Chapter 9 are designed to address the delays between reporting and giving evidence, at least for child complainants. However, even with such measures for those complainants who are given access to them, the time taken to complete a prosecution is likely to continue to be a significant source of stress and distress for complainants. It may even cause some complainants to withdraw before the prosecution is concluded.

Jurisdictions experiencing significant delays may already be close to the limits of what many complainants can bear without withdrawing from prosecutions. It may be particularly important in these jurisdictions to consider any measures that might at least stop the delays from getting worse.

8.3 Examples of current approaches

We are aware of some recent reforms and different approaches adopted in some states and territories in order to improve the efficiency of trials and to reduce delays.

8.3.1 New South Wales

In New South Wales, Division 3 of Part 3 of the *Criminal Procedure Act 1986* (NSW) contains numerous measures, introduced in 2009 and amended in 2013, that set out procedures for mandatory pre-trial disclosure by the prosecution and defence as well as powers for the court to order pre-trial hearings and pre-trial conferences.

The measures were a result of the work of the Trial Efficiency Working Group, which was established to identify the causes of the unnecessary length of criminal trials and to evaluate possible solutions. The working group identified a number of issues that contributed to delays, but of particular relevance here are the late identification of the issues to be determined at trial and the late appointment of prosecutors.[1024]

The working group recommended amendments to the *Criminal Procedure Act 1986* (NSW) to provide for a level of disclosure between the parties as well as the ability of the court to order pre-trial hearings and pre-trial conferences. These recommendations were designed to ensure issues were identified early and narrowed between the prosecution and the defence so that they did not prevent the trial from proceeding when it was set down to start or cause delays during the conduct of the trial.

Defence disclosure requirements were initially limited but were expanded in 2013. They now include a requirement to disclose to the prosecution any particular legal defences to be relied upon and points of law the defence intends to raise; and the facts, matters or circumstances included in the prosecution's disclosure which will be disputed at trial.

At a pre-trial hearing, courts may make rulings necessary for the efficient conduct of a trial, including but not limited to rulings on questions of law and the admissibility of evidence as well as ordering that a pre-trial conference be held. The purpose of a pre-trial conference is to determine whether the parties are able to reach agreement regarding the evidence to be admitted at trial. Within seven days of a pre-trial conference, the prosecutor and the defence must file a pre-trial conference form with the court which indicates the areas of agreement and disagreement between the parties. Parties cannot object to the admission of evidence indicated on a pre-trial conference form as not being in dispute without the leave of the court.

Very few issues can be definitely identified and resolved until the Crown prosecutor who is to conduct the prosecution is appointed and has considered the file. This is why the Trial Efficiency Working Group identified the late appointment of prosecutors as a contributor to delays.[1025]

In Case Study 38, we heard evidence about a recent initiative by the New South Wales ODPP – the Priority Action Initiative, which aims to appoint prosecutors early and to maintain continuity of the prosecution team through to the conclusion of the trial. Under the initiative, a Crown prosecutor or trial advocate is to be appointed early in priority matters, which include matters involving sexual offences committed against a victim who is under the age of 16 years at the time the proceedings are taken over by the Director of Public Prosecutions (DPP). The aim of the initiative is to enable important legal decisions such as the settling of charges, charge negotiations or the discontinuance of a matter to be made early in the proceedings. We have heard that, under the initiative, Crown prosecutors or trial advocates are often being assigned soon after the ODPP first receives charges.[1026] While the initiative is at an early stage, we understand that it is considered to be working well.

We have also heard about a trial of a 'rolling list court' in the New South Wales District Court in the Downing Centre, Sydney. This involves two permanent teams, each made up of a Crown prosecutor and prosecution solicitor, and a public defender and Legal Aid solicitor. Each team runs trials on alternating fortnights before a permanently assigned judge. The perceived advantages of the model are the early briefing of the Crown prosecutor and public defender, the ongoing relationship between the parties, and the ability of the 'out-of-court' team to focus on preparing and negotiating for the next fortnight of trials.[1027]

We understand that the system draws from the experience in regional courts, where prosecutors, defence and judges interact more closely due to geographic necessity, leading to a greater tendency

for communication and early identification of issues. The system will be evaluated by the BOCSAR once sufficient data is available, which may take some years.

In August 2015, the New South Wales Government also appointed two specialist judges to the District Court to hear child sexual assault cases throughout. The New South Wales Attorney-General told the Legislative Assembly that the two specialist judges underwent extensive training for their new roles.[1028] In answering a question on notice in relation to judges in the New South Wales District Court, the Attorney-General made reference to the new specialist justices for child sexual assault and referred to the Attorney-General's media release dated 5 August 2015.[1029] The media release says that the appointment of the two specialist judges 'will make access to justice faster and easier for victims of child sexual assault'.[1030]

In November 2015, the New South Wales Government introduced legislation to provide for a child sexual offence evidence pilot scheme to operate in the Downing Centre District Court and in the Newcastle District Court for three years from 31 March 2016 until 31 March 2019. The pilot scheme provides for prerecorded evidence and children's champions or witness intermediaries to be used by child witnesses in child sexual abuse cases. These reforms are discussed further in Chapter 9.

District Court Criminal Practice Note 11 provides for the operation of the pilot scheme in the Downing Centre District Court.[1031] It makes provision for all matters to which the pilot scheme applies to be listed for arraignment and case management at a Sexual Assault Pilot List call-over within 14 days of committal. The Crown prosecutor or trial advocate and counsel who intend to appear at trial for the accused are expected to attend that call-over. Meeting the court's expectation effectively requires early allocation of the prosecutor for trial and encourages early identification of issues between the prosecution and the defence.

Child sexual abuse matters that do not involve witnesses who are children at the time of trial will continue to receive some degree of priority in the sexual assault case list in the District Court. Under District Court Criminal Practice Note 6, sexual assault matters should be listed for trial within four months of the committal wherever possible and in no case later than six months from committal.[1032] The longer period of six months is said to allow for country areas where the court sits on a circuit basis. If there are more trials listed in a week than can be accommodated, the practice note provides for priority to be given to sexual assault matters, subject to cases where an accused is in custody on another charge.[1033] The practice note also encourages practitioners to notify the court as soon as possible if the accused intends to plead guilty so that the trial can be vacated.[1034]

District Court Criminal Practice Note 6 was issued by the former Chief Judge in April 2007. The data on delays in New South Wales, discussed in section 8.2, suggests that these time frames of four to six months from committal to trial are unlikely to be met, despite the priority given to sexual assault matters, including child sexual abuse.

8.3.2 Victoria

Victorian legislation also includes provisions intended to identify and address certain issues before the commencement of a criminal trial. The *Criminal Procedure Act 2009* (Vic) requires a party to a proceeding to notify the other party and the court if it intends to raise, whether before or during the trial, an issue related to:

- an issue of law or procedure that arises or is anticipated to arise in the trial, including an issue as to the admissibility of evidence
- an issue of fact or mixed law and fact that may be determined lawfully by a judge alone without a jury, including an issue as to the admissibility of evidence
- an application for an order that may be made in relation to the trial under any legislation or common law, including an application to quash a charge in the indictment
- any other issue with respect to the trial.

The court may hear and decide any of these issues before the trial, and it may do so by written submission with the agreement of the parties.[1035]

The *Criminal Procedure Act 2009* (Vic) also includes a provision intended to encourage early guilty pleas. Section 207 allows a court to indicate to the accused whether, if the accused pleads guilty, the court would or would not be likely to impose on the accused a sentence of imprisonment that commences immediately. If the court indicates that it would not impose a sentence of imprisonment and the accused enters a plea of guilty at the earliest opportunity, the court is bound by that indication.

In addition, in the County Court sex offences are managed in a separate list, and the County Court Criminal Division Practice Note PNCR 1-2015 includes specific elements which are aimed at maximising the efficient management of sexual offence trials. In almost all cases where a matter is to proceed as a trial, a standard timetable is set at the initial directions hearing which is expected to be complied with.[1036]

Further, at an initial directions hearing for a sex offence matter, both parties must be able to answer any questions relating to pre-trial issues such as whether the competency or cognitive impairment of the complainant is in issue, whether there will be an application for trial severance or whether any evidence sought to be relied upon by the prosecution will be objected to by the defence.[1037]

The Victorian Office of Public Prosecutions (OPP) has also operated a specialist prosecution unit – the Specialist Sex Offences Unit – since 2007 to provide a specialised approach to prosecuting all indictable sex offences. In 2011, an evaluation found that it:

- was recognised by all stakeholders as a significant reform which had made a real difference to the experience of victim survivors and the quality of sexual assault prosecutions
- supported significant training and advice to police and other government-based victim support services.[1038]

We understand that the Specialist Sex Offences Unit has now been narrowed and refocused. It no longer includes prosecutors but only specialist solicitors. We understand that sexual offences will now be handled by the entire OPP staff, with the most complex matters being handled by solicitors in the specialist unit. The Victorian OPP briefs many of its prosecutions to the private bar, although the smaller number of Crown prosecutors also prosecute sexual offences.

8.3.3 Western Australia

In the Supreme Court of Western Australia, there is a Voluntary Criminal Case Conferencing (VCCC) process which is offered before committal and may occur at any time after committal and before trial. If the parties agree to participate, a conference is held by a facilitator who has previously held judicial office.

The Western Australian Supreme Court's procedure provides a protocol for VCCC.[1039] The purpose of a VCCC conference is stated as follows:

> The purpose of a VCCC conference is to reach agreement, where possible, in respect of any aspects of the criminal trial process. It may include discussion about:
>
> (a) the strength of the prosecution case;
>
> (b) whether the current charge reflects the evidence in the prosecution brief;
>
> (c) the real matters in issue;
>
> (d) whether agreement may be reached about matters which are not in issue; and
>
> (e) any matters relevant to case management.[1040]

The protocol also includes the following provisions:

> In every case in which the State DPP is involved, he will ensure that prior to the conference the Court has the complete prosecution brief, the indictment (if any), a transcript of any interview between the accused and the police (if any) and the accused's prior criminal record (if any), so that these documents can be provided to the facilitator/s. This material should be provided to the Court no later than five (5) business days prior to the date on which the VCCC is to occur.
>
> In order to facilitate the process of VCCC, the parties are also encouraged to take the following additional steps:
>
> (a) the prosecution should serve on the accused and bring along to the conference a list of facts forming part of its case that it hopes or expects are not seriously in issue; and
>
> (b) the accused should serve on the prosecution and bring along to the conference a list of any formal admissions that he or she may be prepared to make.[1041]

Nothing said at the conference is binding, but the conference is intended to be a means by which the parties can reach an agreement in relation to identifying the issues for the trial, resolving evidentiary issues and making admissions. Discussions akin to charge negotiations may also occur.[1042]

A VCCC conference, where used, should encourage early allocation of the brief for the prosecution and defence, early identification and narrowing of the issues and early guilty pleas.

8.4 Possible options to address delay

There is rarely just one issue that causes delay in the criminal justice system. Rather, many factors interact with each other, and a number of aspects of the system may need to change in order to bring about a reduction in delay.

8.4.1 Specialist courts and prosecution units

A number of survivors and other stakeholders have suggested to us that there should be specialist courts to determine child sexual abuse matters. In order to obtain a better understanding of the evidence for specialist courts and specialist prosecution units, we commissioned Professor Patrick Parkinson AM of the University of Sydney to conduct a review of the literature.

We published the literature review, *Specialist prosecution units and courts: A review of the literature*, in March 2016. The literature review identifies the potential benefits of using specialist prosecution units and courts to deal with child sexual abuse cases. It considers what can be learned about the advantages and disadvantages of specialist courts generally, particularly from family violence courts.[1043]

The literature review found that the improvements associated with specialist units were often modest or difficult to quantify, and there was a paucity of both research and real-world institutions to examine, particularly in relation to child sexual offence courts.[1044] Also, as successful specialist court models generally involved multidisciplinary and multi-agency collaboration, it was difficult to identify the exact factors that drove the success or failure of such approaches.[1045]

The literature review found no available literature on courts dealing exclusively with child sexual abuse matters, although literature on courts dealing with sexual offences were identified in New York and South Africa.[1046] The research also evaluated literature on courts specialising in family violence, which were more common.

The literature demonstrates that South African sexual offences courts have been positively evaluated on numerous occasions and are currently being re-established due to evidence of significantly worsened outcomes following their abolition during the 2000s.[1047] The South African courts involved magistrates being rotated through the courts one week out of every six, with model guidelines dictating that prosecutors should remain with a case until its conclusion and be selected based on their ability to interact with complainants and relevant experience,[1048] although they did not necessarily have specialist training before commencing to work in the courts.[1049]

The South African courts were reported as leading to improvements in conviction rates, finalisation time[1050] and complainant satisfaction.[1051] In particular, complainants identified prosecutors providing them with emotional support and a sense that they were genuinely advocating their cause as factors which contributed to their satisfaction with the system.[1052]

A persistent theme of the benefits of specialist prosecutors, including the positively evaluated Victorian Specialist Sex Offences Unit, is having the same prosecutorial team allocated to handle a matter throughout the proceedings, especially if a prosecutor works closely with the investigators to build the case at the front end.[1053] In South Africa, the most positive results were recorded in one

sexual offences court where the same prosecutor handled the matter from the time of first appearance to its conclusion, leading to the prosecutor having an intimate knowledge of the case. This facilitated a proper relationship with the complainant at an early stage.[1054]

Of specialist courts in general, the literature review found that the real benefits were efficiencies arising from both expertise and resourcing.[1055] The literature review also noted that the success of specialist courts depended on being part of a larger response to the targeted offending, including a multidisciplinary and multi-agency approach.[1056] This makes it difficult to evaluate what makes a specialist court successful and also raises questions as to whether the same improvements could be achieved in a generalist court.

The most significant concern raised in the available literature on specialist courts and prosecution units is the burnout of judges and prosecutors. This concern may be magnified in the context of child sexual abuse matters, and we have heard from Australian prosecutors with significant experience in child sex matters that burnout is a very real problem. Also, a specialist court for child sex offence matters might experience difficulties in attracting the best judges and prosecutors, whether due to the confronting nature of the work or a reluctance to work in such a narrow field.[1057]

Compartmentalising a certain category of cases also creates the risk of creating a separate class of law, to the detriment of both child sex offence and general criminal cases. We have heard that a larger proportion of matters in regional courts are related to child sex offences when compared with metropolitan courts, with the result that judges sitting in regional courts often become experts in areas of law such as tendency and coincidence. It would be to the detriment of the criminal justice system in general for such expertise to be restricted to a certain class of matters.

Other problems include the inefficient allocation of resources. In South Africa, the number of court hours in the Sexual Offences Courts was often low,[1058] although, given the volume of sex offence matters currently before Australian courts, that scenario is unlikely here. Conversely, given the present demands on the courts in Australia's larger jurisdictions, greater efficiencies might be achieved if all judges remained generalists.

We have heard from participants in the criminal justice system that, in child sexual abuse matters, there are benefits where the trial judge is well versed in issues such as tendency and coincidence evidence, and severance. We have also heard support for the proposal that generalist judges and prosecutors should be given specialist training in child sexual abuse matters. However, we have not heard much support for the creation of child sex offence specialist courts.

As discussed in section 8.3, some Australian jurisdictions have introduced specialist measures to address sexual offences. In New South Wales, two specialist judges have been appointed to hear child sexual assault matters across the state. In the County Court of Victoria, sex offences are managed in a separate list, with the court's practice note dictating modified procedures for such matters. These measures may ensure that the benefits of specialisation are obtained to the fullest extent possible without the downsides of burnout, difficulty attracting the best judges and prosecutors and compartmentalising the development of the law.

As discussed in section 8.3.2, we understand that the Victorian OPP has restructured and narrowed its Specialist Sex Offences Unit. We also understand that the NSW ODPP used to operate a specialist sexual assault prosecutions team in the 1990s, but it was also disbanded. It has been suggested to us

that, given the volume of child sexual abuse and sexual assault matters being prosecuted, it is likely that a very significant number of prosecutors now prosecute sexual assault matters. A specialist unit is perhaps impractical to deal with the volume of such cases, and specialist training may be a better approach.

8.4.2 Early allocation of prosecutors

A number of discussions about inefficiencies in the criminal justice system identify the late briefing of Crown prosecutors, and the late involvement of prosecution staff in general, as a significant contributor to trial delays.[1059]

A common view we have heard expressed by professional stakeholders is that allocating prosecutors in general early in proceedings and having that team remain with the matter until its conclusion is a key measure which would alleviate many of the factors which contribute to both delays and complainant dissatisfaction with the court system.

In Chapter 7 on prosecution responses, we noted that the late appointment of Crown prosecutors was a significant contributor to complainant dissatisfaction with the criminal justice system. The New South Wales Law Reform Commission (NSW LRC) has noted that the early involvement of prosecutors would enable victims to be better informed about the case when it is in its early stages and to consult with the prosecution much earlier than present.[1060]

In addition to issues of general complainant satisfaction, the early allocation of prosecutors is important for:

- making sure the charges are correct
- early identification and narrowing of the issues
- facilitating disclosure and any negotiations which may encourage early guilty pleas.

These issues do not arise only in Australian jurisdictions. In 2014, the Rt Hon. Sir Brian Leveson, President of the Queen's Bench Division, was requested to conduct a review of efficiency in criminal proceedings in England and Wales (Leveson Review).

The Leveson Review identified a number of overarching principles for achieving efficiency in criminal proceedings, including the following:

- **Getting it right the first time:** As gatekeepers to the criminal justice process, police and prosecutors must make appropriate charging decisions based on the evidence.
- **Case ownership:** To maximise opportunities for case management, there must be one person who is identified to be responsible for the conduct of the case.
- **Duty of direct engagement:** Representatives from either side who have case ownership responsibilities should be under a duty to engage at the first available opportunity.

The early allocation of prosecutors is essential to achieving these principles.

In section 7.5.3, we discussed the importance of getting the charges right early in the process. Identifying and narrowing the issues is also important, as we discuss in section 8.4.5. No meaningful discussion can occur with the defence until a Crown prosecutor has been briefed, and no mechanism for the pre-trial identification of contentious issues can succeed without the early appointment of counsel for both the prosecution and defence.[1061]

The advantages of ensuring the earlier involvement of a Crown prosecutor include earlier engagement of the parties and a reduced likelihood that a matter will be adjourned or discontinued shortly before the trial date because the evidence is not strong enough.

We have heard that resourcing issues make it difficult for Crown prosecutors to be allocated to matters early. Where resourcing limitations make the early appointment of a Crown prosecutor impracticable, there may be alternative means of capturing at least some of the benefits.

In its 2009 report, the Trial Efficiency Working Group noted that in New South Wales all matters are allocated to a pre-trial unit following committal. The pre-trial unit consists of Crown prosecutors who review each matter. While issues between the defence and prosecution can be resolved at this stage or charge negotiations entered into, decisions made by Crown prosecutors during this phase are not binding on the Crown prosecutor who is ultimately briefed to run the trial. However, if the defence is in a position to enter into meaningful discussion on the proposed conduct of the trial, the ODPP can make arrangements for the matter to be allocated to a Crown prosecutor for the purpose of negotiations.[1062]

Such a process may not be possible in every jurisdiction. For example, the Victorian prosecution guidelines state the following:

> A Crown Prosecutor must not discuss resolution with an accused's legal representative unless the Crown Prosecutor is briefed to appear in the prosecution. An Office of Public Prosecutions ('OPP') solicitor must not discuss resolution with an accused's legal representative unless the OPP solicitor has conduct of the prosecution.[1063]

However, the Victorian OPP's practice of briefing many prosecutions to the private bar might prevent this policy being an impediment to early discussions.

In 2014, the NSW LRC produced Report 141, *Encouraging appropriate early guilty pleas.* It identified a number of issues with the New South Wales criminal justice system and suggested reforms to promote efficiencies and encourage appropriate early guilty pleas. One of the key elements the NSW LRC identified was the early involvement of prosecutors as well as a level of continuity of the prosecutor.[1064]

The NSW LRC reported that stakeholders expressed concerns during consultations that the ODPP would not be able to fund the early appointment of prosecutors.[1065] The ODPP's view, on the other hand, was that the NSW LRC's proposals could be resourced with existing allocations if efficiencies in other areas envisaged by the NSW LRC were realised.[1066]

If current levels of resourcing do not permit the early allocation of Crown prosecutors, a next best option might be implementing processes under which, upon request by the defence, Crown or senior prosecutors can be allocated to a matter to enter into discussions and negotiations, with the

explicit understanding that any decisions made will be binding on the Crown prosecutor who is briefed to appear in the matter at trial.

However, such a process would not achieve some of the other benefits of early allocation of a Crown prosecutor, including complainant satisfaction arising from continuity in the team.

8.4.3 Early guilty pleas

In Chapter 7, we discussed the importance of securing appropriate guilty pleas for the efficient operation of the criminal justice system as well as for victims who are spared the ordeal of giving evidence in a criminal trial.

If a matter is to be concluded by way of a guilty plea, it is better for the courts, criminal justice professionals, victims and often the accused for the plea to be entered as early as possible.

For the courts, where a plea of guilty is entered after a trial date has been set, the matter would already have been mentioned on multiple occasions in the court of summary jurisdiction, undergone committal proceedings (or equivalent proceedings in jurisdictions that have abolished committals), been arraigned in the trial court and been listed for trial. It is not uncommon for guilty pleas to be entered on the day of the trial. In such matters, a jury may already have been empanelled.[1067]

The probability of a significant number of late guilty pleas prompts courts to over-list matters, which creates uncertainty for complainants who are awaiting trial and creates an additional barrier to maintaining continuity in prosecution staffing. Over-listing is discussed in section 8.4.6.

For criminal justice professionals such as the police, prosecutors and legal aid lawyers, late guilty pleas represent significant wastage, as already limited resources are expended in preparing for a trial that does not eventuate.

For victims, a late guilty plea can contribute to profound emotional suffering. In the previous section dealing with delays in general, we discussed the often debilitating impact on complainants of the stress of waiting for a criminal trial. Given the typical time frames between committal hearings and trials that currently apply in Australian jurisdictions, a plea of guilty entered on the day of the trial can represent well over a year of unnecessary stress and uncertainty.

Finally, for the accused, a discount on sentence which recognises the utilitarian value of a guilty plea will be greatest when the plea is entered at the earliest possible opportunity.

It seems clear that appropriate early guilty pleas serve the interests of all participants in the criminal justice system.

The NSW LRC's Report 141, *Encouraging appropriate early guilty pleas*, identified a number of issues with the New South Wales criminal justice system and suggested reforms to promote efficiencies and encourage appropriate early guilty pleas.

According to the NSW LRC, the main obstacles to securing early guilty pleas are as follows:

- The prosecution serves part of the brief of evidence late.
- The defence expects further evidence will be disclosed closer to the trial.

- The defence believes that it is common practice for the prosecution to overcharge early and that the charges may well be reduced as the proceedings advance.
- The prosecution accepts a plea to a lesser charge late in the proceedings.
- Crown prosecutors with the authority to negotiate are not briefed until late in the proceedings.
- The defence believes that they will obtain better results in negotiations that occur before trial.
- Discontinuity of legal representation (on both sides) means that advice and negotiations are inconsistent.
- The defence perceives the sentencing court to be flexible in the way it applies a sentence discount for the utilitarian benefit of an early guilty plea that has occurred later in the proceedings.
- The defence is sceptical that sentencing discounts will be conferred on their client.[1068]

In order to address these issues, the NSW LRC proposed a blueprint for change to indictable proceedings which incorporated the following interdependent elements:

- **Early charge advice:** The ODPP should settle the charge before the matter proceeds, and there should be no expectation that the charge will be varied later in proceedings.
- **A framework for disclosure:** The NSW Police Force should give the ODPP, and the ODPP should give the defendant, an initial brief of evidence which contains the key available evidence to support early determination of the charge and defence assessment of the case.
- **Case management:** Local Court case management should replace the current system of committals and move the matter towards resolution.
- **Meaningful structured case management:** A mandatory criminal case conference should be held in all cases.
- **Sentence discount:** Statutes should provide a clear scheme of maximum sentence discounts for the utilitarian value of an early guilty plea which rewards early pleas and discourages late pleas.[1069]

We understand that the New South Wales Government has not yet responded to the NSW LRC's report.

The approach recommended by the NSW LRC is one possible model that governments might consider to encourage early and appropriate guilty pleas. Adopting some of the elements – such as early allocation of prosecutors and structured case management – might also go a considerable way towards encouraging early appropriate guilty pleas.

8.4.4 Committal hearings

As noted in section 8.4.3, one of the recommendations of the NSW LRC in its report on early guilty pleas was to replace committal hearings with a system of Local Court case management.

While some submissions to the NSW LRC suggested that abolishing committal hearings would result in savings to the criminal justice system, other submissions highlighted the benefits of retaining committals.[1070] For example, it was noted that, while rarely used, the testing of a witness by the defence typically had an impact on proceedings – it could generate a plea or a downgrading of the charge (although this may be of less relevance in child sexual abuse matters, with cross-examination of the complainant at committal greatly restricted if not prohibited in all Australian jurisdictions).[1071]

A number of jurisdictions, including England and Wales, New Zealand and Western Australia, have effectively abolished committal hearings in all matters in recent years.

The primary purpose of a committal is to have the strength of the evidence against the accused tested by a judicial officer. However, the NSW LRC's research indicated that the great majority of cases that did not proceed on indictment in New South Wales were discontinued after review by the ODPP, with more matters discontinued by the ODPP after committal than are discharged by a magistrate.[1072]

Also, perceived benefits of the committal process as identified to the NSW LRC by professional stakeholders predominantly relate to matters that are not related to testing the strength of the evidence against the accused.[1073] For example, earlier engagement of the parties and prosecution disclosure were identified as benefits of the committal process.[1074]

If this understanding is correct, it may be possible to abolish committal hearings in those jurisdictions that currently retain them while preserving their benefits, such as case management systems aimed at improving early identification of the issues and early appointment of counsel, through amendments to criminal procedure.

Abolishing committal hearings might also result in earlier pleas of guilty by avoiding any reluctance to enter a plea at the committal stage due to an expectation that charges may be downgraded upon review by prosecutors after committal. Replacing the committal hearing with alternative measures such as criminal case conferencing and the earlier involvement of senior prosecutors may be a more effective means of encouraging early guilty pleas.

However, a risk of abolishing committal hearings and commencing proceedings in the trial court is that delays will merely be shifted to the superior court. The NSW LRC's Report 141, *Encouraging appropriate early guilty pleas*, noted this has occurred to some degree in Australian jurisdictions where committal hearings have been abolished.[1075]

Related to the issue of committal hearings is the question of whether proceedings for child sexual abuse matters should be initiated in a summary jurisdiction at all. In New South Wales, matters that are committed for trial spend around 230 days in the Local Court before being committed to the District or Supreme Courts. However, the issue might again arise as to whether commencing proceedings in the District Court would simply shift this time delay to that jurisdiction.

8.4.5 Case management and early identification of the issues

A failure to establish the issues in dispute as early as possible in the prosecution process may lead to:

- time spent preparing to deal with issues that ultimately do not arise

- the presentation of evidence of little probative value
- delays in the trial to deal with legal issues that could have been identified earlier and dealt with before the trial commenced
- longer trials, increased burdens on court resources, and increased delays.

Both the Trial Efficiency Working Group and the Leveson Review highlighted the need for the early identification of issues to address trial delays. The working group noted that in many cases it is not until after the jury has been empanelled and the trial commenced that any discussion of contentious issues takes place, and in some criminal trials the real issues in dispute may not become apparent until after the close of the prosecution case.[1076]

The Leveson Review identified as an overarching principle for achieving efficiency in criminal proceedings the need for consistent judicial case management, in that the court must be prepared to robustly manage its work, and all parties must be required to work to identify the issues to ensure that court time is deployed to maximum effect.[1077]

The Royal Commission has heard that many child sexual abuse trials commence with an extended period of legal argument in the absence of the jury, witnesses and complainant. Where the argument relates to an application for trial severance which is successful, some complainants may be informed that their trial will be delayed by several months. This can cause great distress for complainants and witnesses who have prepared to give evidence, only for their involvement to be postponed for an indeterminate but potentially lengthy period.

In addition to legal arguments related to issues such as severance, late applications by the defence for access to privileged sexual assault communications may add additional delays before the commencement of the trial.

Where the complainant in a sexual assault matter has received professional counselling to deal with the psychological impact of the crime, the defence may seek access to communications between the complainant and the counsellor to assist with their preparations for trial and potentially to use against the complainant during cross-examination. While the approach taken in each jurisdiction differs, all Australian jurisdictions other than Queensland have specific legislation protecting such communications by making them privileged. The Queensland Government has accepted a recommendation by the Special Taskforce on Domestic and Family Violence in Queensland to adopt the New South Wales model. The Queensland state budget for 2016–17 includes an allocation of $2.2 million over four years for the implementation of a sexual assault counselling privilege.[1078]

In New South Wales, the privilege is absolute during preliminary proceedings such as committal proceedings and bail proceedings and qualified in proceedings which relate to the trial or sentencing, including pre-trial and interlocutory proceedings.[1079] For proceedings where the privilege is qualified, a person cannot seek access to communications without making an application for the leave of the court,[1080] with the court making a determination based on considerations such as the probative value of the material and the public interest in preserving the confidentiality of protected communications.[1081]

Tasmania is the only jurisdiction in which the privilege is absolute in all proceedings.[1082] In all other jurisdictions, applications for access to such material during phases of the proceeding where the

privilege is qualified are likely to contribute to further delays unless the defence's intention to seek the material is identified early in proceedings and the matter is determined early and well in advance of the trial.

In addition to leading to protracted legal argument before the trial commences, a failure to identify the issues undermines the efficiency of the trial itself. It increases the chances of evidence of little relevance or probative value being called, leading to longer trials. This increases burdens on complainants and witnesses and also contributes to jury fatigue and obfuscation of the meaningful evidence on which the jury should be making its decisions.

Also, unless defence counsel and the judge have a clear understanding of the issues in dispute in the trial, there may be unnecessary and irrelevant cross-examination of prosecution witnesses. It will be more difficult for judges to intervene in this cross-examination where the issues in dispute have not been clearly identified in advance.

Further, where the issues in dispute are not identified before the trial, estimates of trial durations will be uncertain, limiting the ability of prosecution agencies to provide continuity of staffing and making trial listing practices more difficult for the courts.

Pre-trial and other case management mechanisms may help courts to manage some of these difficulties.

As discussed in section 8.3.1, legislation to support pre-trial case management exists in New South Wales, but it may be underused. The NSW LRC noted that this level of case management in the District Court rarely occurs. It attributed this to a lack of judicial resources.[1083] The child sexual offence evidence pilot scheme discussed in section 8.3.1 appears to envisage a high level of case management, and it may provide a useful example for the benefits of – and any problems with – greater use of case management in child sexual abuse trials, including those that do not involve child witnesses.

We welcome submissions on mechanisms in other Australian jurisdictions which aim to achieve early identification of issues at trial.

8.4.6 Trial listing practices

A number of stakeholders have told us that court listing practices can operate as impediments to maintaining continuity in prosecution staffing.

In the interests of efficiency, courts often over-list matters on the pragmatic assumption that many matters will be discontinued or resolved by a plea of guilty shortly before or on the day of the trial. On occasions where this assumption is not borne out, it can result in matters not being reached on their listed trial date, leading to uncertainty for complainants.

While it is typical for child sex abuse matters to be given a high listing priority by the courts, we have heard that it is still possible for child sex abuse matters not to be reached on their listed trial date due to over-listing practices. In some cases, this will mean the matter is heard later that week. In other cases, the matter may be adjourned, possibly for months, leading to significant further delay.

An adjournment in these circumstances can result in a different prosecution team then being assigned to the matter due to scheduling conflicts for the existing team, resulting in further uncertainty for complainants.

Similarly, in jurisdictions where matters can be listed as 'back-up' trials, there can be situations where a judge becomes available to hear a back-up matter and a child sex abuse matter is allocated to the judge, but the existing prosecutor is unable to run the trial due to a scheduling conflict.

In addition to delays for the complainant, listing practices can present difficulties for prosecution agencies and defence lawyers. Over-listing means multiple cases must be prepared for trial, some of which will not proceed on the listed date, leading to wasted resources.[1084] Further, Crown prosecutors may be reassigned to different matters at the last minute and may disagree with the outgoing prosecutor as to which charges are most appropriate on the face of the evidence. This contributes to the reluctance of defendants to enter pleas at the earliest opportunity – there may be a possibility of a downgraded charge closer to the trial date.[1085]

Over-listing is not unique to Australian jurisdictions. The Leveson Review noted that over-listing practices in courts in England and Wales had the effect of ensuring maximum utilisation of the courts, at the cost of ineffective trials. For example, over-listing meant the advocate who attended at the preliminary hearing was frequently not instructed for the trial, leading to difficulties in maintaining continuity, creating unnecessary duplication of work[1086] and contributing to a lower standard of advocacy due to inadequate preparation.[1087]

It may not be sensible for courts to change their practice of over-listing. It is a pragmatic approach which ensures maximum use of limited court resources. However, it is also a practice that can hamper the efficacy of other measures that might reduce delays in the court system. Some of the other options we have discussed above, if successfully implemented, might reduce the need for courts to rely on over-listing as a means of managing high case loads and limited court time.

8.5 Discussion

The issues and possible options we have discussed in relation to delays in the criminal justice system have significant and complex interactions with each other. For example:

- trial durations may be improved by the early identification of the issues at trial
- early identification of the issues at trial is only possible with the early involvement of Crown prosecutors
- failure to identify the issues early leads to uncertain estimates of trial duration, which acts as a barrier to continuity of prosecution staffing
- lack of continuity and the late appointment of Crown prosecutors in general contributes to a lack of early guilty pleas, as the defence may have an expectation that charges might be downgraded upon a review of the evidence by the Crown prosecutor appointed for the trial
- late guilty pleas contribute to overall delays in the system
- securing appropriate early guilty pleas requires the early involvement of Crown prosecutors

- the expectation of late guilty pleas can lead courts to over-list trials for hearing
- over-listing of trials for hearing is a barrier to continuity of the prosecutor and prosecution team and it may deplete prosecution resources.

These problems have been identified before. However, a lack of resources for the key participants, particularly courts and prosecution agencies, may make it difficult to implement reforms.

We acknowledge that some states and territories do not have particular problems with delay, or at least not to the same extent as the larger jurisdictions, in relation to child sexual abuse trials.

The differences between jurisdictions that are experiencing unacceptable delays may also mean that solutions in one jurisdiction may not work in other jurisdictions. The interactions between different aspects of the criminal justice system also mean that the problem of delays can be tackled from a number of different directions.

Given these jurisdictional differences and the complexities involved, it may not be feasible for us to make detailed recommendations about how eight very different prosecution and court systems should operate.

However, it may be that some principles can be identified, such as:

- the importance of reducing delay
- the importance of allocating prosecutors as early as possible
- the importance of the Crown – including subsequently allocated Crown prosecutors – being bound by early prosecution decisions
- the importance of securing appropriate early guilty pleas
- the importance of determining preliminary issues before trial.

We welcome submissions that discuss the issues raised in Chapter 8.

In particular, we welcome submissions on:

- the possible options for addressing delays in prosecutions discussed in Chapter 8
- any other possible options to address delay
- 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.

9 Evidence of victims and survivors

9.1 Introduction

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

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

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

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

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

Questioning that prevents the complainant from giving their evidence effectively may lead to significant injustices. As discussed in Chapter 2, the criminal justice system is an adversarial system. 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.

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

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

> At the most fundamental level, in order to participate in the criminal justice process, children and witnesses with cognitive impairments who allege sexual abuse must be able to give a comprehensible account of what has happened. This also means that they must be able to comprehend questions they are asked and communicate comprehensible answers to

questions. These matters will determine whether they can be heard at all, both in the investigative stages of the criminal justice process and at trial.[1088]

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

The Royal Commission has heard that children and people with disability may face significant challenges as complainants of child sexual abuse. The barriers for people with disability when engaging with the criminal justice system have been confirmed in recent reports and inquiries. Barriers include a lack of support programs and negative assumptions about the reliability of their evidence.[1089]

Children with disability are a particular concern for the Royal Commission. High levels of contact with institutions and dependency on professionals for medical treatment and other support often place children with disability in institutional contexts where they may be at higher risk of sexual abuse. The Australian Institute of Health and Welfare reported that in 2012 – the most recent year for which data has been reported – an estimated 171,000 children under 15 years of age in Australia lived with severe or profound disability.[1090]

Research suggests that children with disability – especially those with intellectual disability, cognitive disability, or additional communication needs – are at significantly increased risk of abuse, which includes sexual abuse.[1091] The Royal Commission has 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.

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

As noted in Chapter 2, under the New South Wales reportable conduct scheme, the NSW Ombudsman receives notifications from institutions that are required to report allegations of a child protection nature made against employees of government and certain non-government agencies. Data collected indicates that children with disability are involved in a disproportionately high number of allegations of abuse, yet they are significantly under-represented in cases of abuse being investigated in the criminal justice system.[1092]

In this chapter, we:

- discuss examples from the second week of our public hearing in Case Study 38 in relation to criminal justice issues

- examine the availability of 'special measures' and their use
- examine other issues that arise for complainants at trial, including competency testing and courtroom questioning
- discuss possible reforms to help ensure that the best evidence is available for juries in child sexual abuse matters.

9.2 Examples from Case Study 38

In the second week of Case Study 38, we heard a number of examples of the difficulties facing children and people with disability, and their families, in participating in the criminal justice system. We also heard from Mr Sascha Chandler, who outlined the difficulties that adult survivors face in reporting to police and participating in a trial.

9.2.1 The case of CDE

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

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

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

CDC was also interviewed by police. However, police did not attempt a formal interview with CDD after they were unable to communicate with him, either through his mother or directly. CDE's mother, CDB, gave evidence that they did not know that they had the right to offer suggestions to the police about how to communicate with CDD – for example, by using a speech therapist or someone who CDD trusted.[1093] Detective Sergeant David Crowe, who did not take part in the investigation of CDA but is now a team leader of a Sexual Assault and Child Abuse Team in ACT Policing, agreed that the police officers who participated in the investigation did not try to communicate with CDD either in writing or with the aid of the speech device that CDD had previously used with his parents and said that they should have done so.[1094]

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

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

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

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

CDB gave evidence of the impact that the experience had on her family. Her children have had a number of mental health issues relating to the incident and the family does not use any external carer support services, meaning CDB now devotes all of her time to looking after her own children. A couple of months after the trials ended, CDE told her, 'I know why [CDA] got off mum. It was my fault'.[1095]

CDE later told her that a teacher getting angry with him was 'like being cross-examined'. CDB also said that, had an intermediary scheme been available, this would have been 'incredibly helpful' for CDE, particularly to avoid his becoming confused during cross-examination.[1096] Intermediaries are discussed in sections 9.4 and 9.5.

We also heard evidence from Mr Jonathan White SC, the Director of Public Prosecutions for the ACT, who noted that the ACT provides for the recorded investigative interview of child complainants and witnesses to be used as evidence in chief at trial as well as the remote location prerecording of the cross-examination of complainants in a pre-trial hearing, in the absence of the jury.[1097]

Mr White SC also noted his view that the cross-examination of CDE used a 'not unusual' practice of repeating a series of propositions until the witness accedes to the proposition. He said this style of cross-examination can 'work' with children as they tire, lose energy and effectively start agreeing with the propositions put to them.[1098] Mr White SC also noted that the cross-examination involved closed questions and language beyond the understanding of CDE.[1099] Mr White SC also expressed the view that an intermediary would have been of benefit in the cross-examination.[1100]

9.2.2 The case of CDI

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

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

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

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

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

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

We heard evidence from CDG, who is the mother of CDI, about her experiences of dealing with the police and prosecutors and the impact of the criminal proceedings on CDI and other members of her family. CDG felt devastated when the charges against CDF were ultimately dropped. She said that she is 'terrified of the day that [CDI] comes to realise that his account of [CDF]'s abuse was not 'good enough' for the South Australian judicial system'.[1101]

CDG also gave evidence that the officers who interviewed CDI did not make any adjustments to take into account CDI's disability or use any aids to help him give his evidence.[1102]

We also heard evidence from Detective Superintendent Mark Wieszyk, who did not take part in the investigation of CDF but is now the Officer in Charge of the Special Crimes Investigation Branch in South Australia Police. Detective Superintendent Wieszyk gave evidence about the police involvement in the investigation and charging of CDF. He noted the difficulties that can arise for children with disability who require a support person, as their preferred support person may be a potential witness in the case.[1103]

Detective Superintendent Wieszyk also noted the then approaching commencement of the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA), which provides for additional communication assistance for vulnerable witnesses.[1104] The Act is discussed further in section 9.5.

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

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

> [They] stemmed from the requirement of proving a specific incident, as distinct from some generic wrongdoing, in circumstances where the children's ability to recount detail consistently was seriously compromised.
>
> Throughout the consideration of the matter, the prosecutors involved approached the matter on the basis that the allegations were such that illegal conduct had likely taken place. The difficulties lay in particularising a charge or charges and being able to establish them to the criminal standard.[1105]

9.2.3 The case of CDL

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

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

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

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

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

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

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

We heard evidence from CDK, CDL's mother. CDK stated that, despite the police interview in 2009 being a positive experience due to the professionalism of the police officers involved, in her view further advances could be made with additional training for police regarding communication difficulties and disabilities; and opportunities for expert evidence regarding specific disabilities, such as autism, to be given in court.[1106]

We also heard evidence from Mr Stephen Fontana, Assistant Commissioner, Crime Command, of Victoria Police. Assistant Commissioner Fontana gave evidence regarding the investigation of CDL's

allegations, the efforts police made to obtain a statement from CDL, the decision not to charge CDJ, and the protocols Victoria Police have regarding communicating with people with a disability.

9.2.4 The cases of CDO and CDQ

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CDN gave evidence that 'The biggest issue for me is that the criminal justice system wasn't set up to allow my daughter to share her story. She was so little that she was denied a voice'.[1107]

CDP gave evidence that:

> The present criminal justice system forces parents of child abuse victims to decide between two options. Parents can either expose their children to the trauma of participating in the criminal justice system in order to achieve justice by putting paedophiles in gaol to prevent harm to further children. Alternatively, parents can allow paedophiles to remain free in order

> to prevent the criminal justice system from causing further harm to their own child. In my mind, that will never be a fair and just system.[1108]

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

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

Mr Huw Baker, the Crown prosecutor briefed to appear in the prosecution of CDM, gave evidence about the conduct of the prosecution, including the steps taken to try to obtain evidence to support the charges against CDM to the required standard of proof, and the requirements for particularising charges. Mr Baker outlined that the evidence of the young girls was such that it was difficult to say precisely when or how often the abuse had occurred. He said this would be a problem if the girls were cross-examined, as they would not be able to provide any details about a particular incidence of offending.[1109]

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

9.2.5 The case of Mr Sascha Chandler

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

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

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

Mr Chandler reported the offences to police in 2006. He gave evidence that it was not until then that he felt able to report to police. He found the experience of reporting to police particularly difficult, and he felt like he had little support at a time of extreme vulnerability. Over the next few years, his

case was handled by a number of different detectives, and Mr Chandler felt frustrated at having to retell his story to each detective.

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

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

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

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

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

We heard evidence from Mr Chandler on the abuse that Mr McIntosh inflicted on him and his experiences in reporting the abuse to police and participating in the prosecution of Mr McIntosh. He gave evidence that his experiences of providing evidence, both initially to police and subsequently in court, were isolating and difficult. He made recommendations about providing victims with support and preparation to cope with the challenges of the criminal justice process.[1110]

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

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

9.3 Complainants' Evidence Research

As discussed in section 3.8.2, in 2014, the Royal Commission engaged Professor Martine Powell, Dr Nina Westera, Professor Jane Goodman-Delahunty and Ms Anne Sophie Pichler to conduct a research project on how complainants give evidence and the impact that different means of taking evidence from a complainant have on the outcome of the trial. The research report, *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants' Evidence Research), is published on the Royal Commission's website.

The need for the research arose from a concern that special measures may not be being used as often as they could or should be and that there may be opposition to their use from some lawyers

and judges, who might be either discouraging complainants from making use of permitted special measures or, in the case of judges, not permitting the use of some special measures.

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

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

The Complainants' Evidence Research identifies that criminal justice professionals regard special measures as having improved the evidence-giving processes for child sexual abuse complainants and that they are routinely used, although more for children than for adults.[1111]

Criminal justice professionals perceived that the special measures were generally an effective way of reducing the complainant's stress when giving evidence without compromising the fairness of the proceedings to the accused.[1112]

The criminal justice professionals considered that reduction in stress improved the reliability and completeness of the complainant's evidence. The most effective and frequently used special measures were identified as prerecorded investigative interviews, closed circuit television (CCTV) and the presence of a support person.[1113]

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

- the conduct of police interviews, which is discussed in section 3.8
- overcoming technological problems, which is discussed in section 3.8 in relation to police investigative interviews and below in relation to courtroom issues
- improving questioning in the courtroom
- reducing delays in the prosecution process.[1114]

The research also suggested that adult complainants would benefit from special measures being made more available for them to use.[1115]

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

9.4 Special measures in Australian jurisdictions

9.4.1 The range of special measures

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

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

- the use of a prerecorded investigative interview, often conducted by police, as some or all of the complainant's evidence in chief. This is discussed in section 3.8
- prerecording all of the complainant's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the complainant need not participate in the trial itself. This measure can also reduce uncertainty in timing and delay
- CCTV may be used so that the complainant is able to give evidence from a room away from the courtroom
- the complainant may be allowed to have a support person with them when giving evidence, whether in the courtroom or remotely by CCTV
- if the complainant is giving evidence in court, screens, partitions or one-way glass may be used so that the complainant cannot see the accused while giving evidence
- the public gallery of a courtroom may be cleared during the complainant's evidence
- in some cases, particularly while young children are giving evidence, the judge and counsel may remove their wigs and gowns.

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

- restricting the scope of questions that can be asked in cross-examination
- requiring the court to disallow improper questions in cross-examination
- allowing third parties to give evidence of the disclosure of abuse as evidence that the abuse occurred

- allowing expert evidence to be given about child development and child behaviour, including about the impact of sexual abuse on children.

9.4.2 Eligibility for special measures

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

New South Wales

In New South Wales, complainants in sexual offence proceedings may have a support person in court, use screens in the courtroom to avoid seeing the accused or give evidence from another room through CCTV.[1116] Where the complainant or witness is a child, the court may also be closed to the public.[1117]

A 'vulnerable person' (defined as a child under 16 years or a 'cognitively impaired person') is a separate category of witness with access to special measures under the *Criminal Procedure Act 1986* (NSW).[1118] These include being able to give evidence in chief through use of their recorded police interview.[1119]

Under the child sexual offence evidence pilot scheme in Sydney and Newcastle District Courts, children under the age of 18 years who are complainants of child sexual abuse may have all their evidence prerecorded in the absence of a jury.[1120] Intermediaries may be appointed to assist the parties and the court to communicate and explain questions and answers of child complainants in this pilot.[1121] In all other courts, the vulnerable person must be available for cross-examination and re-examination orally in the courtroom or by means of alternative arrangements such as giving evidence remotely using CCTV. This evidence currently cannot be prerecorded outside of the pilot scheme.

Victoria

In Victoria, under the *Criminal Procedure Act 2009*, complainants and other witnesses in sexual offence proceedings can access alternative arrangements for giving evidence.[1122] These witnesses may give evidence through CCTV, with a screen, with a support person or in a closed court. Legal representatives may also be required not to wear robes while the witness gives evidence and to be seated when examining or cross-examining the witness.[1123]

Witnesses in sexual offence proceedings who are under 18 years or have a cognitive impairment may give prerecorded evidence as their evidence in chief at trial.[1124] Usually, this will be their recorded police investigative interview. Complainants in sexual offence proceedings under the age of 18 years or who have a cognitive impairment can have their cross-examination and re-examination recorded at a special hearing.[1125] This enables the entire evidence to be prerecorded before the trial.

Queensland

In Queensland, a 'special witness' relevantly includes:

- a child under 16 years
- a person with mental, intellectual or physical impairment likely to be disadvantaged as a witness
- a person likely to suffer severe emotional trauma or intimidation.[1126]

The special measures available for special witnesses include:

- screens
- closed court during evidence
- giving evidence from a separate room
- having a support person
- video recording the special witness's evidence for viewing in court instead of the special witness giving direct evidence
- court directions about rest breaks for the special witness, keeping questions simple for the witness, limiting time for questions or the number of questions asked on a given issue, or any other appropriate orders.[1127]

Further special measures are also available for an 'affected child'. This refers to a witness in a sexual offence proceeding who was under 16 years at the commencement of a criminal proceeding or a witness who was under 18 years at the commencement of a criminal proceeding and who is a 'special witness'.[1128]

The further special measures include prerecording the entirety of the child's evidence before the trial, or the child giving evidence by audiovisual (AV) link or with a screen.[1129]

Western Australia

In Western Australia, a 'child' is defined as being a person under 18 years.[1130] A child is entitled to a support person while giving evidence.[1131] The court may also appoint a person to act as a communicator for the child. The communicator's function is to communicate and explain questions to the child and the child's answers to the court.[1132] The whole of a child's evidence (including cross-examination and re-examination) in a sexual offence proceeding may be recorded at a special hearing and presented at trial.[1133]

Recorded police interviews may be admitted as the whole or part of a witness's evidence in chief for a child or person with mental impairment if police had reason to believe the witness may have been physically or sexually abused.[1134]

In addition, under section 106R(1) of the *Evidence Act 1906* (WA), a judge may declare a witness to be a special witness. A 'special witness' is a person with physical disability or mental impairment; or a person who is likely to suffer severe emotional trauma or be so intimidated or distressed that they

cannot give evidence satisfactorily.[1135] Available measures include having a support person, a communicator or the ability to give evidence by AV link or with screens.[1136] As with children, the court may order the whole of the evidence to be recorded at a special hearing.[1137]

South Australia

In South Australia, special arrangements are available for protecting witnesses generally from embarrassment, distress or intimidation when giving evidence.[1138] The court 'should' order special arrangements. Special arrangements may include:

- giving evidence through CCTV
- prerecording evidence to be used at trial
- use of a screen, partition or one-way glass
- use of a support person
- that the evidence be taken a particular way to minimise embarrassment or distress if a witness has a physical disability or cognitive impairment.

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

- a person under 16 years of age
- a person with a cognitive impairment
- a victim of a sexual offence
- any witness who, because of the circumstances of the case, in the court's view would be specially disadvantaged if not treated as a vulnerable witness.[1139]

The court 'must' order special arrangements for vulnerable witness, which may include the special arrangements listed above. They may also include additional measures of an extra allowance for breaks and that lawyers and the judge not wear robes or wigs.[1140] The court may also appoint a communication assistant for a witness, which is discussed further in section 9.7.2.[1141]

Also, for a child under 14 years, or a person with disability that adversely affects their capacity to give a coherent account of their experiences or respond rationally to questions, the court may order a pre-trial special hearing to record their full evidence.[1142]

Tasmania

In Tasmania, under the *Evidence (Children and Special Witnesses) Act 2001*, special measures are available for a child under 18 years old.[1143] Measures include:

- a child may have a support person[1144]
- a child's evidence in sexual offence proceedings may be recorded in full at a special hearing so that it can be presented at trial, where the child need not be present[1145]

- a child's evidence in sexual offence proceedings can be given by AV link, and prior statements of the child may be admitted.[1146]

A 'special witness' is a person with an intellectual, mental or physical disability that would prevent them from giving evidence in the ordinary manner; or some other vulnerability, such as a relationship to any party to the proceeding that is likely to cause severe emotional trauma, intimidation or distress so as to prevent them giving evidence satisfactorily.[1147] Special witnesses may be permitted to have a support person, give evidence via AV link, have a prior statement admitted, record their evidence in full in a special hearing, or give their evidence in a closed court.[1148]

Australian Capital Territory

In the Australian Capital Territory, in a sexual offence trial, complainants and other witnesses may access special measures, including the use of screens, support persons, and closing the court.[1149]

Witnesses in sexual offence proceedings who are under 18 or intellectually impaired may have their police investigative interview admitted as their evidence in chief by means of a video recording.[1150]

Prosecution witnesses in sexual offence proceedings who are under 18, are intellectually impaired or are likely to suffer severe emotional trauma or be intimidated or distressed may give the whole of their evidence, including cross-examination and re-examination, via AV link at a pre-trial hearing.[1151]

Northern Territory

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

- children under 18 years
- persons who have a cognitive impairment or intellectual disability
- victims of a sexual offence
- persons who the court considers vulnerable.[1152]

A vulnerable witness may give evidence by CCTV, using a screen, with a support person or in a closed court.[1153]

For vulnerable witnesses in sexual offence proceedings, the court may admit a recorded statement as their evidence in chief and hold a special pre-trial hearing to record the cross-examination and re-examination of the witness.[1154]

9.4.3 Use of special measures

Frequency of use of special measures

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

The Complainants' Evidence Research found that child and adolescent complainants had ready access to special measures when giving their evidence in chief, with almost all using the police investigative interview. Although most adults used special measures, there was more variability, and more adults gave their evidence in person.[1155]

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

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

As noted in section 9.3, the Complainants' Evidence Research identified that criminal justice professionals regard special measures as having improved the evidence-giving processes for child sexual abuse complainants. They are generally an effective way of reducing the complainant's stress when giving evidence, which improves the reliability of the complainant's evidence without compromising the fairness of the proceedings to the accused.

Problems with use of special measures

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

Improving police investigative interviewing, including through improved skills and training, is discussed in section 3.8.

The Complainants' Evidence Research also found that approximately 50 per cent of cases in New South Wales and Victoria, and 40 per cent in Western Australia, experienced some kind of problem when playing prerecorded interviews – the most common being inadequate volume, a problem viewing the complainant on the screen and the operation of devices playing recordings.[1156] Similar problems arose when using CCTV or AV links.[1157]

The researchers conclude that best-practice standards are needed to address the image and audio quality of prerecorded and CCTV videos.[1158] They state:

> Videotaped evidence varied depending on the camera angle used. Many recordings failed to capture images of the complainant that allowed for an adequate assessment of demeanour, by omitting an image of more than just the complainant's face, or by placing the camera at such a great distance from the complainant that the complainant's facial expressions were not adequately displayed.[1159]

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

The Complainants' Evidence Research also identified that some stakeholders felt that evidence given via a prerecorded interview or via CCTV had less impact than evidence given in person, and it made it harder for the jury to assess the credibility of the witness. Such problems can be exacerbated where there are technical problems with viewing the evidence.[1160]

Views on the impact of special measures on the credibility of the complainant varied according to the age of the complainant. A prerecorded interview was considered the most credible special measure for children, while giving evidence live, without any special measures, was perceived as the most credible form of evidence for adult complainants.[1161]

The Complainants' Evidence Research also surveyed different criminal justice professionals on their attitudes to different special measures and their impact on credibility. The researchers found that opinions on which special measures produced the most reliable evidence differed depending on the professional background of the person surveyed. Defence lawyers were significantly more likely to rate evidence given live in person as more reliable, whereas judges, prosecutors, police and support persons were more likely to rate evidence given via CCTV or a prerecorded interview as more reliable.[1162]

9.5 Other courtroom issues

9.5.1 Competency testing

In the Uniform Evidence Act jurisdictions, everyone is presumed to be competent to give evidence.[1163] A person will not be competent where it can be shown that they do not have the capacity to understand a question about a fact or give an understandable answer.[1164]

To give sworn evidence, a person must have the capacity to understand that they are under an obligation to give truthful evidence.[1165] If a person does not have this capacity, they may give unsworn evidence after the court has informed them that it is important to tell the truth, that they can say if they do not know the answer to a question and that they should not feel any pressure to agree with statements that are not true.[1166]

Although they differ in some respects, the competency tests in Queensland, Western Australia and South Australia are similar to that used in the Uniform Evidence Act jurisdictions.[1167]

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

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

- Definition – for example, 'What does the truth mean?'
- Identification – for example, 'If I were to say my hair was green, would that be the truth?'
- Example – for example, 'Give me an example of a lie.'
- Difference – for example, 'What's the difference between truth and lie?'
- Evaluation – for example, 'Is it good or bad to tell a lie?'
- Consequence – for example, 'What do you think will happen if you tell a lie?'
- Prior occurrence – for example, 'Have you ever told a lie?'
- Obligation/promise – for example 'Will you tell the truth today?'[1168]

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

Children who ultimately gave unsworn evidence tended to be younger. Although the research found that judges tended to ask more questions of younger children,[1169] this may simply reflect the fact that competency is more likely to be in issue with younger children, and judges are giving younger children every chance to give sworn evidence by testing their capacity.

The Complainants' Evidence Research cites academic literature suggesting that testing whether a child knows the difference between a truth and a lie (the difference type) is not a good indicator of whether a child will tell the truth in their evidence. The researchers suggest that, based on academic literature, a better approach would be simply to ask a child whether he or she will promise to tell the truth (the obligation/promise type). They refer to this being the approach now adopted in Canada and Scotland.[1170]

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

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

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

In her evidence in Case Study 38, Professor Penny Cooper gave her opinion that an intermediary can make the difference between a child being assessed as competent or not, as they can play a role in helping a witness to understand and answer questions, which is the basic test of competency.[1171] Professor Cooper also noted that at least one non-government organisation that trains intermediaries has developed a mobile device application – an app – to assist children with telling the difference between a truth and a lie.[1172]

9.5.2 Courtroom questioning

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

In her evidence in Case Study 38, Ms Henning stated that the nature of courtroom questioning can, itself, render vulnerable witnesses unreliable. This is because these witnesses will rarely seek clarification, even where they do not fully understand the question. They will try to give answers that do not necessarily make sense, rendering them unreliable in the eyes of the jury.[1173]

After police investigative interviews, the aspect of current practice most criticised by the criminal justice professionals interviewed for the Complainants' Evidence Research was courtroom questioning that was unfair to the complainant. However, the criminal justice professionals also identified that the adversarial nature of criminal trials meant that giving evidence was always going to be taxing for complainants.[1174]

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

Below we outline the findings from specific studies undertaken as part of the Complainants' Evidence Research, highlighting particular issues in courtroom questioning.

Cross-examination and normative assumptions

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

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

Noting separate research that children can be accurate witnesses if questioned correctly, the researchers identified that defence counsel sometimes implied that children may not be accurate witnesses by reference to their creativity or imagination.[1175]

The Complainants' Evidence Research cites empirical research that errors or inconsistencies in minor details do not reliably predict overall accuracy or deception. The transcript analysis identified that defence counsel routinely suggested that poor memory or inconsistency in relation to minor details indicated that the central allegation was wrong. 'Minor details' included the colour of clothing or the weather.[1176]

After noting research indicating that, for a variety of reasons, victims of child sexual abuse may delay reporting and even show loyalty to the offender, the researchers identify examples of defence counsel questioning the complainant about their lack of resistance or delayed reporting.

Cross-examination strategies and tactics

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

The main strategies identified were:

- attacking the complainant's reliability – for example, by:
    - questioning the accuracy of their recall
    - raising environmental factors at the time of the offence, such as the complainant having been asleep
- attacking the complainant's credibility – for example, by:
    - suggesting that the complainant is lying
    - suggesting a motive for making a false allegation
    - raising previous 'bad character' or dishonesty by the complainant
- attacking the plausibility of the complainant's story – for example, by:
    - raising the absence of resistance by the complainant at the time of the offence
    - raising the delay in reporting
    - raising the lack of emotionality by the complainant at the time of the offence
    - raising the continued relationship between the complainant and the accused after the offence
    - suggesting that the abuse simply could not have taken place in the manner alleged, whether because of the presence of other adults in close proximity or physical limitations
- attacking the complainant's consistency – for example, by raising inconsistencies between the complainant's evidence in court and:
    - the complainant's police interview
    - other evidence the complainant has given in court

- evidence of other witnesses
- the accused's account

- indiscriminate strategies that target reliability or credibility – for example, by:
  - suggesting the complainant is wrong
  - suggesting collusion and contamination with another complainant
  - raising custody disputes in relation to familial abuse
  - raising the complainant's mental health
  - raising the complainant's drug and alcohol use
  - raising any history of sexual abuse, including abuse of close relatives of the complainant.[1177]

The Complainants' Evidence Research found that eight out of 10 complainants had every strategy used against them and that this occurred regardless of the age of the complainant.[1178]

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

The researchers suggest that some tactics – for example, asking about motivations to make a false allegation; or contradictions between the complainant's accounts of events that were directly relevant to establishing the elements or particulars of the offence – are legitimate lines of questioning. They are more critical of tactics that rely on unfounded stereotypes about memory and complainant behaviour, such as memory errors over minor details or lack of resistance.[1179]

The researchers also suggest that defence lawyers used tactics in some cases without any clear aim and that, as a consequence, complainants endured prolonged questioning regardless of age. They suggest that the indiscriminate use of tactics and prolonged cross-examination are likely to be making the evidence-giving process more difficult for complainants.[1180]

Cross-examination on inconsistencies

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

The results indicated that:

- inconsistencies within the complainant's own evidence or with the evidence of another witness were raised far more frequently (raised with over 90 per cent and over 80 per cent of complainants respectively) than inconsistencies with the accused's evidence (raised with more than 40 per cent of complainants) or other evidence (raised with more than 30 per cent of complainants)

- defence lawyers raised inconsistencies with matters the researchers identified as 'central' to proving the offence with 72.4 per cent of complainants, but they raised inconsistencies with 'peripheral' matters with 98.4 per cent of complainants
- inconsistencies regarding the offence, its timing and the evidence of other witnesses were raised with the majority of complainants
- inconsistencies that were contradictions were raised far more frequently (raised with 98.4 per cent of complainants) than those that were additions (raised with 50.4 per cent of complainants) or omissions (raised with 29.3 per cent of complainants)
- the most common sources for inconsistency arguments from the defence against children and adolescents were between the police interview and the cross-examination, and these were raised with 74.7 per cent of complainants.[1181]

In the 83 cases where the complainant was under 18 years of age and had a prerecorded police interview, the Complainants' Evidence Research found that, as the number of questions asked by police in the prerecorded interview increased, so did the lines of questioning on inconsistencies in cross-examination.[1182]

The researchers also assessed the quality of the police interviews on a scale of 1 to 5 and found that better quality interviews were associated with the raising of fewer inconsistencies at trial.[1183]

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

Labelling

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

As discussed in section 3.8.3, the Complainants' Evidence Research cites research to the effect that, ideally, labels should be created at the police interview and used consistently thereafter. Also, particularly for children, if a child can generate the label in their own words and from their own perspective or recollection of events, it is more likely that unique and meaningful labels will be created. It is important that labels are used consistently to avoid errors and also because labels can have an important memory function: they allow a more accurate and detailed recall.

The study only examined labels used in Western Australia, as the trial transcripts from New South Wales and Victoria did not contain all aspects of the trial.[1184] For the 59 incidents given labels, 177 labels were used, meaning that 118 labels were replacing a previous label.[1185]

Table 9.1 shows who created the labels and whether they were the first or replacement labels. It also highlights labels created by defence lawyers.[1186]

Table 9.1: Creation of labels

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

Table 9.2 shows at which stage of the criminal justice process each label was created.[1187]

Table 9.2: Stage at which label was created

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

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

Types of questions

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

Questions were coded into categories such as:

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

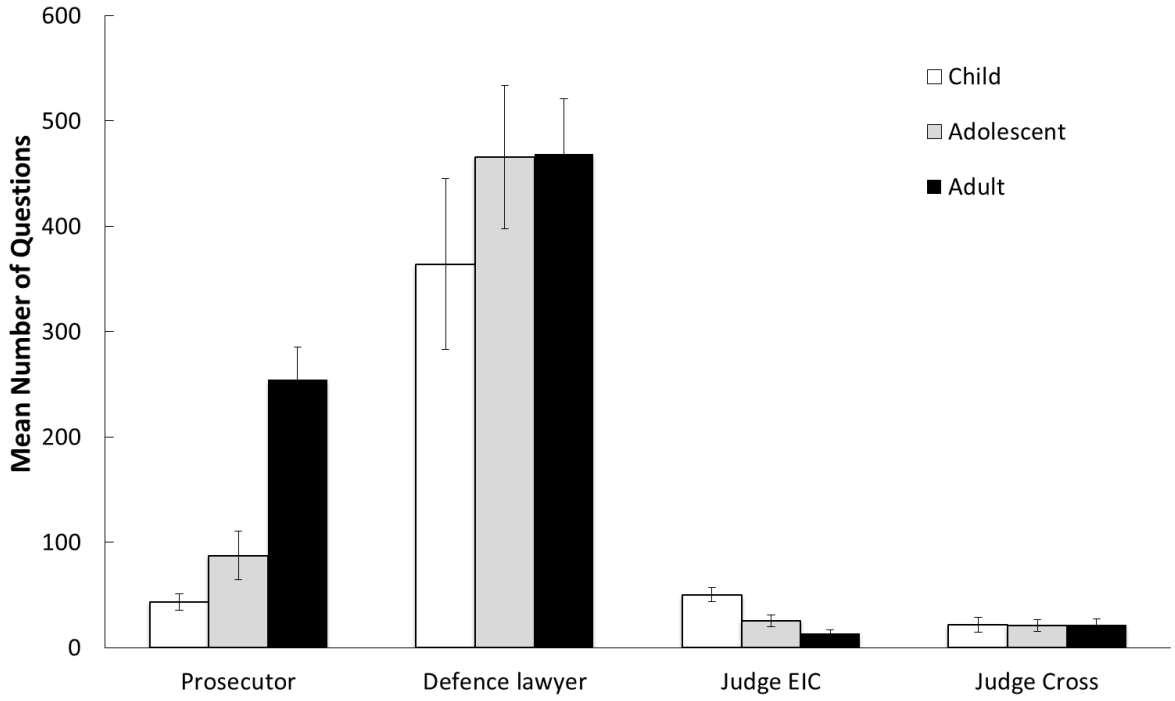
Responses were coded into categories such as 'complies', 'resists' and 'misunderstands'.[1188]

The researchers noted literature that suggested that leading, complex and repeated questions increased the chance that complainants would produce unreliable evidence.[1189]

The analysis showed that defence lawyers asked the most questions.

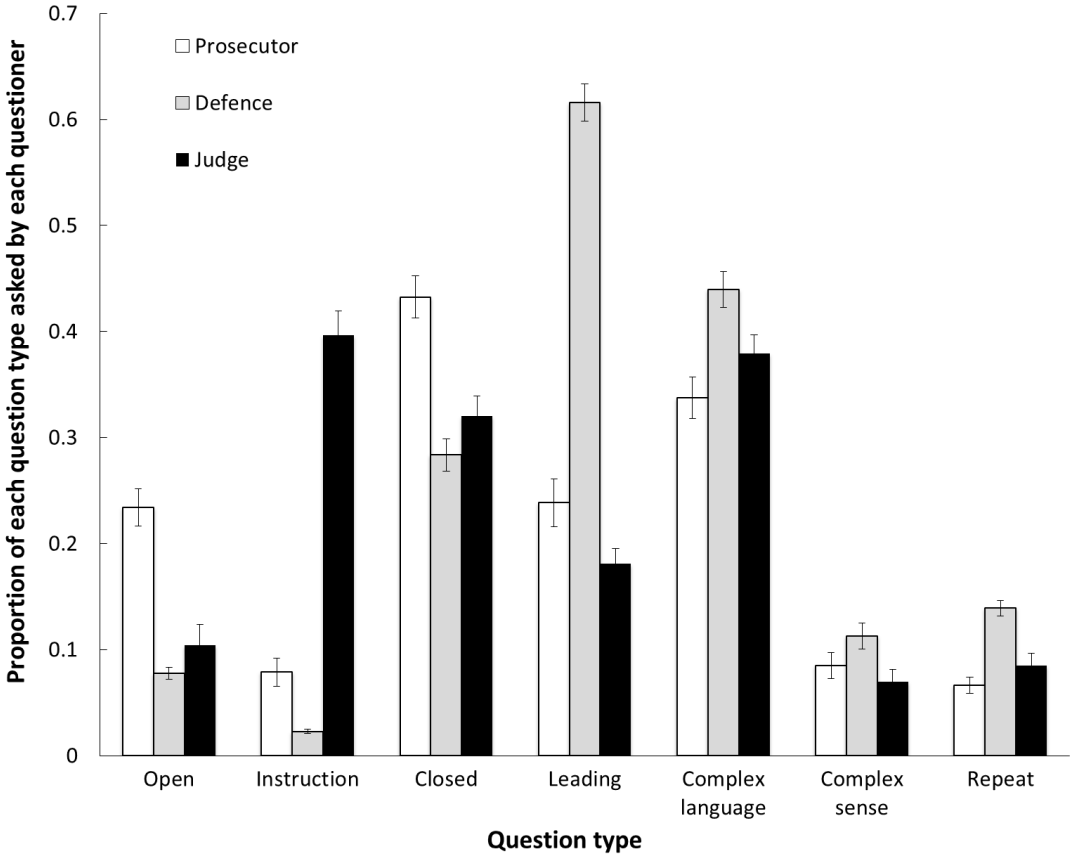
Figure 9.1 shows the mean number of questions asked by prosecutors, defence lawyers and judges, with the judges' questions separated between evidence in chief and cross-examination. Figure 9.1 also breaks down the questions by age group ('children' are six to 11 years old, 'adolescents' are 12 to 17 years old and 'adults' are 18 years or older).[1190]

Figure 9.1: Mean number of questions



The study also broke down the types of questions, as shown in Figure 9.2, and identified whether the prosecutor, defence counsel or judge asked the question. Closed, leading and complex questions were by far the most common asked by both prosecutors and defence counsel.[1191]

Figure 9.2: Types of questions



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

In Case Study 38, Ms Henning agreed with the literature cited in the Complainants' Evidence Research to the effect that leading questions are unlikely to elicit the best evidence from vulnerable witnesses, because the witness will simply agree with the suggestion in the question as it is put by someone older and who is in a position of authority.[1192]

Judicial interventions

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

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

- **Question form:** This can include vague or misleading questions, complex language and sentence structure
- **Question manner:** This can include repetitive question, going too quickly, interrupting the complainant or changing topics abruptly in a manner that might be confusing

- **Question substance:** This can include oppressive or harassing questions
- **Matter of law:** This can include issues of relevance, introduction of sexual history evidence
- **Complainant care:** This can include suggesting a break
- **Complainant directions or questions:** This can include asking the complainant to wait until the question is put, clarifying the complainant's answers or asking questions of the complainant (to clarify the evidence).[1193]

The analysis showed that the most common intervention was by the judge during cross-examination, and this occurred nearly four times more often than interventions by prosecutors.[1194]

Table 9.3 shows the number of interventions by judges and lawyers.[1195]

Table 9.3: Interventions by judges and lawyers

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

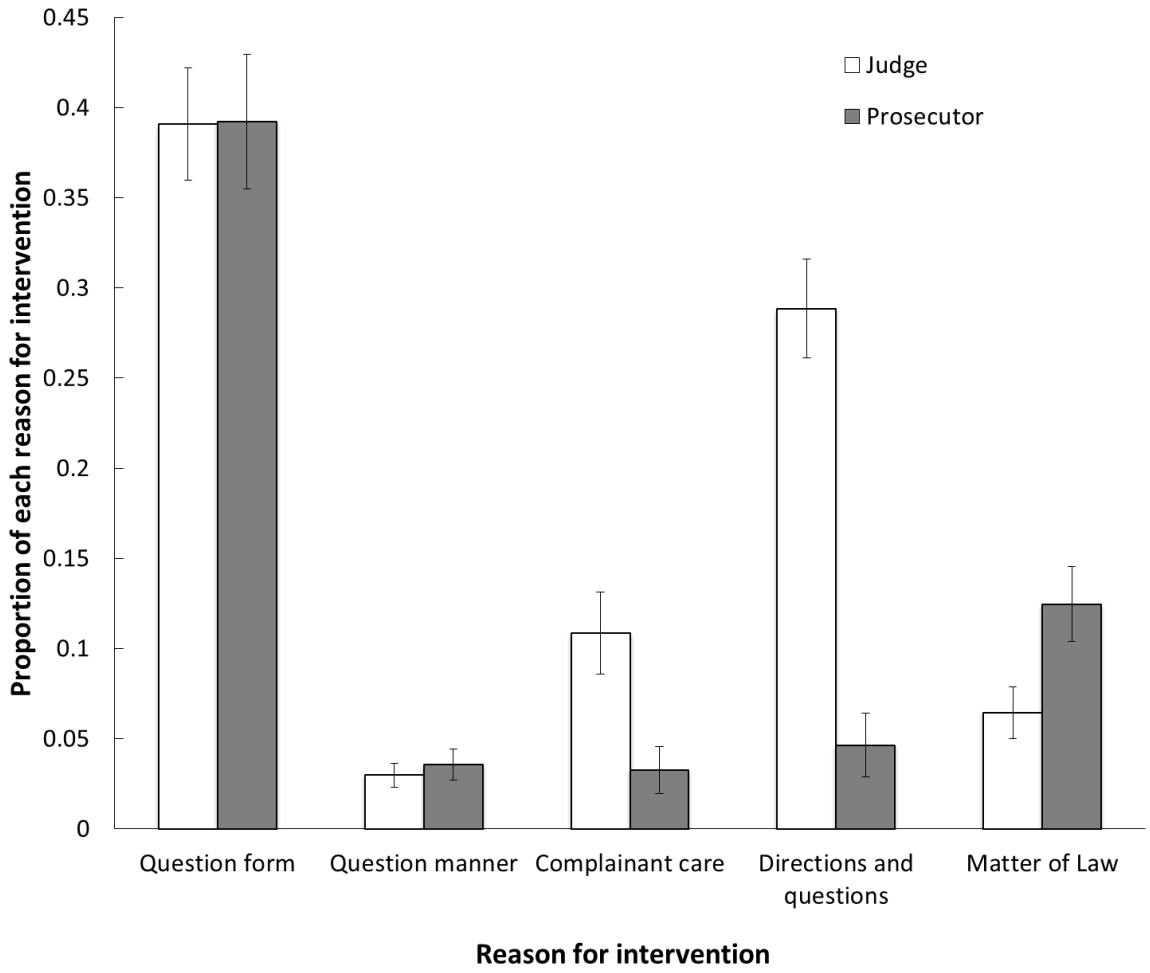
Defence lawyers intervened more often with adults than with children (which would be expected given that children's evidence in chief, or at least most of it, would generally have been settled in advance through editing the prerecorded investigative interview). The interventions of judges and prosecutors did not significantly differ based on the age of the complainant.[1196]

The most common judicial intervention was regarding the form of a question (for example, asking counsel to rephrase a complex or vague question) or to give a direction or ask their own question. There were very few interventions for question substance.[1197]

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

Figure 9.3 shows the reasons for intervention by judges and prosecutors (excluding question substance, because it occurred so infrequently).[1198]

Figure 9.3: Reasons for intervention



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

- they do not wish to be seen as intervening too much in a cross-examination because it may result in a jury drawing adverse inferences about the witness
- as a matter of principle, some judges allow counsel significant autonomy in conducting their case, as that is consistent with the principles of adversarial trials
- the factors they may take into account in deciding whether a question is improper include the subjective characteristics of the witness, which is difficult to do on the limited information that the judge might have about the witness.[1199]

The rule in Browne v Dunn

The rule in *Browne v Dunn* is a rule of fairness. It requires a party who intends to lead evidence that will contradict or challenge the evidence of a witness to put that evidence to the witness.[1200] The rule prevents a witness being discredited without the chance to respond.

We have heard that observance of the rule can have unintended consequences for children and other vulnerable witnesses. Instead of seeing it as an opportunity to correct an inaccurate statement, vulnerable witnesses may become confused and feel like they are simply being accused of lying.[1201] Where the rule requires the defence counsel to seek a response from the complainant about any claims by the accused – typically in the form of questions such as 'I put it to you that' or 'I suggest to you that' – this may be confusing and distressing for complainants.[1202]

The Complainants' Evidence Research reports that some defence counsel participating in the survey of professionals questioned the utility of the rule and recognised that it could cause harm and confusion for complainants. They identified it as a possible area for reform.[1203]

Ms Henning gave evidence that, in England and Wales, courts have provided that the rule need not be complied with in certain situations to avoid such problems.[1204] In her statement for Case Study 38, Professor Cooper stated that the Criminal Procedure Rules in England and Wales were amended in April 2015 to explicitly provide for ground rules hearings and that one of these ground rules can be a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety.[1205]

9.5.3 Evidence of disclosure to third parties

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

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

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

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

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

- in circumstances that make it highly probable that the disclosure is reliable: Uniform Evidence Act, section 65.

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

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

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

- it was made by the alleged victim of a sexual offence
- the alleged victim will not be called as a witness because, at the time they made the out-of-court statement, they were a young child or a person with a disability that adversely affects their capacity to give evidence
- it was not made to police or another authority in a formal interview in investigating the alleged offence
- the judge is satisfied that it has sufficient probative value to justify its admission.

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

> The contemplation is that the Act, the communication partner model and the improved specialist training will make life a lot better for vulnerable parties. However, it is still contemplated that there will be some witnesses, or there may be some witnesses or victims, who are so young or whose intellectual disability is so severe that even with the increased support contemplated under both the Act and the Disability Justice Plan, they would be unable to give evidence, unable perhaps to satisfy the test in South Australia, which, unlike the UEA [Uniform Evidence Act], still requires the witness to be able to know the difference between truth or a lie.
>
> That section [section 34LA] is designed to deal with that rare situation. The example that was raised during consultation might be I think based on a couple of very unfortunate cases in Victoria: say a person with a severe intellectual disability has been sexually abused. That person is sadly unable, even with the support, the assistance, to be able to give evidence in court. However, there is something said by that witness which is damning or probative evidence of guilt. There may be other evidence, such as forensic evidence, some other evidence. So the intention is to somehow ensure that if you are so young or so severely intellectually disabled that you are sadly unable to give evidence, there may be means that a

> case can still be brought using the initial or the first statement made by that witness as evidence of truth of its contents, but ideally, and I think in practice, it would require other cogent evidence to enable a case to be brought by the prosecution. That's what is meant by section 34LA.[1206]

In his evidence, the South Australian Director of Public Prosecutions, Mr Kimber SC, noted that the previous provision, section 34CA, could be used in similar circumstances.[1207] However, that provision received some criticism of its drafting, and that led to the development of section 34LA.[1208]

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

9.6 Other jurisdictions

9.6.1 England and Wales

In its review of the use of special measures, the Complainants' Evidence Research considered the use of these measures in overseas jurisdictions. The researchers noted that in the United Kingdom the most frequently used special measures for vulnerable witnesses, particularly for younger witnesses, were prerecorded evidence in chief and CCTV. They also identified that many vulnerable witnesses would have liked to use special measures but did not do so.[1209]

In week 2 of Case Study 38, we heard evidence from a number of experts familiar with the operation of the Registered Intermediary Scheme, which has been in operation across England and Wales since 2008. The Registered Intermediary Scheme had its origins in a number of government reports and academic studies in England and Wales in the late 1980s and 1990s on the way children were treated by the criminal justice system. The scheme was initially conducted as a pilot from 2004 before being rolled out across England and Wales in 2008.[1210]

Intermediaries can be used to assist vulnerable witnesses at both the investigative stage by police and in preparation for a trial, although involvement at the police stage is through an administrative arrangement rather than as a statutory right.[1211]

The intermediary is generally a professional with expertise in the type of communication difficulty that has been identified with respect to the witness.[1212] Intermediaries can be requested by police, and they are matched to the witness according to the skills and location of the intermediary and the needs of the witness through a matching process operated by the Ministry of Justice.[1213]

Within 24 hours of accepting a request, the intermediary will contact the requesting police officer, arrange to meet to gather more information about the communication needs of the witness, and arrange a time to conduct an assessment of the witness's communication needs.[1214] The intermediary will also gather other information about the witness, such as from parents, teachers, speech and language reports and psychologist reports.[1215]

Then, in the presence of the police officer, the intermediary will conduct an assessment of the communication skills of the witness. Having the police officer attend allows the officer to build

rapport with the witness and start to learn more about how the witness communicates.[1216] Ideally, the assessment will take place in the interview suite where the investigative interview will take place, which assists in making the witness comfortable in that environment.[1217] Intermediaries are trained not to assess the witness on the evidence that is relevant to the proceedings but on neutral topics.[1218]

The intermediary then provides an assessment to police regarding the techniques that might be used to draw information from the witness, including question types, and the need for breaks.[1219] Following discussion with the relevant police officer about the role the intermediary will play, the intermediary will then participate in the investigative interview.[1220] Dr Michelle Mattison, who is a Registered Intermediary in England and Wales, outlined her role in the investigative interview:

> My role is passive in the sense that I'm not there as a second interviewer. I'm there to listen and to monitor the questions put to the child carefully to ensure that they are appropriate for that person's communication needs. I also monitor and carefully watch the child or the vulnerable adult's anxiety and concentration and, where appropriate, I may suggest that the person needs a break or we need to think about strategies to help that person remain calm and focused.[1221]

In terms of intervening, Dr Mattison stated that:

> I try to pre-empt, as much as possible, whether or not that child – that person will understand that question before they answer the question. So, for example, if a police officer uses a very big word that I believe a five-year-old may not understand, I'll intervene and I might say, 'Mr Policeman, what does that word mean?' That's my way of alerting the police officer to think perhaps about reframing that question, or rewording that question, rather than me interjecting and doing that myself.[1222]

It was made clear during the hearing that the intermediary's role is not to rephrase or summarise the witness's evidence, because this brings with it the risk of misunderstanding or reinterpreting the evidence.[1223]

If the matter proceeds to prosecution, a more substantial report is prepared to assist the court in the questioning of the witness. The report includes the findings of both the assessment and the interview process, along with recommendations for the court in terms of communicating with the witness.[1224]

Ideally, the intermediary will also participate in a 'ground rules' hearing before the witness's evidence is taken. In the hearing, the intermediary can report to the court on the witness's requirements and the judge can give guidance to counsel as to which recommendations of the intermediary are to be adopted.[1225]

The intermediary will also sit with the witness during their evidence and may intervene where they believe a communication breakdown is likely to occur.[1226] In terms of intervening during a trial, Dr Mattison gave the following example:

> I alert the judge to the terribly worded question usually by saying 'your Honour' and then I explain what the problem is with the question, such as saying, 'That's a tagged question.' It's then up to the judge to decide what to do with that information. If the judge agrees with what

> I've highlighted, they may say something like, 'Counsel, please rephrase the question.' If counsel tries to rephrase the question and then unfortunately there is still a tag or there is still an issue with the question, on some occasions the judge may seek my assistance with rephrasing. My assistance with rephrasing questions is extended only to me giving suggestions to the judge and then counsel taking them upon him or herself to then put the question to the witness, but at no point do I actually communicate the question to the witness myself.[1227]

Intermediaries are formally trained in their role in the justice system and are bound by a code of practice and a requirement to maintain their professional development and registration.[1228] Their duty is to assist the court to communicate with the witness and to be impartial, not to support a child witness or assist police in catching a criminal.[1229] Intermediaries are paid an hourly rate for their work.[1230]

The scheme in England and Wales is available to all witnesses under the age of 18 and to adults with a disorder affecting their communication.[1231] We heard that the scheme in England and Wales provides assistance to roughly equal numbers of children and adults with disability.[1232] The scheme is not formally available to defendants, but we heard that some courts have appointed and funded the provision of intermediaries out of their own inherent jurisdiction.[1233] A pilot scheme in Northern Ireland extends to vulnerable defendants.[1234]

We also heard that the prerecording of the cross-examination of complainants is still subject to a pilot scheme in England and Wales.[1235]

9.6.2 New Zealand

The Complainants' Evidence Research noted similar trends in New Zealand for the use of special measures as those identified for the United Kingdom. That is, the research notes that there was high demand for and use of prerecorded investigative interviews and CCTV, especially for younger witnesses.[1236]

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

Ms Henning noted that the New Zealand Court of Appeal, in the case of *M v R & E v R*,[1237] had suggested that, as the 'only' benefit of prerecording the entire testimony of the witness was to reduce the stress caused by long court delays, this would rarely outweigh the disadvantages to the accused, the court and the witness.[1238] Therefore, the court held that prerecording would only be appropriate in extreme situations, such as where the witness is dying or leaving the jurisdiction, and only where it can be completed significantly in advance of the trial.

However, Ms Henning's evidence, discussed in section 9.7.1, made clear that the benefits of prerecording are broader than simply reducing the stress of long court delays.[1239]

9.7 Possible reforms

In the course of our work, a number of possible reforms have emerged that may make a significant difference to the way that vulnerable witnesses give their evidence. They may help vulnerable witnesses to give their best evidence. They have already been implemented in some Australian jurisdictions to varying degrees and may be worthy of further consideration.

9.7.1 Prerecording of all of a witness's evidence

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

- as the recording will take place in advance of any trial, the events in question will be fresher in the memory of the complainant, and the completion of the prerecording will provide an earlier release for the complainant from the stress of testifying
- preparing for the recording, and the evidence that ultimately comes out, may make clearer the key issues in the trial for both the prosecution and the defence, possibly leading to the earlier resolution of cases
- as objections, judicial interventions and inappropriate questions can be edited out of the final recording to be shown to the jury, the prerecording process may be better controlled by the judge.[1240]

Full recording of the complainant's evidence may also facilitate some of the case management and related reforms discussed in Chapter 8, such as requiring earlier allocation of the Crown prosecutor and defence counsel.

The main criticism we have heard of full recording of the complainant's evidence is that it takes up too much time and too many other resources of the court, in that court time has to be taken both to record the complainant's evidence and then again to replay it to the jury. Another potential criticism, that a child may be called to give evidence in a trial even though they had already prerecorded their cross-examination, would appear to be a rare occurrence.[1241]

However, the procedure appears to have been used successfully for some time in at least one Australian jurisdiction. In Case Study 38, Ms Henning gave evidence that prerecorded testimony has been in operation in Western Australia since 1992, and research has shown that the procedure was working well, is well accepted and has been taken up well.[1242]

In our private roundtable discussions, some participants noted that the mere provision for certain special measures in legislation is not, of itself, enough to make a difference to the complainant experience. Provisions supporting the use of prerecording of evidence require commitment from a range of other stakeholders to ensure their effectiveness. They require the support of the judiciary, including through supporting their use and, where necessary, issuing practice notes to manage their integration into case management procedures. They also require the support of governments,

including through providing the necessary infrastructure to ensure that facilities and equipment are available to make, and replay, recordings of sufficient quality to be probative for a jury.

Similar implementation issues may arise in the case of intermediaries and ground rules hearings, discussed below.

9.7.2 Intermediaries

In Case Study 38, in addition to hearing the evidence of expert witnesses regarding the Registered Intermediary Scheme in England and Wales, described above, we also heard evidence of the recent introduction of similar schemes in South Australia and New South Wales.

New South Wales

A pilot scheme providing witness intermediaries for child complainants commenced in New South Wales on 31 March 2016. The scheme is based on the Registered Intermediary Scheme in England and Wales, but it is only available for child complainants. It is being piloted in two District Courts.[1243] Intermediaries receive formal training for their role, are expected to provide comprehensive assessment of witness capabilities and are paid.[1244]

Although neither the legislation establishing the scheme nor the relevant District Court practice note provide for ground rules hearings, they can occur at the discretion of the court.

A process evaluation of the scheme will take place after 12 months, and an outcome evaluation will take place after three years.[1245]

It is noted that the pilot scheme also provides for the prerecording of children's evidence in full in matters in the pilot scheme.[1246]

South Australia

The South Australian scheme of 'communication partners' commenced on 1 July 2016. The scheme has been in development since 2010 as part of the state's Disability Justice Plan.[1247]

While the scheme is largely based on the Registered Intermediary Scheme in England and Wales, it has some differences, noted in the evidence of Mr Plater, Senior Legal Officer with the South Australian Attorney-General's Department in Case Study 38. The differences are that:

- communication partners will be volunteers[1248]
- the scheme extends to defendants, not just vulnerable witnesses[1249]
- it is unclear whether the scheme will involve the preparation of comprehensive assessments of the witness for the court, although Mr Plater noted that the Chief Justice and Chief Judge were aware of the importance and utility of ground rules hearings.[1250]

Given the recent commencement of the scheme, it is too early to tell how significant these differences will be. It is anticipated that the scheme and other measures introduced under the Disability Justice Plan will be evaluated at the end of 2017.[1251]

We note that the *Statutes Amendment (Vulnerable Witnesses) Act 2015*, which included the provisions providing for communication partners, also includes provisions for:

- specialised training for police interviewers of vulnerable witnesses so that those interviews can be used as the witnesses' evidence in chief[1252]
- the prerecording of cross-examination[1253]
- a revised provision allowing evidence to be given by third parties where a complainant has made a disclosure to that party but cannot give evidence in court, as discussed in section 9.5.3.[1254]

Discussion

In Case Study 38, Professor Cooper gave evidence that the primary justification for the provision of intermediaries is that all people have a right to participate in the justice system. If a person requires an intermediary to provide accurate and reliable evidence then it should be provided.[1255]

We heard that the introduction of the Registered Intermediary Scheme in England and Wales has not only allowed many people to give evidence who otherwise might have been deemed unable to do so but also, over time and with support from senior members of the judiciary, it has encouraged a cultural change at the bar, recognising that examining evidence from vulnerable witnesses requires skill and planning and that traditional approaches have prevented these witnesses from providing evidence at all.[1256] Further recognition and support for the scheme came from the then Lord Chief Justice in 2010 and 2011 through judgments and a speech stating that intermediaries had become an integral part of the system without diminishing any rights to a fair trial.[1257]

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

> I'm not suggesting that it's possible to remove all traces, if you like, of somebody being suggestible. I think even a robust adult witness can be vulnerable to suggestibility, particularly with regard to memory processes. However, if questions are phrased so that the child understands them and if the child understands that if it's something that they are talking about that they know about, then they can say, 'No, that's not right.'[1258]

Whereas generalised training for legal practitioners on questioning techniques may well improve the general level of awareness of the particular skills required to obtain the best evidence from vulnerable witnesses, the interaction of police, counsel and judges with intermediaries not only provides assistance to help an individual witness with particular needs but also provides 'on the job' training for those practitioners and access to expert advice about the techniques that can be used to meet different communication needs.[1259]

In the Complainants' Evidence Research, in the context of a child giving their evidence in chief, the professionals who were surveyed regarded the use of an intermediary as the least credible of the special measures.[1260] However, the researchers noted that, in considering the results of the survey, participants' familiarity with a measure may predispose them to rate it more favourably, reflecting a jurisdictional bias towards what is most commonly used in their state.[1261] Given the very limited use of intermediaries in any Australian jurisdiction before 2016, it is possible that stakeholders will support the use of intermediaries if they have the opportunity to become familiar with their use.

Inevitably, intermediaries cannot fix all communication problems for vulnerable witnesses. There will remain the issue that police or prosecutors must recognise that there is a potential for communication breakdown before an intermediary is engaged.[1262] Similarly, there will be some witnesses who, despite assistance from an intermediary, may not be able to give evidence – for example, a witness with advanced dementia.[1263]

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

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

9.7.3 Ground rules hearings

A number of witnesses in Case Study 38 outlined the potential benefits of pre-trial directions hearings, including laying ground rules for how the questioning of witnesses – in particular, vulnerable witnesses – is to be conducted.[1264] These rules can include the way questions may be asked, whether the defence case needs to be put to the witness, and the overall management of the witness's evidence – for example, whether breaks are required.[1265] As noted in section 9.5.2, in England and Wales the ground rules hearings can set rules about questioning, including relieving a party of the obligation to put their case to the complainant.

Professor Cooper expressed the view that such hearings are essential to the smooth running of cross-examination and working collaboratively with intermediaries.[1266] In England and Wales, directions have been made for defence counsel to consult directly with an intermediary on how best to frame their questions.[1267] Given their duty of impartiality, intermediaries are required not to subsequently disclose these questions to either the prosecution or the witness.[1268]

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

While inevitably the actual effect of the ground rules will depend on the judge enforcing them in the trial, the experience in England and Wales has been of increasing compliance as the intermediary scheme has become more familiar to judges and practitioners.[1269] Ground rules hearings are now formally required for all vulnerable witnesses, whether or not they have an intermediary. They have received judicial endorsement from the England and Wales Court of Appeal and, in the opinion of Professor Cooper, have been a key part of the cultural shift in the approach to vulnerable witnesses.[1270]

Again, it may be that ground rules hearings would have significant educational value for judges and practitioners in terms of the best way to obtain evidence from vulnerable witnesses and the need to carefully plan their questioning.

9.7.4 Improving special measures

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

In terms of the range of special measures available, the priority for improvement appears to be extending the provision for prerecording the complainant's full evidence, as discussed in section 9.7.1.

In terms of eligibility for special measures, definitions differ between jurisdictions. We are not aware of any real gaps in covering child complainants and complainants with cognitive impairments, but we welcome submissions that identify any gaps.

The most significant gap in terms of eligibility for some special measures is the coverage of adult complainants who do not have disability. It is clear to us, including from what we have heard in private sessions, that many survivors of institutional child sexual abuse who are now adults and do not have disability could be described as 'vulnerable'. This is particularly so where they are describing their experiences of abuse.

Some survivors have told us of the satisfaction and pride they have taken in their ability to confront their abuser in court, face to face. However, other survivors – as adults – may require more assistance to be able to give reliable evidence. While CCTV and AV links may be available currently, some adult survivors are likely to gain real benefit from being able to use a prerecorded police investigative interview as their evidence in chief and to prerecord their full evidence, including cross-examination and re-examination.

In terms of problems with special measures, it seems that improving police investigative interviewing, including through improved skills and training, should be a particular priority. This is discussed in section 3.8.

It also seems likely that the full benefits of using prerecorded or remote evidence may not be realised if there are technical problems with the recording and playback of such evidence. There may be benefits in amending protocols and improving staff training to eliminate or minimise these technical problems. Governments may need to work with courts to improve the technical quality of CCTV and AV links and the equipment and staff training used in taking prerecorded and remote evidence.

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

9.7.5 Improving courtroom issues

As noted above, introducing intermediaries and ground rules hearings might result in an improvement of the skills of police, prosecutors, defence counsel and judges in dealing with vulnerable witnesses.

However, intermediaries and ground rules hearings might be available only to a limited number of complainants. The question arises as to what improvements can be made for those who are not eligible for these special measures, or what should be adopted if these special measures are not supported for implementation.

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

In the absence of additional, or more widely available, special measures, it may be that specific training is warranted on the needs of vulnerable witnesses and the ways in which existing aspects of the criminal justice system are particularly challenging for victims and survivors of child sexual abuse. For example, this might be particularly relevant in seeking to address the problems with courtroom questioning highlighted in section 9.5.2.

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

In relation to competency testing, discussed in section 9.5.1, there appears to be strong support for the view that the practice of questioning younger children on the difference between truth and lies is not effective in ensuring that the witness subsequently tells the truth. It may be more effective simply to ask the witness for a promise to tell the truth.

9.7.6 Expert evidence

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

Evidence and criminal procedure legislation provides for the use of expert witnesses to address issues of child behaviour and development. These provisions are discussed in Chapter 11.

9.7.7 Use of interpreters

All Australian jurisdictions accept that interpreters should be provided for witnesses who require them to understand and reply to questions.

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

- **Problematic processes:** Court and criminal justices processes, including court support services and legal language, can be insensitive to the culture and the needs of complainants or, at the very least, unfamiliar.

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

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

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

We welcome submissions that discuss the issues raised in Chapter 9.

In particular, we seek submissions from::

- interested parties on:
  - eligibility for, and use of, special measures and how special measures can be improved
  - intermediaries and ground rules hearings
  - whether competency testing should be reformed
  - whether other reforms should be considered to improve courtroom questioning – particularly cross-examination – for complainants
  - the use and availability of interpreters
- state and territory governments in relation to special measures, including:
  - the range of, eligibility for and use of special measures
  - the possibility of prerecording all of an eligible witness's evidence
  - the possible extension of special measures to all adult complainants of institutional child sexual abuse
  - how to improve technical aspects of special measures
  - any resourcing issues in improving and extending special measures
- state and territory governments in relation to intermediaries and ground rules hearings, including:
  - the introduction of intermediaries and ground rules hearings
  - any resourcing or procedural issues in introducing intermediaries and ground rules hearings
- state and territory governments in relation to interpreters, including:
  - the adequacy of interpreter services in relation to the investigation and prosecution of institutional child sexual abuse, particularly for Aboriginal and Torres Strait Islander victims and survivors
  - any resourcing issues in providing adequate interpreter services.

10 Tendency and coincidence evidence and joint trials

10.1 Introduction

One of the most significant issues we have identified in our criminal justice work to date is the issue of how the criminal justice system deals with allegations against an individual of sexual offending against more than one child.

As we discussed in section 2.3, 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 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' can 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 or not 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 on 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 have also recently 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.

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.[1271] In the High Court decision in 1995 in *Pfennig v The Queen*[1272] (*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'.[1273]

The discussion in the first week of our public hearing in Case Study 38 indicates that this question remains vexed, even in those jurisdictions that have adopted the Uniform Evidence Act.

In this chapter, we outline:

- tendency and coincidence reasoning and the current law in Australian jurisdictions
- the examples of prosecutions we examined in the first week of Case Study 38
- the concerns expressed by the courts about unfair prejudice to the accused
- key findings of the Jury Reasoning Research we commissioned
- approaches adopted in overseas jurisdictions, particularly in England and Wales and also in Canada, New Zealand and the United States
- opinions on the law and options for reform, including those expressed in the first week of Case Study 38.

We then briefly discuss possible options for reforms.

In releasing the Jury Reasoning Research in May 2016, Justice McClellan said that Commissioners had not then formed any concluded view on whether or how the rules on the admissibility of tendency and coincidence evidence and joint trials should be changed.

Based on what we have heard to date, and the research and other material we have considered, Commissioners are now reasonably satisfied that the current law needs to change so that it facilitates more cross-admissibility of evidence and more joint trials in child sexual abuse matters.

However, we remain open to considering submissions that the current law does not need to change. We welcome submissions on the issues discussed in this chapter, including submissions on how the law should change.

10.2 Outline of the current law

10.2.1 Tendency and coincidence reasoning

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 his 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.

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 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 clearly identify the alleged perpetrator. This is often the case in institutional contexts, where there has often 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 and 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.

Tendency evidence can be used to reason that, if the accused has sexually abused another child or other children, such as to have a relevant tendency, it is more likely that he abused the child whose complaint is the subject of the trial.

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.

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 can be seen as a subset of tendency evidence, 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.

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 or not a joint trial will be allowed usually depends upon whether the tendency or coincidence evidence is cross-admissible; that is, whether or not 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 or not allegations by multiple complainants against a single accused can be tried together.

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.

10.2.2 The current law in Australian jurisdictions

The law about when tendency and coincidence evidence can be called 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 other 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 offence, 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.[1274]

We discuss these issues further in section 10.4.

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*.[1275] 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 inculpation of the accused in the offence charged'.[1276]

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*[1277] (*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.[1278]

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 considering the possibility of collusion, concoction or contamination. The Queensland legislation prohibits the exclusion by a trial judge of propensity or similar fact evidence only because of the possibility of collusion, concoction or contamination. Such a possibility is a matter to be left for the jury's consideration.[1279]

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 10.6.1.

In Case Study 38, we examined the common law approach in Queensland, including through the example of the prosecutions of Noyes. This is discussed in section 10.3.6.

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

In spite of uniform legislation that 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*[1280] (*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 at least three 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*[1281] (*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*[1282] (*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.

- There are differences 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 do not play any role in assessing the probative value of evidence, so collusion, concoction and contamination are matters for the jury to resolve.

  Victoria has rejected the New South Wales position and maintains 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.

The High Court recently 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. In *IMM v The Queen*[1283] (*IMM*), 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.

Tasmanian and the Australian Capital Territory have tended to follow New South Wales on these issues. 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 Maguire, Doyle and Cable
- the prosecutions in Victoria of Poulter (which is the case of *PNJ*) and Rapson.

These prosecutions are discussed in sections 10.3.1 to 10.3.5.

Counsel Assisting also sought comment from the Australian expert witnesses who gave evidence in the first week of the public hearing about cases such as *Velkoski*, *PNJ* and *PWD*.

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 and reliability of that evidence.
- The minority (Nettle and Gordon JJ and Gageler J) dissented on this point.

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.[1284]

Both logical and practical considerations supported this reasoning.

The logical consideration was that identified by Gaudron J in *Adam v The Queen*.[1285] 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.[1286]

The practical consideration was that identified by Simpson J in *R v XY*:[1287] 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.[1288]

There were two judgments in the minority *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 value[1289] and the ALRC material.[1290] Justices Nettle and Gordon found additional support for their reading in the common law background against which the Act was enacted.[1291] That common law background includes 'accrued corporate judicial knowledge and experience of the inherent potential for unreliability' of particular types of evidence.[1292] This includes tendency evidence, to which 'special dangers' attach.[1293]

In *Bayley v The Queen*,[1294] 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 QC[1295] 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*.[1296] [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,[1297] 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'.[1298] 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.[1299]

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.[1300]

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.[1301]

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.[1302]

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.[1303]

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'.[1304]

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'.[1305]

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 reason rationally to 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.[1306]

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'.[1307]

Justice Gageler stated that there was no general rule that the uncorroborated tendency evidence of a complainant is inadmissible.[1308] 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.[1309]

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.[1310]

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*,[1311] 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'.[1312]

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.[1313]

Justices Nettle and Gordon held:

> 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.[1314]

In many trials, evidence such as 'the massage incident' might more commonly be led as relationship or context evidence rather than tendency evidence.

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.

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*.[1315]

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 10.3.7.

10.3 Examples from Case Study 38

10.3.1 Prosecutions of Mr John Maguire – New South Wales

The prosecutions of Mr 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, Mr 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 Mr 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 Mr 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, Mr 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 Mr 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 Mr 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, Mr Maguire was found not guilty of all charges.

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 Mr 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.[1316]

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'.[1317]

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.'[1318]

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.[1319]

Some eight years later, in 2012, another man, CDS, reported to the police about Mr Maguire's abuse of him when he was a year 7 boarder at St Joseph's College in 1983. Mr Maguire was charged with eight child sexual abuse offences against CDS. In November 2014, the jury found Mr 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 Mr Maguire. No tendency or

coincidence evidence was used in the 2014 trial, but evidence of the disclosures he made to his two friends the following year was admitted.

We heard from Ms Nanette Williams, the Crown prosecutor who conducted the eight trials of Mr 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.[1320] 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.[1321]

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.[1322] 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.[1323] Moreover, changes to the Longman direction (discussed further in section 11.2) 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.[1324]

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.[1325]

We also heard evidence from Mr Huw Baker, the Crown prosecutor who prosecuted Mr 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.[1326]

10.3.2 Prosecutions of Mr Philip Doyle – New South Wales

The prosecutions of Mr 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 Mr 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.[1327]

Mr 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 Mr 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, Mr 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 Mr 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. Mr Doyle was sentenced to an overall term of seven years imprisonment, with a non-parole period of four years and six months.

Mr Doyle appealed against his conviction and the Crown appealed against the sentence. The New South Wales Court of Criminal Appeal dismissed Mr Doyle's appeal against his conviction and granted the Crown's appeal on sentence. The Court of Criminal Appeal re-sentenced Mr Doyle to an overall term of nine years imprisonment, with a non-parole period of six years and six months. The High Court refused Mr Doyle's application for special leave to appeal in September 2014.

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 Mr 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.[1328]

We also heard evidence from Mr Kevin Whitley, who was one of the two complainants in respect of whom Mr 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 Me 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.[1329]

We heard evidence from Ms Siobhan Herbert, the Crown prosecutor who conducted the trials of Mr Doyle. Ms Herbert gave evidence about the prosecutions of Mr 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 Mr 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.[1330] The larger of the split trials, involving 39 counts, was still more counts than any sexual assault trial she was aware of.[1331] 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.[1332]

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.[1333]

10.3.3 Prosecutions of Mr Francis Cable – New South Wales

The prosecutions of Mr 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, Mr 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. Mr Cable was convicted of all 13 counts relating to the two complainants.

Mr 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, Mr Cable was sentenced to 16 years imprisonment, with a non-parole period of eight years.

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 Mr 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'.[1334]

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.[1335]

We also heard evidence from Mr John Dunn, who was one of the complainants in respect of whom Mr 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 Mr Cable, including the decision to accept a guilty plea in relation to Mr 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'.[1336]

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'.[1337]

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.[1338]

We heard evidence from Mr Richard Herps, the deputy senior Crown prosecutor who conducted the trial of Mr Cable. Mr Herps gave evidence about the prosecution of Mr 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.[1339]

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.[1340]

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.[1341]

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.[1342]

10.3.4 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*[1343] that we referred to in section 10.2.2.

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.

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.[1344] 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.[1345]

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.[1346] 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.[1347]

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 Count 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.[1348]

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.[1349]

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'.[1350]

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.[1351]

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.[1352]

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.[1353]

10.3.5 Prosecutions of Mr David Rapson – Victoria

The prosecutions of Mr 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.

Mr 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, Mr 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. Mr Rapson was sentenced to 13 years imprisonment, with a non-parole period of 10 years.

Mr 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 Mr 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 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. Mr 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. Mr Rapson was sentenced to 12 years and six months imprisonment, with a non-parole period of nine years and four months.

We heard evidence from Mr James Brandt, who was the complainant with respect to whom Mr 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 Mr Rapson's convictions in 1992; and his experiences of reporting to police in 2012 and participating in the prosecution of Mr 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 Mr 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 Mr Rapson in 2013 and 2015. CDU gave evidence about the restrictions placed on the evidence he could give in 2013 about Mr Rapson's prior convictions for abusing him.

Mr Champion SC, the Victorian DPP, gave evidence about the prosecution of Mr Rapson, particularly in relation to tendency evidence, the effect of the decision in *Velkoski* and the joint and separate trials. Mr Champion gave his view 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.[1354]

Counsel Assisting discussed the Victorian Court of Appeal's decision in *Rapson v The Queen*[1355] 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]).[1356]

10.3.6 Prosecutions of Mr Graham Noyes – Queensland

The prosecutions of Mr Graham Noyes in Queensland illustrate the common law approach to tendency and coincidence evidence which applies in that state.

Mr 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, Mr 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.

Mr 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 Mr Noyes following his conviction in the fourth trial.

We heard evidence from Mr Dennis Dodt, who was one of the complainants whose matter was discontinued after the conviction of Mr 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 Mr 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.[1357]

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'.[1358]

Mr Dodt gave evidence that he feels no jury every got to hear the full picture about Mr Noyes's offending and that splitting the trials significantly weakened the prospect of Mr Noyes being convicted.[1359] As his charges were discontinued, Mr Dodt did not ever get a chance in court to tell a jury what Mr Noyes did to him.[1360]

Mr Michael Byrne QC, the Queensland DPP, gave evidence about the prosecution of Mr 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 Mr 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.[1361] He accepted that this was a restrictive view of when such multi-complainant cases can be heard together and treated as cross-admissible.[1362]

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.[1363]

10.3.7 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 on an independent school in Perth.

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.

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.[1364] 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.[1365]

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, lead trial counsel in the first and second trials and 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).[1366] 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.[1367]

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).[1368]

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 that [sic] in any of the Uniform Evidence Act jurisdictions.[1369]

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).[1370]

Mr Whalley also gave his opinion that the current provision in Western Australia is fair. He pointed to the fact that in CDV's joint trial he was acquitted of four counts even though the jury heard the propensity evidence.[1371]

10.4 Concerns of unfair prejudice

10.4.1 The concerns of the courts

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*[1372] is often cited as a significant starting point for tracing the courts' concerns that propensity and similar fact evidence must be kept from jurors.[1373]

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*[1374] (*Boardman*), Lord Cross of Chelsea observed that the reason for the exclusionary rule for 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.[1375]

In *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.[1376] This includes tendency evidence, to which 'special dangers' attach.[1377] 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.[1378] [References omitted.]

In *Pfennig*, McHugh J listed a number of reasons for restricting the admissibility of tendency and coincidence as follows:

- it will create 'undue suspicion against the accused [which] undermines the presumption of innocence'[1379]
- juries 'tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct'[1380]
- '"(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"'[1381] (references omitted)
- 'in many cases the [shocking] facts of the other misconduct may cause a jury to be biased against the accused'[1382]
- '[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'.[1383]

Concerns about tendency and coincidence evidence have also been expressed in different terms by other judges over time, including:

- 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[1384]
- 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[1385]
- the jury will ignore the presumption of innocence and replace it with a presumption of guilt[1386]
- the jury will become confused and substitute an element from the other alleged misconduct for an unproven element in the present charge.[1387]

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 ALRC, the NSW LRC and the 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.[1388]

The term 'unfair prejudice' is not defined under the Uniform Evidence Act. In *Dupas v The Queen*,[1389] 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.[1390] [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.[1391] [Reference omitted.]

However, unfairly prejudicial evidence is not merely evidence that makes the accused more likely to be convicted.[1392] 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.[1393] In the High Court's decision in 2001 in *KRM v The Queen*,[1394] 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.[1395] [References omitted.]

In the 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:[1396]

- **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'.[1397] 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 10.5.

10.4.2 Absence of evidence of unfair prejudice

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, 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.

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 Mr Doyle involving two complainants, one of whom was Mr Whitley. This is discussed in section 10.3.2. 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 Mr Rapson, discussed in section 10.3.5; and the prosecutions of CDV, discussed in section 10.3.7. 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'. 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. 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.

10.5 Jury Reasoning Research

10.5.1 Purpose

We engaged Professor Goodman-Delahunty, Professor Cossins and Ms 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'?

10.5.2 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.[1398]
- 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'.[1399]

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.[1400]

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 10.4 or whether it was a result of using additional evidence and permissible reasoning in a logical and fair way.

10.5.3 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 abuse 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,[1401] 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.

10.5.4 Key findings on unfair prejudice

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 …[1402]

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.[1403]

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'.[1404] 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.[1405]

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 10.1 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 10.1: Verdict and factual culpability by type of trial for the moderately strong case[1406]

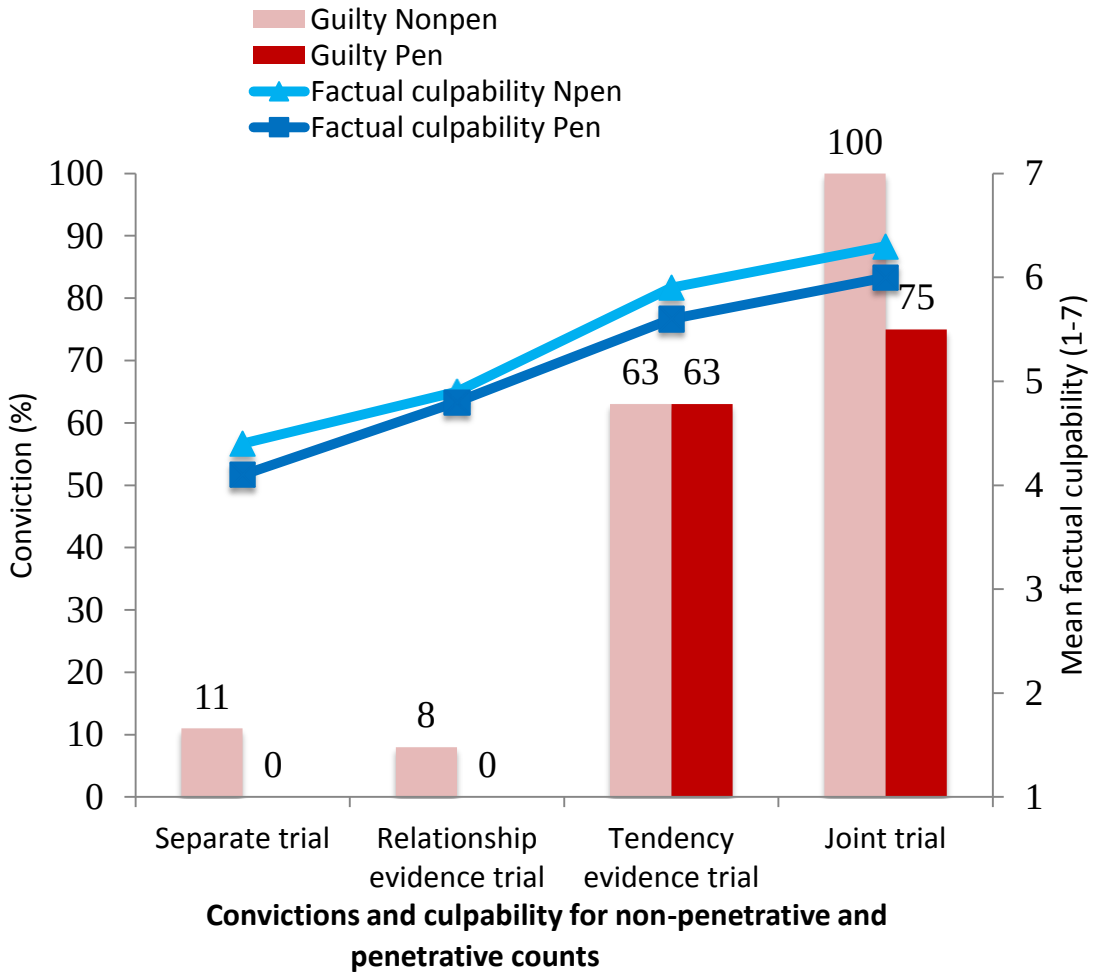


Figure 10.1 shows that, in the separate trial, while the mean factual culpability rating is above four out of seven for the penetrative and non-penetrative offences, the conviction rate is low – 11 per cent for the non-penetrative offence and no convictions for the penetrative offence. This suggests 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.[1407] 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.[1408] [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.[1409]

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.[1410] 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.[1411]

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.[1412] 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.[1413]

The researchers' analysis of individual mock jurors' main reasons for their verdict showed the 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.[1414]

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 10.1.[1415]

Table 10.1: 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 10.1 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.

10.6 Overseas approaches

The Royal Commission commissioned Associate Professor 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.

10.6.1 England and Wales

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 not adopted as restrictive a position on the admissibility of propensity and similar fact evidence as applied in Australian common law as a result of the High Court's decisions in *Hoch* and *Pfennig*. 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 Associate Professor Hamer reviewed, England and Wales appear to 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 11 years worth of practical experience available to assess the effectiveness – including the fairness – of the reforms.

Associate 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 Associate Professor David 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'[1416] or that it 'is relevant to an important matter in issue between the defendant and the prosecution'.[1417] The evidence is also subject to general tests of relevance and limited probative value.[1418]

'Evidence of bad character' is defined as 'evidence of, or of a disposition towards' misconduct,[1419] 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’.[1420]

‘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.[1421] Professor Hamer also states that this is a significant departure from the common law that propensity reasoning was forbidden.[1422] 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.[1423]

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.[1424] It may also be the case that the offences charged and those previously convicted can be quite different.[1425]

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.[1426] 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.[1427] Contamination may be either a result of deliberate collusion by witnesses or accidental or inadvertent.[1428]

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’.[1429]

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’.[1430] 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’.[1431]

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.[1432]

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.[1433]

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.[1434] 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.[1435]

Cross-admissibility and joinder of counts

In instances where charges relating to multiple victims and heard together, evidence will need to be assessed for admissibility in relation to each charge.[1436]

Professor Spencer's evidence

In Case Study 38, we heard expert evidence about the reforms adopted in England and Wales from Professor John Spencer, Professor Emeritus of Law at the University of Cambridge. The third edition of Professor Spencer's book, *Evidence of bad character*, is expected to be 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 considering 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.[1437]

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.[1438]

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 '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.[1439]

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.[1440]

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.[1441]

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.'[1442]

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.[1443]

10.6.2 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.

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.[1444]

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.[1445]

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.[1446] 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.[1447]

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.[1448]

Quoting the Canadian case of *R v Handy*[1449] (*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').[1450]

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.[1451]

There are contrasting positions as to what constitutes sufficient probative value. Some cases relied on the test in the English case of *Boardman* that the earlier offence needed to share a 'striking similarity' with the matter currently before the courts.[1452] 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. 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.[1453]

As is the case in England and Wales, 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.[1454]

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.[1455]

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*[1456], 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.[1457]

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.[1458] 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.[1459]

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, it could be admitted (subject to the general principle of probative value outweighing prejudicial risk) in the narrow interpretation. Under the broad interpretation, it will not be admissible unless it satisfies the admissibility test because it has a lower risk of prejudice.[1460]

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.[1461] 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.[1462]

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.[1463]

10.6.3 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 David Hamer.

Legal basis

Admissibility of tendency and coincidence evidence is governed by Subpart 5 of Part 2 of the *Evidence Act 2006* (NZ).[1464]

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.[1465] 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.[1466]

'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.[1467]

Probative value and prejudicial effect

The approach to assessing probative value is set out in section 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. A key issue will be the nature of the issue in dispute. Professor Hamer discusses the case of *N v R*,[1468] in which 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.[1469]

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.[1470]

In the case of *Mahomed v The Queen*[1471], the majority of the Supreme Court indicated that each should be considered. In *R v Healy*[1472], 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).[1473]

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.[1474] However, it does arise in some cases. In *D v The Queen*[1475], 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.[1476]

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
- the fact-finder will tend to give disproportionate weight in reaching a verdict 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.[1477]

The burden is on the prosecution to establish admissibility under section 43 and on the defence to exclude evidence under section 8.[1478] 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.[1479]

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.[1480]

Relationship evidence

Professor Hamer notes there is no specific definition of 'relationship evidence' in the New Zealand legislation.[1481] 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 the offence being tried'.[1482]

Professor Hamer notes the Court of Appeal's decision in *Perkins v The Queen*[1483], 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* held that evidence adduced to explain family dynamics should have been ruled inadmissible.[1484]

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.[1485]

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.[1486]

10.6.4 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 compared to Australia, England and Wales, Canada and New Zealand, representing a more absolute exclusionary rule which could be considered to be at an earlier stage of development
- 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.[1487]

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*.[1488]

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'.[1489]

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.[1490]

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.[1491] 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.[1492]

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'.[1493]

Professor Hamer identifies similar relaxation of the general exclusion in relation to matters of identity and to negate accident or mistake.[1494] 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.[1495] Further cases arise in the categories of motive or to provide background on the alleged offence.[1496]

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.[1497]

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.[1498] Justifications for these provisions include studies that demonstrate the comparative propensity for sex offenders is particularly high[1499] and that it is necessary to overcome under-enforcement of child sexual assault and the associated difficulty in finding corroborative evidence.[1500]

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).[1501]

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.[1502]

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.[1503]

10.7 Opinions on the law

In addition to the opinion of Mr Game SC, Ms Roy and Ms Huxley of the New South Wales Bar, we received opinions from a number of expert witnesses in Case Study 38. We have also outlined the views of one expert witness – Professor John Spencer, Professor Emeritus of Law at the University of Cambridge – in section 10.6.1 and we do not repeat them here.

We have also now obtained the opinion of Counsel Assisting in Case Study 38, Mr Kirk SC and Mr Barrow, in relation to the issues considered in the first week of the public hearing.

We outline below a brief summary of the various opinions we have obtained. The advice provided by Mr Game, Ms Roy and Ms Huxley, and the opinion of Counsel Assisting, are published on the Royal Commission's website and should be read in full for a good understanding of the opinions expressed.

Similarly, evidence given by the DPPs and senior members of the private bar giving a defence counsel perspective is set out in the transcripts for the first week of the public hearing in Case Study 38 and should also be read in full for a good understanding of the opinions expressed.

10.7.1 Mr Game SC, Ms Roy and Ms Huxley

In 2015, barristers Mr Game SC, 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.

Mr Game, Ms Roy and Ms Huxley argue 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 state:

> 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.[1504]

They conclude 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.[1505]

They particularly caution against any change in the threshold for admissibility of such evidence:

> Any lowering of the threshold will merely put the burden on the jury to decide difficult questions regarding the probative value of the evidence and will lead to lengthier trials whereby collateral issues are explored and quite possibly a higher incidence of successful appeals.[1506]

They criticise the Western Australian approach as follows:

> 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'. We note also that the definition of propensity evidence is manifestly too broad, including 'similar fact evidence or *other evidence of the conduct of the accused person*' (emphasis added); read literally, any evidence of the conduct of an accused person is propensity evidence requiring significant probative value outweighing the degree of risk of an unfair trial. Neither of these drafting curiosities are likely, in practice, to adversely impact upon the admissibility of probative evidence or the fair trial (which is not to say they

> couldn't have been drafted better). However, in the interests of clarity and unity, we recommend the adoption of the approach of the Uniform Evidence Acts, include [sic] as to notice, in Western Australia.[1507]

They identify the different tests for admissibility between jurisdictions and express the opinion that:

> In our view, although the tests vary in the apparent height of the barrier to admissibility, there is not a significant practical difference between the jurisdictions. All bar Queensland still involve a balancing exercise comparing probative value to the prejudicial effect. Further, even though Queensland prima facie appears to have the highest barrier, the legislative prohibition on considering the impact of the possibility of concoction and the prohibition on considering reliability generally when assessing rational views consistent with innocence decreases the height of that barrier. And the reality is that in most historic child sex offence cases, the Pfennig barrier is met in any event.[1508]

In relation to the issue of collusion, concoction and contamination, Mr Game, Ms Roy and Ms Huxley do not support the statutory modification of the common law in *Hoch* as adopted in Queensland, Western Australia and South Australia. They do not support proscribing factors that trial judges can take into account in determining admissibility.[1509] They are particularly critical of Queensland's provision,[1510] and Counsel Assisting express some support for their criticism.[1511] They are less critical of the comparable provision in South Australia, although they suggest some redrafting.[1512]

Mr Game, Ms Roy and Ms Huxley also express support for the notice requirements in relation to tendency and coincidence evidence that apply under the Uniform Evidence Acts.[1513]

An important issue for Mr Game, Ms Roy and Ms Huxley is how tendency and coincidence is framed when put to a jury. They suggest a set of basic questions that should be asked when framing an application to use such 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.[1514]

This is 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.[1515]

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.[1516]

10.7.2 Directors of Public Prosecutions

We heard expert evidence from five state DPPs. This evidence canvassed the current law and practice in the relevant DPP's jurisdiction in relation to tendency and coincidence evidence and joint trials as well as possible reforms. The DPPs were provided with a number of examples of institutional child sexual abuse prosecutions to facilitate an exploration of the issues, particularly the degrees of similarity or differences in the alleged offending, and how the examples might be treated differently in different Australian jurisdictions. A number of these examples were drawn from the particular prosecutions which were considered earlier in the week through the evidence of survivors and prosecutors. The DPPs were also asked to consider the reforms in England and Wales.

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 involve Mr Michael Byrne QC, the DPP for Queensland; Mr Joseph McGrath SC, the DPP for Western Australia; and Mr Adam Kimber SC, the DPP for South Australia.

A number of the DPPs expressed opinions about the capacity of juries to consider tendency and coincidence evidence.

Mr Babb SC 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.[1517]

Mr Champion SC 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.[1518]

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.[1519]

Similarly, Mr Kimber SC said:

> 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.[1520]

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.[1521]

He suggested that such variance might be minimised through uniform training and education for the legal profession and the judiciary.[1522]

Mr Byrne QC 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.[1523]

In relation to degrees of similarity, Mr Babb disagreed with the proposition in *PNJ* (discussed above) that, in relation to the question of whether coincidence evidence is admissible, factors beyond the control of the accused should be excluded.[1524] 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'.[1525]

Mr Champion's views on the decision in *PNJ* are discussed in section 10.3.4.

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.[1526]

Mr Babb noted that, where there is a mere possibility of collusion, there is strong authority in New South Wales that matters should not be separated on that basis.[1527] Mr Champion noted that according to *Velkoski*, where there is a reasonable possibility that there has been collaboration or contamination, this then renders the tendency or coincidence evidence inadmissible.[1528] As such, Mr Babb considered that a specific provision removing the possibility of contamination as a relevant matter in considering admissibility would be unnecessary, whereas Mr Champion expressed a view that such a provision would be appropriate in Victoria.[1529]

In relation to possible reforms to tendency and coincidence law, Mr Babb and Mr Champion expressed support for any reform to apply in all criminal matters rather than having different requirements for institutional child sexual abuse cases.[1530]

In relation to the approach in Western Australia, Mr McGrath did not accept the criticism made by Mr Game, Ms Roy and Ms Huxley.[1531]

Counsel Assisting summarised Mr McGrath's evidence on the effect of the Western Australian approach in sexual abuse cases 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).[1532]

Mr Champion expressed the view that the Western Australian legislation was worth further consideration.[1533] Mr Kimber also expressed some support for the Western Australian approach, particularly because of its simplicity.[1534]

In relation to the approach in England and Wales, Mr Champion noted that, if such an approach was implemented in Australia, there was the possibility of a plethora of interpretations across the states and territories.[1535]

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 to the trial.[1536] Mr Byrne stated that this is also the practice in Queensland.[1537]

In relation to the standard of proof to apply in relation to tendency and coincidence evidence, Mr Babb said that, in New South Wales, coincidence evidence does not require 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 proven beyond reasonable doubt.[1538] Mr Babb expressed the view that, consistent with the treatment of other circumstantial evidence, these should not require proof beyond reasonable doubt.[1539]

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.[1540]

10.7.3 Defence counsel perspective

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 were given the same material as the DPPs and were asked to consider the same issues. They gave their evidence concurrently.

Mr Odgers SC 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.[1541] 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.[1542]

Mr Morrissey SC also expressed the view 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.[1543] 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*, discussed in section 10.3.5, as an example of the judge not allowing all the evidence to be cross-admissible.[1544]

Mr Lynch QC 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.[1545] 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.[1546]

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?[1547]

In relation to evidence of uncharged acts generally, Mr Morrissey said:

> what all defence counsel know viscerally and what trial judges know viscerally, when they see the jury at the time when that evidence is actually led, and when evidence of other wrongdoing is led before a jury it is the almost inevitable response of the jury to sigh and to look disturbed. We do not have an insight into what happens in the jury room, we can't. But it would be just ignoring reality to say that it does not have a 'wow' factor when it is led.[1548]

In response to a question whether that is 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.[1549]

In relation to tendency and coincidence evidence generally, Mr Odgers said:

> 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.[1550]

Mr Morrissey agreed with Mr Odgers' concerns 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.[1551]

Mr Odgers stated that, in his view, there was no evidence that the Uniform Evidence Act provisions on tendency and coincidence had produced any injustice; hence, in his view, there was no case for reform.[1552] Mr Lynch expressed support for the *Pfennig* test and the rules as they apply in Queensland and said that they work fairly well.[1553]

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.[1554]

Mr Odgers expressed the opinion that the test for admission in Western Australia was almost identical to the test under the Uniform Evidence Act.[1555] However, he also expressed a preference for the Uniform Evidence Act test rather than the Western Australian test. He said:

> Since I support the uniform evidence law approach, and since I regard this as quite close, I wouldn't be greatly troubled [by the Western Australian test]. But I did say that I preferred [section] 101 to [section] 31A(2)(b) for the reasons that have just been articulated, which I think actually to talk about letting the evidence in, even though there is a risk of an unfair trial, is problematic philosophically, and it's preferable to express it in terms of balancing probative value against dangers of unfair prejudice.
>
> It seems to me that that's a better way of expressing it even though, in truth, as Justice McHugh said in Pfennig, these are essentially incommensurables and, at the end of the day, the real question is not whether or not it has priority over the risk of an unfair trial but, rather, what does fairness require in the circumstances. That's an intuitive judgment which is a necessary one under [section] 101 and it is a necessary one under [section] 31A and it's a necessary one, even in the United Kingdom when they balance it in the discretionary context. These are unavoidable questions.[1556]

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.[1557] Mr Odgers described an intermediate position where the mere possibility of collusion or contamination should not result in inadmissibility, but the judge should retain the ability to consider collusion or contamination as a factor to be taken into account in assessing the probative value of the evidence.[1558]

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.[1559] 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. As you know, appellate courts restrict the extent to which they will interfere or provide – interfere with the exercise of those discretions and, therefore, don't provide much guidance as to how the discretion should be exercised. So there are a number of reasons why English academics are concerned about the current law there and why practitioners here would be equally concerned if the uniform evidence law moved in that direction.[1560]

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.[1561]

Mr Odgers noted that, under the Uniform Evidence Act, section 91 prohibits evidence of a finding in an Australian proceeding being admissible to prove that the existence of the fact was an issue in the proceeding – therefore, evidence of a conviction cannot be admitted to prove the facts that led to that conviction.[1562]

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.[1563] 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.[1564]

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.[1565] Mr Morrissey referred to the New South Wales approach favourably as providing a safeguard.[1566]

10.7.4 Counsel Assisting

Counsel Assisting the Royal Commission in Case Study 38, Mr Kirk SC and Mr Barrow, provided an opinion on the issues examined in the first week of the public hearing. This opinion is published on the Royal Commission's website.

In their opinion, Counsel Assisting outline 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 note 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 CJA in England and

Wales, Counsel Assisting identify 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)?[1567]

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.[1568]

  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.[1569]
- **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.[1570]

The primary criticism of the approach in England and Wales, in Counsel Assisting's opinion, is 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.[1571] However, in this context, Counsel Assisting note the findings of the Jury Reasoning Research conducted for the Royal Commission, discussed in section 10.5.

- **An intermediate approach:** While not canvassing such an approach in detail, Counsel Assisting noted that, between a Uniform Evidence Act approach and the England and Wales approach, 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.[1572]

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.[1573]

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*. The approach of the New South Wales Court of Criminal Appeal is to be preferred.[1574]

- 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.[1575]
- The question of whether accounts by different complainants have been concocted or are contaminated should usually be a matter for the tribunal of fact.[1576]
- '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.[1577]
- 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.[1578]
- 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.[1579]
- The arguments about whether evidence of a prior conviction should be able to be adduced as evidence in a subsequent trial are finely balanced.[1580]

10.8 Discussion

10.8.1 Is reform needed?

A rational argument can 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 agree with Counsel Assisting's observation 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.[1581]

We also agree 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.[1582]

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 ALRC, NSW LRC and 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'.[1583]

As we indicated in section 10.1, based on what we have heard to date and the research and other materials we have considered, Commissioners are now reasonably satisfied that the current law needs 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 referred to in section 10.4.2, we consider that the Jury Reasoning Research provides strong support for the view that the courts' long and strongly held concerns about tendency and coincidence evidence are misplaced.

The Uniform Evidence Act has moved substantially from the common law position, yet we have seen no evidence or heard any suggestion of injustices arising as a result of these changes. As Counsel Assisting state:

> 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 …[1584]

Similarly, the Western Australian provisions – at least as they are applied in Western Australia – have moved further than the Uniform Evidence Act, yet again we have seen no evidence or heard any suggestion of injustices arising as a result of these changes.

Finally, the position in England and Wales has moved even more substantially from any of the positions applying in Australian jurisdictions, and again 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.

Counsel Assisting express the view that:

> The public hearings 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.[1585]

We regard this as both a significant concern and a significant impetus for reform.

We also agree 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.[1586]

We know enough about institutional child sexual abuse – including from the examples we considered in Case Study 38, as discussed in section 10.3 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 12 – 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.[1587]

Given this evidence of the variety of institutional offending, the test for admitting tendency and coincidence evidence should not require degrees of similarity that are inconsistent with this evidence of the nature of institutional child sexual abuse offending. This is particularly the case where the identity of the alleged offender is not in issue.

We agree with Counsel Assisting's criticism of the Victorian Court of Appeal's 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 state, 'the force of the coincidence evidence lies in a number of complainants making an allegation against a particular person in authority'.[1588]

It is also of concern that exclusions of relevant evidence leave 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. The prosecutions of Maguire and Rapson, discussed in section 10.3.1 and 10.3.5, provide examples of this problem.

10.8.2 Options for reform

Counsel Assisting discuss some options for reform, and these are summarised in section 10.7.4.

While we are reasonably satisfied that the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials, it is not yet clear to us how this can best be achieved. We seek the assistance of all interested parties on this issue.

In considering the Uniform Evidence Act approach, 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.

We note 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'.[1589]

Another significant concern with the Uniform Evidence Act approach is that it allows restrictions on admissibility that go too far in excluding tendency and coincidence evidence. *PNJ* provides a key example in relation to coincidence evidence.

What we have learned through public hearings and private sessions makes 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.

It is 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.

The suggestion in *Bayley v The Queen*[1590] that, following *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 Acts' 'significant probative value' test.

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. If this is 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.

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, an approach that allows more relevant evidence to be placed before juries is appealing. It may be 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 will be a test of mere relevance or the approach in England and Wales.

As to some of the other issues, it seems 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. It also seems reasonably clear that tendency or coincidence evidence should not be required to be proved beyond reasonable doubt.[1591]

As we noted in section 10.1, we remain open to considering submissions that the current law does not need to change. Given the complexity of these issues and the extent to which they have troubled the courts for many years, we recognise that reform is likely to be challenging. We want to be confident that any reforms we propose will achieve the desired outcomes and will not have unintended consequences.

We welcome submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions from interested parties on:

- whether or not the law in relation to tendency and coincidence evidence and joint trials should be reformed
- the validity of the concerns of the courts in relation to unfair prejudice in light of the Jury Reasoning Research findings and any other relevant material
- the approaches adopted in any overseas jurisdictions and, in particular, whether there is any reason why we should not recommend adopting the approach in England and Wales
- if the law is to be reformed:
    - should there be any requirement beyond relevance for admissibility and, if so, what should it be
    - if there is to be any requirement for similarity in the evidence, how should it be expressed and what should it allow and exclude
    - if there is to be a weighing of probative value against prejudicial effect, should the test favour admissibility or exclusion of the evidence
    - should the burden for persuading the court be on the prosecution (to admit the evidence) or the accused (to exclude the evidence)
    - should issues of concoction, contamination or collusion be left to the jury
    - should the evidence need to be proved beyond reasonable doubt
    - should evidence of prior convictions be admissible
    - should evidence of alleged conduct for which the accused has been acquitted be admissible
- in relation to joint trials:
    - does any specific provision need to be made in favour of joint trials, in addition to any reform to the law in relation to admissibility of tendency and coincidence evidence
    - if so, what provision should be made
- in relation to tendency and coincidence evidence and joint trials, should any reforms apply specifically to child sexual abuse or institutional child sexual abuse offences, or should any reforms be of general application.

11 Judicial directions and informing juries

11.1 Introduction

The trial judge is obliged to ensure that a trial of the accused is fair. To that end, the judge must give a firm direction as to the appropriate law and remind the jury of the relevant facts. In *RPS v The Queen*,[1592] Gaudron ACJ, Gummow, Kirby and Hayne JJ described the role of jury directions in the following terms:

> The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.[1593] [Emphasis original, references omitted.]

A misdirection by the trial judge may result in a miscarriage of justice. In *Conway v The Queen*,[1594] Kirby J stated:

> A high store is placed on the accuracy of judicial instructions to a criminal jury about the law and the evidence relevant to such law. In a sense, this principle recognises that a criminal trial that has departed from such accuracy is not one that has been entirely conducted according to law. The strictness observed in such matters reflects an acceptance that, in one sense, a single misdirection can amount to a form of miscarriage of justice.[1595]

When giving directions in a trial, the judge may in some circumstances be required to give the jury an appropriate warning or caution. The Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSW LRC) have described it as including responsibility to give an appropriate warning or caution where acting upon particular evidence involves potential 'dangers'.[1596] When a warning is required, it usually concerns legal matters, where the court is said to have 'special experience' not possessed by members of the jury.[1597]

When discussing the concerns that courts express about the risk of unfair prejudice arising from tendency and coincidence evidence in section 10.4, we referred to the common law's longstanding concern that sexual offences, including child sexual offences, are of a class for which special care needs to be taken to ensure that the accused is not unfairly prejudiced.[1598] In *KRM v The Queen*,[1599] 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 ...[1600] [References omitted.]

It is common in trials of child sexual offences for some directions and warnings to be given over and above the directions commonly given in trials for other offences. The law with respect to judicial directions and warnings in sexual offence – including child sexual abuse – trials is complex and controversial, and it has been the subject of considerable review and research in Australia over the last decade.[1601]

Victoria has recently enacted major legislative reform in relation to jury directions. In 2013, the Parliament enacted the *Jury Directions Act 2013* (Vic), which commenced on 1 July 2013. The effect of the 2013 Act was continued, with some refinements and additions, in the *Jury Directions Act 2015* (Vic).[1602]

The initial legislation in 2013 followed the report of the Judicial College of Victoria and the Department of Justice, *Simplification of jury directions project: A report to the Jury Directions Advisory Group August 2012* (the Weinberg Report). The *Jury Directions Act 2015* then followed the Victorian Department of Justice and Regulation report, *Jury directions: A jury-centric approach*, which details the reasons for the reforms incorporated into the *Jury Directions Act 2015*. In introducing the Jury Directions Bill 2015, the Victorian Attorney-General told Parliament: 'The title of the [Department's] report highlights that ensuring that jury directions assist juries in performing their task is central to improving jury directions.'[1603]

The reforms in the *Jury Directions Act 2015* relating to directions on delay and credibility were designed to 'simplify the current law, which requires the trial judge to give competing and apparently contradictory directions in some cases'.[1604] They were also designed to 'address common misconceptions about the behaviour of legitimate sexual offence complainants (in particular, that a genuine victim would complain about the offence soon after it occurred)'.[1605]

For centuries, judges have relied on their own understandings of human behaviour to inform the content of the relevant directions and warnings. The difficulty is that, in the absence of research or other evidence as to how people behave, we do not know whether the judges' assumptions are correct.[1606]

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

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

As the Victorian Department of Justice and Regulation report stated, the law as it applied before the major legislative reforms in 2015 'was based on assumptions about the expected behaviour of legitimate complainants that have since been discredited. Legislative reforms have been attempted to address this issue, but jury directions in this area continue to be problematic'.[1607]

The research report *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (Jury Reasoning Research), which we discussed in Chapter 10, examined how juries reason and empirically tested the accuracy of the courts' concerns about the risks of unfair prejudice to the accused arising from the admission of tendency and coincidence evidence. As discussed in Chapter 10, we consider that the Jury Reasoning Research provides strong support for the view that the courts' long and strongly held concerns about tendency and coincidence evidence may be misplaced.

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

In this chapter, we discuss:

- our case studies and research relevant to judicial directions
- key judicial directions and warnings relevant to child sexual abuse trials
- what we know about juries' understanding and reasoning and the assistance they may require in child sexual abuse trials
- possible options for improving the assistance given to juries in child sexual abuse trials.

11.2 Case studies and research

11.2.1 Case studies

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

Case Study 11 examined the experiences of a number of men who were resident at Christian Brothers residences in Western Australia and the responses of the Christian Brothers and relevant Western Australian authorities to allegations of child sexual abuse at the residences. In or around November 1993, the then Director of Public Prosecutions (DPP) for Western Australia issued a media release setting out his reasons for deciding not to prosecute in respect of allegations of child sexual and physical abuse by a small group of Christian Brothers 40 years earlier.[1608]

Mr Bruno Fiannaca SC, Deputy DPP for Western Australia, discussed the need in 1993 for the judge to direct the jury about the disadvantages to the accused resulting from long delay in the making of the complaint and the impact it may have on the jury's decision.[1609] These directions are referred to as 'Longman' directions or warnings after the High Court's decision in 1989 in *Longman v The Queen*[1610] (*Longman*).

Mr Fiannaca SC gave evidence that the need to give a jury these warnings, together with the need for the jury to be satisfied of the accused's guilt beyond reasonable doubt, meant that the prospects of conviction were fairly small. This was a factor in the 1993 allegations not being prosecuted.[1611]

Case Study 12 examined the response of an independent school in Perth, Western Australia, to concerns raised about the conduct of a teacher between 1999 and 2009. In September 2009, WP, a former student at the school, disclosed to the Western Australia Police that YJ (the pseudonym used

by the Royal Commission) had sexually assaulted him while he was a student at the school. YJ was later charged with having committed sexual offences against five students, including WP.[1612]

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

YJ appealed against his conviction and sentence. The appeal succeeded. The Western Australian Court of Appeal held that the trial judge failed to give the jury an adequate Longman direction in relation to the three complainants who were the subject of the earlier abuse.[1613] A retrial was ordered on six counts in relation to offences against WP and two other complainants. It is of interest that the retrial resulted in convictions on all six counts.[1614]

The Longman direction was also raised in Case Study 38 in relation to criminal justice. In relation to the prosecutions of Mr John Maguire, which are discussed in section 10.3.1, Ms Nanette Williams, a Crown prosecutor in New South Wales, noted that at the time of those trials (2003 and 2004):

> there was a standard direction called the Longman direction that was to be given in cases if there was just the evidence of a single complainant. That direction, which was a standard direction, was to the effect that if the evidence of the complainant could not be adequately tested because of the passage of time, it would be unsafe or dangerous to convict on uncorroborated evidence of the complainant alone, unless satisfied of its truth and accuracy after scrutinising it and the relevant circumstances with great care and after taking the warning into account. That is a general summation of that direction.[1615]

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

> what we refer to as the Longman direction is no longer to be given and, in my view, that has significantly changed the landscape of prosecuting these types of historical matters.
>
> The Longman direction, when it was given, in my own opinion, was the kiss of death to many prosecutions. It was very difficult for a Crown case, no matter how credible, how reliable, how strongly the complainant gave evidence – it was very difficult for the prosecution to withstand that direction. It was a direction – and I've talked about this with my colleagues over the years, that you would see the juries attending to the directions given by the presiding judge and it was almost visceral, a juror's direction to hearing that direction, 'dangerous to convict'. They are heavy words.[1616]

Tendency and coincidence issues have also been the subject of discussion. In Case Study 38 we heard evidence from a number of DPPs, as discussed in section 10.7.2. Mr Adam Kimber SC, the South Australian DPP, suggested that appeals in relation to judicial directions on tendency and coincidence evidence remain a challenge:

> Certainly there have been a number of appeals. Those appeals have been perhaps more directed towards directions than they have towards severance. I'm not saying there haven't been appeals about severance, there plainly have, and there have been a number. But the more difficult appeals and the ones that have tended to be allowed have more been in the area of directions given to juries, not so much about whether or not the trial judge made the right choice about severance.[1617]

11.2.2 Research

Jury Reasoning Research

The Jury Reasoning Research discussed in Chapter 10 examined the influence of jury directions on jury reasoning and decision-making. Otherwise identical trials were run, with the only difference being the presence of a specific context or tendency direction, depending on the type of evidence used in the trial. The researchers then analysed a number of variables, including the verdicts, juror ratings of the culpability of the defendant and cognitive effort, and the error rate in deliberations to assess the impact of the directions.[1618]

The findings of the Jury Reasoning Research are in line with a large body of empirical research demonstrating the ineffectiveness of most jury directions.[1619] The researchers found that:

- the context evidence direction has a greater impact on jurors than the tendency evidence direction, which produced no apparent benefits, whether deployed in a separate trial or joint trial[1620]
- the context evidence direction raised conviction rates for the penetrative offence but had no impact on conviction rates for the non-penetrative offence, although juror ratings of the factual culpability of the defendant increased significantly on both counts when the direction was given.[1621]

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

> mock jurors who received context directions as opposed to the standard directions perceived the judge's instructions as more confusing; found it more difficult to assess witness credibility and apply the law; reported a higher cognitive load; and felt that the judicial instructions made it harder to understand the charges, recall the facts, weigh the evidence and assess the case for the prosecution. Similarly, compared to the standard directions, mock jurors rated tendency evidence directions as more difficult to understand, and perceived that these directions increased their cognitive load. However, mock jurors rated the charges as easier to understand when they were given tendency evidence directions in a joint trial than when they were not given these directions.[1622]

The Jury Reasoning Research concluded that the level of jury error in using context and tendency evidence was unaffected by the presence of context evidence or tendency evidence directions.[1623]

Appeals Study

The Royal Commission also commissioned research on child sexual abuse appeals in New South Wales (the Appeals Study). It discusses judicial directions. The Appeals Study, which is discussed further in Chapter 13, concludes that errors in judicial directions – judicial misdirections – continue to be a source of error in child sexual abuse trials.

The study found that 16.5 per cent of all conviction appeals succeeded on the basis of judicial misdirection, and over half of the successful appeals against conviction cases involved judicial misdirection.[1624] This is consistent with a prior study by the Judicial Commission of New South Wales.

While that study examined all appeals rather than just those relating to child sexual assault convictions, it found that one or more misdirections were present in 53 per cent of successful conviction appeal cases.[1625] Most of the judicial errors identified in the Appeals Study related to giving inadequate warnings to the jury, unbalanced judicial summing-up, and failure to correctly direct the jury.[1626]

Research undertaken in Victoria for the period from July 2000 to June 2007 indicates that error in the judge's directions was a ground of appeal in approximately 52 per cent of successful appeals against convictions decided in the Victorian Court of Appeal.[1627] The Victorian Law Reform Commission (VLRC) *Jury directions: Final report* suggested that a primary cause of error resulting in appeals based on misdirection lies in the complexity and uncertainty of the law concerning jury directions.[1628]

11.3 Judicial directions and warnings

The history of judicial directions and warnings – particularly directions and warnings based on judicial assumptions about the unreliability of women, children and complainants of sexual offences, including child sexual abuse – reflects a tension between the view of the High Court and the legislation of the parliaments, as seen in New South Wales and Victoria.

11.3.1 Sexual offences

The common law

The common law identified sexual assault complainants – who were assumed to be women – as a class of witnesses whose evidence was said to be inherently unreliable.[1629] Children were also considered to be inherently unreliable witnesses.[1630]

As a result, the common law required directions to be given in respect of the need for corroboration of evidence given by sexual assault complainants and child witnesses.

The common law has also required warnings about delay in complaint by women and children in sexual offences. The jury was required to consider whether delay in complaint reduced the credibility of the complainant and disadvantaged the accused in defending the charges.

In 1973, in *Kilby v The Queen*[1631] (*Kilby*), Barwick CJ stated the common law requirement to warn the jury that delay in complaint adversely affects a complainant's credibility as follows:

> It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper, but depending of course on the particular circumstances of the case, ought as a general rule to be given.[1632]

Legislative reform and cases in the 1980s

In 1981, New South Wales enacted sections 405B and 405C of the *Crimes Act 1900* (NSW). If delay in complaint was raised in a trial for a prescribed sexual offence, section 405B required the trial judge to warn the jury that delayed complaint does not necessarily indicate that the allegation was false and to inform the jury that there may be a good reason why a sexual assault victim may hesitate in complaining.

Section 405C of the *Crimes Act 1900* (NSW) removed the requirement in a trial for a prescribed sexual offence that a judge warn the jury that it is unsafe to convict a person accused of certain sexual offences on the uncorroborated evidence of the alleged victim. Section 405C(3)(c), as enacted in 1981, preserved any law or practice that required a judge to warn the jury that it is unsafe to convict on the uncorroborated evidence of a child. However, section 405C(3) was repealed in 1986.[1633]

Sections 405B and 405C were considered in 1987 by the New South Wales Court of Criminal Appeal in *R v Murray*[1634] (*Murray*). The 'delay' in complaint in this case was a period of two to three days.

In relation to corroboration and section 405C, Lee J (with Maxwell and Yeldham JJ agreeing) said:

> Section 405C has brought about the result that women are no longer, in the eyes of the law, to be put before juries as persons whose evidence requires corroboration before it is safe to act upon it. That concept which has been in the law for a long time has now gone … this does not mean that the judge cannot or should not, as is done in all cases of serious crime, stress upon the jury the necessity for the jury to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case. *In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in*; but a direction of that kind does not itself imply that the witness' evidence is unreliable.[1635] [Emphasis added.]

While the decision in *Murray* acknowledged section 405C, it introduced what became known as the 'Murray direction'. Arguably, this had an effect similar to the corroboration direction in undermining the jury's view of the complainant's evidence in sexual offence cases. The Murray direction required that, where there was only one witness to the crime, the jury must be warned to scrutinise the evidence of that witness with great care. As discussed in Chapter 2, in most child sexual abuse cases, the only witness to the offences will be the complainant.

Murray was approved by the High Court in *Robinson v The Queen*.[1636] The Victorian Court of Appeal held in *R v Aden & Toulle*[1637] that, when Lee J in *Murray* referred to the giving of the direction as customary, he was not to be taken to have meant that the direction was obligatory.[1638]

In 1989, in *Longman*,[1639] the High Court said that, in cases of delayed complaint, the trial judge should warn the jury that it may be more difficult for the accused to defend themselves because of the delay. Brennan, Dawson and Toohey JJ stated that:

> The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, *it would be dangerous to convict on that evidence alone* unless the jury, scrutinizing the evidence with great care, considering

the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.[1640] [Emphasis added.]

This has become known as the 'Longman direction'.

Commenting in 2015, the Victorian Department of Justice and Regulation described the Longman direction as 'one of the most problematic and controversial jury directions'.[1641] It identified a number of problems with the decision, including the following:

- It has been criticised for reinstating false stereotypes about the unreliability of sexual assault complainants and for undermining legislative attempts to address these stereotypes.
- The meaning of 'substantial delay' is unclear, with broad variations between trial judges and judges erring on the side of caution.
- It creates an irrebuttable presumption that the delay has prejudiced the accused.
- The wording 'dangerous to convict' encroaches on the fact-finding role of the jury and may be interpreted as a coded instruction to acquit.[1642]

Legislative reform and cases in the 1990s

In 1991, Victoria enacted section 61 of the *Crimes Act 1958* (Vic). Section 61(1)(a) provided that the judge must not warn the jury that the law regards complainants in sexual cases as an unreliable class of witness. Section 61(1)(b) was very similar to section 405B of the *Crimes Act 1900* (NSW). It provided that, in cases of delayed complaint, the judge must warn the jury that delay does not necessarily indicate that the allegation is false and inform the jury that there may be good reasons that a victim may hesitate in complaining. Section 61(2) preserved the judge's ability to make any comment on evidence that it is appropriate to make in the interests of justice.

In 1995, New South Wales enacted the *Evidence Act 1995* (NSW). Section 164 of the Evidence Act abolished the requirements for corroboration and removed any requirement for the judge to warn the jury that it is dangerous to act on uncorroborated evidence. It did not prohibit the giving of a warning. (Section 405C of the *Crimes Act 1900* (NSW) was repealed at the same time.)

Section 165 of the *Evidence Act 1995* (NSW) also made provision for warnings on the request of a party about evidence of a kind that might be unreliable. Examples of evidence of a kind that may be unreliable included evidence the reliability of which may be affected by age.

In 1996, in *Crofts v The Queen*[1643] (*Crofts*), the High Court considered the Victorian provisions enacted in 1991. That case concerned complaints of child sexual abuse made some six years after the first alleged incident of abuse and six months after the last alleged incidence of abuse. Justices Toohey, Gaudron, Gummow and Kirby stated, '[b]y the measure of cases of this kind, that was a substantial delay'.[1644] The work of the Royal Commission has confirmed that this statement is wrong. In cases of that kind, the delay in *Crofts* was short.

Justices Toohey, Gaudron, Gummow and Kirby held that provisions such as section 61(1)(b) and 61(2) in Victoria (and section 405B in New South Wales) require a balanced direction. They referred to the High Court's decision in 1989 in *Longman*, saying:

> [The decision in *Longman*] makes it clear that the purpose of such legislation, properly understood, was to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses. It was simply to correct what had previously been standard practice by which, based on supposed 'human experience' and the 'experience of courts', judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to 'sterilise' complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration. The overriding duty of the trial judge remains to ensure that the accused secures a fair trial. It would require much clearer language than appears in s 61 of the Act to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, on ordinary human experience, would be material to the evaluation of those facts.
>
> Had the Victorian Parliament intended to overrule the practice followed in Australian courts, at least after *Kilby*, s 61(1)(b) would have been expressed in much clearer language than appears. This view of the section is confirmed by the presence in it of s 61(2) and by the established construction of the equivalent section in New South Wales at the time the amendment to the Victorian Act was adopted in 1991.[1645] [References omitted.]

In 1997, Victoria further amended its legislation to respond to *Crofts*. The amendment to section 61 of the *Crimes Act 1958* (Vic) removed the requirement to warn the jury that delay in complaining does not necessarily indicate that the allegation is false. The judge was required only to inform the jury that there may be good reasons why a victim of sexual assault may hesitate in complaining. It also prohibited the judge from making any comment on the reliability of the complainant's evidence 'if there is no reason to do so in the particular proceeding in order to ensure a fair trial': section 61(3).

Legislative reform and cases in the 2000s

In 2000 and 2001, the High Court applied its 1989 decision in *Longman* in the cases of *Crampton v The Queen*[1646] (*Crampton*) and *Doggett v The Queen*[1647] (*Doggett*). *Crampton* involved allegations of sexual abuse made against a teacher of children with learning disabilities by two of his former students. The trial commenced about 20 years after the abuse was alleged to have occurred. The High Court reversed the decision of the New South Wales Court of Criminal Appeal and held that the trial judge's directions to the jury on delay did not satisfy the requirements of *Longman*.[1648]

In *Doggett*, the abuse was alleged to have occurred between 1979 and 1986. The complainant disclosed the abuse to her mother in 1986, but the abuse was not reported to the police until 1998. There was evidence of a taped telephone conversation between the complainant and the accused which the prosecution relied on to corroborate the complaints. The defence did not seek a Longman direction during the trial, and none was given.

The Queensland Court of Appeal considered that a Longman direction would have been inappropriate given the nature of the corroboration in the telephone call. However, a majority of the

High Court (Gaudron, Kirby and Callinan JJ; Gleeson CJ and McHugh J dissenting) held that a Longman direction was required, regardless of corroboration or the strength of the case.[1649]

In 2001, New South Wales amended section 165 of the *Evidence Act 1995* (NSW) and inserted sections 165A and 165B concerning warnings about children's evidence.[1650] The provisions prohibited a judge from warning or suggesting that children as a class are unreliable witnesses or warning of the danger of convicting on the uncorroborated evidence of a child: sections 165(6) and 165A. However, the judge could warn the jury that a particular child may be unreliable because of their age and of the need for caution in considering the child's evidence if the warning was requested and the judge was satisfied that circumstances particular to the child affected the reliability of their evidence and warranted the giving of the warning: section 165B.

In 2006, Victoria made further amendments in relation to *Crofts* and Longman directions.

In relation to *Crofts* and the impact of delay on credibility, Victoria added two prohibitions to section 61(1)(b) of the *Crimes Act 1958* (Vic).[1651] In addition to the existing requirement that the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining, the amendments required that the judge must not warn or suggest in any way to the jury that:

- delay may affect the credibility of the complainant, unless the accused applied for the direction and the judge was satisfied that there was sufficient evidence tending to suggest that the credibility of the complainant was so affected by the delay to justify the warning: section 61(1)(b)(ii)
- it would be dangerous or unsafe to find the accused guilty because of the delay: section 61(1)(b)(iii).

In relation to *Longman* and delay causing forensic disadvantage to the accused, Victoria inserted section 61(1A)–(1F) into the *Crimes Act 1958* (Vic). Under these provisions, on application by the accused and if the judge was satisfied that the accused had suffered a significant forensic disadvantage because of the delay in complaint, the judge was required to inform the jury of the nature of the forensic disadvantage and to instruct the jury to take it into consideration: section 61(1A). However, the provision also prohibited the judge from warning or suggesting that it would be dangerous or unsafe to convict because of the delay: section 61(1B). Also, passage of time alone was not sufficient to cause a significant forensic disadvantage: section 61(1C).

In 2006, New South Wales amended its provisions relating to the Longman direction, corroboration and the Murray direction, and delay and credibility.[1652]

In relation to *Longman*, section 294(3)–(5) of the *Criminal Procedure Act 1986* (NSW) made similar amendments to those introduced in Victoria in relation to *Longman*. The New South Wales provisions also gave examples of factors that might establish significant forensic disadvantage, being the death or inability to locate potential witnesses or the loss or unavailability of potential evidence: section 294(4).

In relation to corroboration, section 294AA was inserted into the *Criminal Procedure Act 1986* (NSW) to prohibit judges from warning the jury of the danger of convicting on the uncorroborated evidence

of any complainant.[1653] The Minister introducing the amending Bill on behalf of the Attorney-General said:

> The direction in Regina v Murray (1987) 11 NSWLR 543 provides that where there is only one witness asserting the commission of the offence, the evidence of the witness is to be scrutinised with great care. The typical sexual assault offence takes place in private without any other witnesses. The members of the task force agreed that the direction was unnecessary, as existing directions as to reasonable doubt were sufficient to protect the accused. Item [8] of the schedule therefore adds a new section s 294AA …[1654]

The *Criminal trial courts bench book* states that cases decided before section 294AA was enacted are no longer good law.[1655]

The New South Wales Court of Criminal Appeal recently considered the effect of section 294AA in *Ewen v The Queen*.[1656] The court held that section 294AA prohibits a Murray direction if the only factor said to give rise to the requirement for a direction of that kind is the absence of corroboration.[1657]

The 2006 amendments also included a prohibition on the judge warning the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify a warning: section 294(2)(c) of the *Criminal Procedure Act 1986*.[1658]

In *Jarrett v The Queen*,[1659] Basten JA stated that the introduction of section 294(2)(c) 'significantly recasts' that section, there now being a 'critical difference'[1660] between this provision and the provision considered in *Crofts*.[1661] Justice Basten also stated that section 294(2)(c) 'must be read as complemented by s 294AA' in relation to corroboration, which was enacted at the same time.[1662]

On the content of any warning to be given under section 294(2)(c) Basten JA said:

> First, and most obviously, both the circumstances and the nature of the warning will vary from case to case. This is not an area in which a standard form warning is appropriate. Secondly, the requirement of 'sufficient evidence' must not only mould the content of the warning, but it must also fit with the mandatory directions required by paragraphs (a) and (b). Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the 'good reasons' why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).[1663]

In 2007, New South Wales enacted further provisions in relation to children's evidence and *Longman*. The provisions commenced in 2009.[1664] The provisions about warnings in relation to children's evidence were consolidated and amended in section 165A of the *Evidence Act 1995* (NSW). The specific provisions to allow a warning that the evidence of a particular child may be unreliable because of their age was removed and the judge was prohibited from giving a warning about the particular child's evidence solely on account of the age of the child: section 165A(1)(c). The judge is permitted, on request, to inform the jury that the evidence of a particular child may be unreliable and to inform the jury of the reasons why it may be unreliable if satisfied that there are circumstances other than solely the age of the child that warrant it: section 165A(2).

In relation to *Longman*, the amendments inserted a new section 165B and repealed section 294(3)–(5) of the *Criminal Procedure Act 1986* (NSW). Section 165B(2) continued the requirement that, on application and if satisfied that the accused has suffered a significant forensic disadvantage because of the delay in complaint, the judge must inform the jury of the nature of the forensic disadvantage and instruct the jury to take it into consideration. Additional provisions allowed the judge not to comply with section 165B(2) if there are good reasons for not doing so: section 165B(3). They made clear that no particular form of words need be used, but the judge must not in any way suggest that it would be dangerous or unsafe to convict solely because of the delay or the forensic disadvantage suffered: section 165B(4). Section 165B also included examples of the factors that may be regarded as establishing significant forensic disadvantage: section 165B(7).

The Explanatory Note to the Bill inserting section 165B stated:

> The section is intended to make it clear that (contrary to the tendency at common law following Longman v The Queen (1989) 168 CLR 79 for judges to routinely give warnings in relation to forensic disadvantage arising from delay) information about forensic disadvantage need only be given if a party applies for it, and should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.[1665]

In 2008, Victoria enacted the *Evidence Act 2008* (Vic), which commenced in 2010. It abolished the rules requiring warnings or directions about corroboration: section 164. Section 165B of the *Evidence Act 2008* (Vic) also replaced section 61(1A)–(1F) of the *Crimes Act 1958* (Vic) in relation to Longman warnings.

Jury Directions Act 2015 (Vic)

As noted above, Victoria has recently implemented major legislative reform to jury directions. The *Jury Directions Act 2015* provides for a number of directions which the trial judge must give in relation to various issues. It also contains provisions in relation to directions which affect the *Evidence Act 2008* (Vic).

In relation to directions as to the absence of corroboration, Victoria has gone further than other Uniform Evidence Act jurisdictions in its reforms. Victoria has prohibited – rather than simply removing the requirement for – the warnings and directions covered by section 164(3) (other than in cases of perjury): section 164(5) of the *Evidence Act 2008* (Vic). It has also abolished 'the principles and rules of the common law that relate to jury directions or warning on corroboration of evidence, or the absence of corroboration of evidence, in criminal trials' that are to the contrary of section 164: section 164(6) of the *Evidence Act 2008* (Vic).

Victoria has also codified the law relating to directions on the relevance of delay to credit in sexual offences, abolishing the rules attributed to *Kilby* and *Crofts*.[1666] Section 54 of the Jury Directions Act provides that:

> Any rule of common law under which a trial judge is required to direct the jury that –
>
> (a) a complainant's delay in making a compliant or lack of complainant may cast doubt on the reliability of the complainant's evidence; and

(b) the jury should take this into account when evaluating the credibility of the allegations made by the complainant –

is abolished.

From 29 June 2015, the relevant law in Victoria is that set out in Part 5, Division 2, of the Jury Directions Act. The division applies to a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence.[1667]

The division provides for:

- a mandatory direction which the trial judge must give if he or she considers that there is likely to be evidence suggesting the complainant delayed in making a complaint: section 52
- a discretion to give an additional direction at the request of the prosecution: section 53
- a legislative prohibition on statements and suggestions that binds the judge, the prosecution and defence counsel: section 51.

The mandatory direction under section 52 requires as follows (under section 52(4):

the trial judge must inform the jury that experience shows that –

(a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and

(b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and

(c) delay in making a compliant in respect of a sexual offence of a sexual offence is a common occurrence.

It is the judge's assessment of what the likely evidence will suggest that triggers the need for a direction, and the direction must be given before any evidence regarding delay is adduced. This is a key distinction from previous iterations of section 61 of the *Crimes Act 1958*. The judge is therefore required to make objective assessments of both the interval between the alleged offending and the complainant and the evidence that is likely to be led in the trial.[1668]

The direction under section 53, which the prosecution may request, is a direction that there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence. The trial judge must give this direction, if requested, unless there are good reasons for not doing so.[1669] The trial judge can also give the direction in the absence of a specific request if he or she considers that there are substantial and compelling reasons for doing so.[1670]

Section 51(1)(c) provides that the trial judge, prosecution and defence counsel (or unrepresented accused) must not say, or suggest in any way, to the jury that 'complainants who delay in making a complaint or do not make a compliant are, as a class, less credible or require more careful scrutiny than other complainants'.

Section 51(2) imposes a further restriction on the trial judge as follows:

> The trial judge must not say, or suggest in any way, to the jury that, because the complainant delayed in making a complaint or did not make a complaint –
>
> (a) it would be dangerous or unsafe to convict the accused; or
>
> (b) the complainant's evidence should be scrutinised with great care.

A note to section 51 states that the section does not prohibit those parties from stating or suggesting that the particular complainant's delay does or may affect their credibility.

The trial judge is required to correct any statement or suggestion made in breach of section 51, unless there are good reasons for not doing so.[1671]

Victoria has also codified the law relating to directions on delay and forensic disadvantage, abolishing the rules attributed to *Longman*, *Crampton* and *Doggett*.[1672] Section 40 of the Jury Directions Act provides that:

> Any rule of common law under which a trial judge is required or permitted to direct a jury on a disadvantage to the accused in challenging, adducing or giving evidence or conducting his or her case because of delay is abolished.

Section 39 provides for when a direction in relation to forensic disadvantage may be given and the content of the direction. The judge may only give the direction where the forensic disadvantage is both significant and identifiable.

Section 39 allows the trial judge to direct the jury on forensic disadvantage experienced by the accused if defence counsel requests a direction and the trial judge is satisfied that the accused has experienced a 'significant forensic disadvantage'. Under section 39(3), if the trial judge gives a direction, the trial judge:

> (a) must inform the jury of –
>
> (i) the nature of the disadvantage experienced by the accused; and
>
> (ii) the need to take the disadvantage into account when considering the evidence; and
>
> (b) must not say, or suggest in any way, to the jury that –
>
> (i) it would be dangerous or unsafe to convict the accused; or
>
> (ii) the complainant's evidence should be scrutinised with great care.

'Forensic disadvantage' is defined as follows:

> [A forensic disadvantage is] a disadvantage (that is more than the mere existence of delay) to the accused in –
>
> (a) challenging, adducing or giving evidence; or
>
> (b) conducting his or her case –

because of the consequences of delay due to the period of time that has elapsed between the alleged effect and the trial.

The trial judge is required to give the direction, if requested, unless there are good reasons for not doing so.[1673] If a direction has not been requested, the trial judge is required to give the direction if he or she considers that there are substantial and compelling reasons for doing so.[1674]

The Judicial College of Victoria's *Criminal charge book* refers to some forensic disadvantages that the case law has indicated may result from delay.[1675] They include:

- loss of a chance to explore the circumstances of the alleged offending in detail
- loss of a chance to identify the occasion of the allegations with any specificity
- loss of a chance to make any defence other than a simple denial
- loss of a chance of medical examination of the complainant
- loss of chance to establish an alibi
- loss of chance to call evidence contradicting the broader evidence of the complaint
- loss of chance to obtain documents that may have assisted the defence
- disadvantage in testing events that may have affected the complainant's recollection or reliability.

The *Criminal charge book* also states that, while the passage of time alone cannot be determinative of whether a direction is required, the length of the delay will be a significant factor.[1676]

Unreliable evidence generally is addressed in Division 3, Part 4, of the Jury Directions Act. Section 31 provides a list of types of evidence that may be unreliable. Evidence given after a lengthy delay is not specifically identified.

Under section 32, either the prosecution or the defence may request a direction. They must specify the significant matters that may make the evidence unreliable or, if the request concerns the evidence of a child, the significant matters, other than age alone, that may make the evidence unreliable. Under section 14, the judge must give the direction if requested, unless there are good reasons for not doing so.

In giving a direction under section 32, the trial judge must:

- warn the jury that the evidence may be unreliable
- inform the jury of:
    - the significant matters the judge considers may cause the evidence to be unreliable or
    - if the direction concerns a child's evidence, the significant matters, other than solely the child's age, that the judge considers may make the evidence of the child unreliable

- warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.[1677]

The *Criminal charge book* notes that the common law rules regarding unreliable evidence have been abolished and that the *Jury Directions Act 2015* (Vic) is now the only source of obligations on a judge to direct the jury about evidence of a kind that may be unreliable.[1678] However, the common law may give guidance about the kinds of evidence that may be unreliable, in addition to the categories listed in s 32 of the Act.[1679]

The *Criminal charge book* also states that the Jury Directions Act provisions are not directly concerned with directions about honest but erroneous memory following delay and suggests that these issues should now be considered by reference to section 32 of that Act.[1680]

It states that cases such as *Longman* and *Crampton* identified that after a period of lengthy delay there was a risk that false recollections may be converted to honestly and strongly held beliefs.[1681] The risk of honest but erroneous memory must be assessed in the circumstances of the case, but it will be strongest where the alleged offence was discovered while the complainant was half asleep or there is evidence suggesting the complainant was suggestible.[1682]

The *Criminal charge book* also notes that a number of commentators and judges have cast doubt on the validity of some of the common law assumptions about child psychology that underlie the asserted need for directions about honest but erroneous memory but states that, '[d]espite those doubts, it seems that judges should continue to consider the necessity for giving a warning about honest but erroneous memory in cases involving a long delay in complaint'.[1683]

In relation to the evidence of children, the provisions in sections 32 and 33 of the Jury Directions Act are similar to sections 165(6) and 165A of the *Evidence Act 1995* (NSW). The new provisions are broader than those under the *Evidence Act 1995* (NSW). Under sections 165(6) and 165A of the *Evidence Act 1995* (NSW), only the judge is prohibited from giving certain warnings or information. The Jury Directions Act provisions extend these prohibitions to counsel.

Section 33 provides:

> The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that –
>
> (a) children as a class are unreliable witnesses; or
>
> (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
>
> (c) a particular child's evidence is unreliable, or requires more careful scrutiny, than the evidence of adults; or
>
> (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.

Section 7 imposes a positive obligation on the judge to correct any statement or suggestion by counsel that is prohibited by this provision.

11.3.2 Separate counts and Markuleski

As discussed in Chapter 10, courts are concerned that the joinder of charges in sexual offences cases may create a risk of unfair prejudice to the accused. It is common in cases involving more than one charge – whether or not there is more than one complainant – for the judge to give a direction requiring the jury to consider each count separately.

The 'separate consideration' direction, or 'KRM direction', has its origins in the common law. In the High Court's decision in 2001 in *KRM v The Queen*[1684] (*KRM*), McHugh J said:

> It has become the standard practice in cases where there are multiple counts … for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a 'separate consideration warning').[1685]

Separate consideration directions are given in New South Wales and Victoria. A separate consideration warning may often be supplemented by a Markuleski direction, discussed below. In Victoria, a separate consideration warning is given in circumstances where there is more than one count on the indictment.

In 1998 in *R v Robertson*,[1686] in the Victorian Court of Appeal, Winneke P said:

> In cases where the presentment contains multiple counts, and where the Crown is not contending … that the evidence relied upon to support one count is admissible to support other counts, it is necessary for the trial judge to give clear directions to the jury as to the separate consideration which they must give to each of the counts and that they must confine their attention, when considering their verdict on each such count, to the evidence which has been given in respect of that count. It is customary to instruct the jury that the combining of more than one count in the presentment is a procedure of convenience but that such convenience should not be permitted to usurp a just outcome which entitles the parties to a separate consideration of each crime charged in the light of the evidence which applies to the particular count being considered. It is also customary to tell the jury that it would be quite wrong to say that, because they find the accused guilty or not guilty of one count that, therefore, the accused is guilty or not guilty of another.[1687]

In 2001, in *R v Markuleski*[1688] (*Markuleski*), the New South Wales Court of Criminal Appeal sitting with five judges allowed an appeal in a child sexual abuse case. The accused had been convicted on four counts of indecent assault and one count of sexual intercourse and had been acquitted on another count of sexual intercourse. The offending had occurred some 20 years earlier, and the case was largely word against word.

By majority (Spigelman CJ with Carruthers AJ agreeing, and Wood CJ at CL), the court held that, as a general rule in word against word cases, the trial judge should direct the jury that a reasonable doubt with respect to the complainant's evidence on any count ought to be taken into account in its assessment of the complainant's credibility generally – a 'Markuleski direction'.[1689] The majority held that the trial judge did not give an adequate direction on this issue in this case.

Chief Justice Spigelman stated:

> it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.
>
> Some form of direction assisting the jury in this respect should be given, to employ the terminology found in Kilby and R v Davies 'as a general rule'. Its absence is not necessarily fatal (as it was not in R v Davies itself). Furthermore, as the joint judgment in Crofts affirmed (at 451), the 'general rule' does not apply 'where the particular facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness' …
>
> The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant's evidence, ought be considered by them when assessing the overall credulity of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts.[1690]

Although Spigelman CJ referred to the desirability of the KRM direction being supplemented in 'word against word' cases, subsequent cases have held that the direction may be required even where the case concerned is not strictly one of 'word against word'.[1691]

However, limits to the appropriateness of a Markuleski direction have also been identified. In *R v Gar*, Miles JA (with Spigelman CJ and Bell J agreeing) stated:

> Far from being required in all cases, the direction required in Markuleski may be quite inappropriate where it is open to the jury to convict on one count and to acquit on another, as was the case in the present matter. Further, a Markuleski direction, given when it is not required, may give the jury the mistaken impression that the jury, having come to a view on one count, may not take their view on that count into consideration for the purpose of considering their findings on another count, having regard to whatever evidence may be common to the several counts.[1692]

Victorian courts have held that Markuleski directions should generally be avoided. In *The Queen v Goss*,[1693] Redlich JA said '[n]o such direction need be given in the absence of some unusual feature of the case which gives rise to a specific risk that a miscarriage of justice may occur without such a direction'.[1694]

Victorian courts have doubted the desirability of giving a Markuleski direction on the basis that '[t]he direction given in the New South Wales cases may be thought to undermine the separate consideration direction and swing a delicate balance towards propensity reasoning'.[1695]

In *R v PMT*,[1696] Buchanan JA stated that a direction of this nature is unnecessary, as it directs the jury to do something they are already likely to do:

> I think it unlikely that a jury given a separate consideration direction will be entirely uninfluenced by the impressions they derive from the evidence of a witness taken as a whole;

> I doubt that such a natural tendency needs judicial encouragement in the form of a Markuleski direction.[1697]

While not naming *Markuleski*, in *Flora v The Queen* (*Flora*), Coghlan JA suggested that the ground of appeal based on the absence of a Markuleski direction 'assumes, in a somewhat condescending way, that jurors are utterly devoid of common sense'.[1698]

The *Criminal charge book* cites *R v PMT* and *Flora* as authority for the proposition that a Markuleski direction should generally be avoided.[1699]

11.3.3 Evidence given using special measures

We discussed the special measures available for vulnerable witnesses in Chapter 9.

New South Wales and Victoria provide for a number of directions to be given if vulnerable witnesses give evidence using special measures. These directions are generally framed to provide that the jury should not regard the fact that a vulnerable witness uses special measures to give evidence as adverse to the accused and or as giving the evidence any greater or lesser weight.

For example, in New South Wales, section 306X of the *Criminal Procedure Act 1986* (NSW) provides in relation to the use of a prerecorded police investigative interview as evidence in chief:

> If a vulnerable person gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in accordance with this Division in any proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given that way.

In Victoria, section 361 of the *Criminal Procedure Act 2009* (Vic) provides generally in relation to the use of alternative arrangements for giving evidence (including, for example, closed circuit television (CCTV), screens or support persons):

> If the court directs that alternative arrangements be made in a trial for the giving of evidence by a witness, the trial judge must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the making of those arrangements.

11.4 Juries' understanding and reasoning

11.4.1 Introduction

As discussed in section 2.3, there are a number of myths and misconceptions about sexual offences, including child sexual abuse, that have affected the criminal justice system's responses to child sexual abuse prosecutions.

The myths and misconceptions have influenced the law – including judicial directions – and the attitudes jury members bring to their decision-making. The myths and misconceptions may lead to a complainant's behaviour being regarded as 'counterintuitive' to the behaviour expected of a 'real'

victim of sexual abuse, even though social science research establishes that the behaviour is common – and sometimes even typical – for victims of sexual abuse.

Misconceptions about children's responses to child sexual abuse and the reliability of children's evidence have been shown to exist among the general public, who are potential jurors.[1700]

Judges and counsel ask jurors to draw on their 'common sense' and 'life experience' when assessing whether a child complainant is telling the truth.[1701] However, a significant body of research has shown that children's behaviours and reactions to child sexual abuse can be counterintuitive and inconsistent with juror expectations.[1702] This may lead jurors to question whether abuse has in fact occurred, with child complainants' credibility undermined on the basis of incorrect assumptions. The misconceptions may negatively affect jurors' perceptions of both child and adult complainants in child sexual abuse trials.

11.4.2 Myths and misconceptions

A 2009 study by Cossins, Goodman-Delahunty and O'Brien showed that Australian jury-eligible participants reported high levels of uncertainty about whether children were suggestible about sexual abuse and whether they were truthful and reliable witnesses.[1703] One-third of participants were also unsure whether inconsistencies in a child's testimony were associated with lying.[1704] Some participants held the following misconceptions:

- A victim of sexual abuse will avoid the abuser.
- Children who are abused display strong emotional reactions.
- A physical examination by a doctor will almost always show whether or not a child has been sexually abused.
- An abused child will typically cry for help and try to escape.[1705]

There were high rates of uncertainty among participants as to:

- the extent to which children can, or cannot, be manipulated into inventing a false story
- the fact that non-leading, open-ended questions are unlikely to lead children to make false claims of sexual abuse
- the fact that suggestive questioning can lead children to make false reports of abuse.[1706]

The authors concluded that these findings indicate 'the Australian public lacks a sound understanding of children's reactions to sexual abuse, as well as children's memory, reliability and suggestibility when disclosing and reporting sexual abuse'.[1707] The authors noted that all jurors would benefit from specialised knowledge about child development and the impact of child abuse on children, although they identified a greater need for guidance among jurors whose formal education did not extend beyond high school, as well as juries dominated by men.[1708]

Juror uncertainty or lack of information – as distinct from juror misconceptions – may be of particular concern in trials because it may make the jury 'more malleable and susceptible to suggestions by counsel'.[1709]

In the Jury Reasoning Research discussed in Chapter 10, the researchers assessed the knowledge of the mock jurors about child sexual assault before they viewed the mock trial and participated in the mock jury deliberations, in order to assess the impact that their level of knowledge had on their reasoning and verdicts. Mock jurors completed a nine-item questionnaire, testing their understanding on the impact of child sexual abuse (for example, 'expected' reactions, including to the abuser, or the likelihood of a medical examination) and the reliability of children's reports of child sexual abuse.[1710]

The researchers found that those with better knowledge of the impact of child sexual abuse had better memory of the case facts. Those with better knowledge of factors that influence reports of child sexual abuse were more likely to perceive the complainant as credible.[1711] Those with better knowledge of child sexual abuse overall were less likely to endorse other types of bias (for example, cynicism about the defence, racial bias, confidence in the justice system).[1712]

There is also the issue of how myths and misconceptions may be used – and exploited – in cross-examination.

In the research report *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants' Evidence Research), described in Chapter 9, the researchers examined how defence counsel use assumptions about victim behaviour and human memory to attack child complainants' credibility at trial. The researchers analysed transcripts of evidence given by 120 complainants from 94 child sexual abuse trials[1713] and found that defence lawyers used strategies which questioned robust findings from psychological research. These findings are that:

- children are capable of giving reliable evidence
- errors about minor details do not indicate the central allegation is wrong
- victims respond to abuse in many ways.[1714]

The transcript analysis showed that defence counsel routinely suggest a complainant's poor memory or inconsistency in relation to minor details indicated that the central allegation was wrong.[1715] 'Minor details' included the colour of clothing or the weather.[1716] Defence counsel also attacked the plausibility of the complainant's story – for example, by exploiting misconceptions about child abuse such as:

- the lack of resistance by the complainant at the time of the offence
- the delay in reporting
- the lack of emotion by the complainant at the time of the offence
- the continued relationship between the complainant and the accused after the offence.[1717]

Defence counsel may legitimately cross-examine a complainant about their credibility in many ways. However, it appears that defence counsel currently also create doubt in the minds of jurors by relying on misconceptions and uncertainty, which may make jurors more susceptible to suggestions by counsel. As discussed above, misconceptions and uncertainty have been found to be common among jury-eligible citizens.[1718]

11.4.3 Evidence about how juries reason

In the Jury Reasoning Research, discussed in Chapter 10, key findings were that:

- jury verdicts were not infected by factual errors of individual jurors. The small number of errors made by individual jurors were corrected by other jurors during deliberation
- jurors were not overwhelmed by the number of charges or witnesses, instead determining the defendant's culpability on the strength of the evidence
- juries did not base their decisions on the perceived 'bad character' of the defendant, viewing the defendant as equally convincing across the different trial types regardless of the number of charges or allegations against the defendant.[1719]

The researchers concluded that juries:

- were capable of following instructions that they should consider different counts separately and base their verdicts on the evidence relevant to each count
- based their reasoning and verdicts on the probative value of the evidence.[1720]

As outlined in section 10.7.2, we also heard evidence in Case Study 38 from DPPs from a number of jurisdictions who gave their views that properly instructed juries can be trusted to appropriately consider the evidence and deliver sound verdicts, despite allegations or evidence of abhorrent or terrible behaviour.

In considering reforms to the rules which govern whether tendency and coincidence evidence can be put before a jury, Counsel Assisting the Royal Commission, in their opinion on the issues considered in the first week of Case Study 38, state:

> The assessment of the significance of tendency and coincidence evidence itself involves consideration of human behaviour on which minds may differ, including because of different life experiences. That is the very sort of thing that we have juries for, rather than just relying on the assessment of individual judicial officers.[1721]

11.5 Possible options for reform

11.5.1 Introduction

As noted in section 11.1, the purpose of judicial directions is to ensure the accused is tried according to the law. While this focuses on ensuring the accused receives a fair trial, the discussion in section 11.3.1 suggests that some judicial directions have been more likely to have improved the accused's prospects of acquittal, to the detriment of the community at large and the complainant in particular. Despite the legislated changes in some jurisdictions, this raises the question of whether further changes should be made.

Judicial directions should ensure that the accused receives a fair trial and that the jury is given the necessary information and assistance to perform its tasks. These considerations raise issues of

possible reforms to judicial directions but also issues of improving the information and education available to judges and lawyers and to jurors.

11.5.2 Reforming judicial directions

As discussed in section 11.3, the history of judicial directions and warnings – particularly directions and warnings based on judicial assumptions about the unreliability of women, children and complainants of sexual offences, including child sexual abuse – reveals a tension between parliaments and the courts.

Judicial directions based on (incorrect) judicial assumptions about ordinary human behaviour have had a detrimental impact in the trials of child sexual assault and complainants. As Justice McClellan has stated:

> The decisions in Longman and Crofts had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time at which they were assaulted. They derive from what judges thought they knew about how genuine complainants behaved, and what they thought they knew about how memory worked. Those assumptions have turned out, with the benefit of empirical research, to be flawed. However, they became embedded in the fabric of the common law and proved difficult, even for Parliament, to dislodge.[1722]

The Victorian Parliament appears to have gone further than other parliaments towards resolving this tension with the courts over judicial directions by enacting the *Jury Directions Act 2013* (Vic) and the *Jury Directions Act 2015* (Vic).

Codifying judicial directions may assist in avoiding judicial directions that are not supported by social science and other research. It may also assist in simplifying directions with a minimisation of error and successful appeals.

In 2009, the VLRC *Jury directions: Final report* concluded that:

> The law on jury directions has become complex, voluminous and uncertain within a relatively short period. The average duration of jury charges by Victorian judges thirty years ago was much shorter than today. The directions themselves were also generally far less complex.[1723] [Reference omitted.]

The Victorian Department of Justice and Regulation's report *Jury directions: A jury-centric approach* stated:

> Jurors are less likely to listen to, understand or apply directions that are long and complex. If jurors are unclear on the law to be applied in the case, or on how to apply that law to the facts, this affects the integrity of their decision-making and the likelihood of a fair trial.[1724]

The Weinberg Report specifically considered the length of judicial directions.[1725] The Weinberg Report referred to a 2006 survey of judges who were experienced in the conduct of criminal trials in Australia and New Zealand. The survey found that the average estimated length of the charge following a 10-day jury trial in Victoria was 255 minutes. For a 20-day trial, that figure increased to

349 minutes, or nearly six hours.[1726] By contrast, the average estimated charge length for trials conducted in New Zealand was 76 minutes for a 10-day trial and 108 minutes for a 20-day trial.[1727]

The Weinberg Report considered the length of judicial directions given in other jurisdictions and noted:

> In Australia, only New South Wales came close to rivalling Victoria in terms of the sheer length of jury directions. In Western Australia, the average estimated length of a charge following a ten day jury trial was only 116 minutes, and for a twenty day trial, a mere 155 minutes. In other words, it took less than half the time to deliver a jury charge in Western Australia than it took to deliver a charge in an equivalent case in Victoria.
>
> The brevity of jury instructions in Scotland puts the matter into even starker contrast. There, the standard jury direction takes between 15 and 18 minutes.
>
> Directions in the United States are also substantially shorter than those given in Victoria. Typically, they take no more than about 30 minutes.[1728] [References omitted.]

Trial judges face challenges in directing a jury in sexual offence cases, due to the number of directions that are required and the complexity of those directions.[1729] The ALRC and NSW LRC, in their report *Family violence: A national response*, noted:

> In a sexual assault trial, numerous complex directions and warnings 'which focus on the unique characteristics of sexual assault such as delay, one witness to the offence and a lack of corroborating evidence' may be required. The duties of the trial judge to direct the jury in a manner which is clear, intelligible, relevant, brief and insulated from appeal, and the duty of jurors to comprehend and apply each direction are problematic to discharge.[1730] [References omitted.]

The complexity of jury directions has been the subject of judicial comments. In 2011 in the Victorian Court of Appeal's decision in *Wilson v The Queen*[1731] – a case involving multiple sexual offence counts and multiple complainants – Maxwell P noted:

> The issues raised by this appeal serve as a salutary reminder of the urgent need for legislative simplification of jury directions … [T]he law governing the trial of sexual offences is now so extraordinarily complex as to throw into doubt the expectations on which the system of trial by jury is founded. Those expectations are, first, that a judge can reasonably be expected to explain the relevant law to the jury, in all its permutations and combinations, without falling into error; and, secondly, that the jury can reasonably be expected not only to comprehend the law as so explained, but to apply it, in all its permutations and combinations, to the evidence which they have heard.[1732]

Long and complex directions make the task of the trial judge more difficult, making errors in directions more likely.[1733] Errors in jury directions result in appeals, retrials and delays in the court system.

The Victorian Department of Justice and Regulation also referred to the difficulties that can arise from attempts to 'appeal proof' directions as follows:

> The risk that an appellate court may form a different view about what was 'relevant' to the case may lead to long, irrelevant and formulaic directions being given by trial judges in an attempt to 'appeal proof' their directions. This is problematic, as the jury is unlikely to be assisted by lengthy directions on matters that are not in issue.[1734]

The Victorian codification of judicial directions appears to have been welcomed by the judiciary. In the County Court of Victoria 2012–2013 annual report, his Honour Judge Taft commented:

> Judges in this Court have embraced the Jury Directions Act 2013 which is directed to simplifying jury directions in criminal trials and we welcome the prospect of further legislative intervention to assist judges in giving simpler and clearer jury directions.[1735]

Given the Victorian example, it may be that all states and territories should consider codifying judicial directions. Codification would be for the purposes of both:

- accuracy and fairness, by prohibiting judicial directions that are not supported by social science and other research, particularly in cases of sexual offending including child sexual abuse
- simplification, for the assistance of juries, trial judges and all parties.

However, if governments pursue codification then, particularly in cases of sexual offending, including child sexual abuse, they would need to keep appellate decisions on judicial directions under careful review to ensure that the law is applied as the parliaments intend.

In relation to the particular directions discussed in section 11.3.1, it seems that, through many legislative amendments responding to decisions of the appellate courts, both New South Wales and Victoria have arrived at a position in relation to corroboration, delay and reliability that is consistent with the social science research.

It should also be noted that the New South Wales and Victorian provisions continue to ensure that the accused can receive a fair trial by allowing for relevant directions to be given where necessary to assist the jury in a particular case, without relying on broad and incorrect assumptions based on stereotypes and misconceptions about women and children and how 'real' victims of sexual offences, including child sexual abuse, will behave.

If other states and territories have not yet arrived at similar positions in relation to these judicial directions, it may be appropriate for them to legislate in respect of these particular directions in advance of developing any broader codification. These directions are obviously of considerable significance in child sexual abuse trials and they may require fairly immediate attention.

The Markuleski direction is a point of difference between New South Wales and Victoria. Similarly, a Markuleski direction is given in relevant trials in Queensland[1736] but is not given in Western Australia.[1737] The judicial criticism of the Markuleski direction in Victoria and Western Australia is significant, and it is not clear that the Markuleski direction is warranted.

11.5.3 Improving information for judges and legal professionals

As the discussion in section 11.3.1 indicates, assumptions that judges make about how complainants behave and how memory works are embedded in the common law. They have been repeated regularly over the decades by appellate judges, with limited, if any reference, to any relevant research to support them.

Some of the judicial directions that have been particularly significant in child sexual abuse cases stem from judges' assumptions that they are uniquely placed to warn jurors about the dangers of certain evidence.

In 1986 in the High Court's decision in *Bromley v The Queen*,[1738] Brennan J stated:

> The courts have had experience of the reasons why witnesses in the three accepted categories [accomplices, children giving evidence on oath, and complainants in sexual assault cases] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses.[1739]

The Queensland Law Reform Commission in its reports *A review of jury directions*, stated:

> the faith that courts place in their own accumulated wisdom on matters in which it is assumed (by judges) that other judges have acquired insights that are not obvious to lay jurors. In the area of the long-accepted unreliability of complainants in sexual offence cases, however, this faith has been displaced by empirical evidence which has offered a perspective on the reasons for the behaviour of victims of these crimes that is at odds with how it was assumed that they did and should behave.[1740]

The discussion of *Longman* and *Crofts* in section 11.3.1 provide good examples. Similarly, the courts' concerns about how juries reason and risks of unfair prejudice arising from tendency and coincidence evidence discussed in Chapter 10 provide examples of other erroneous assumptions.

It may be that part of the response to the problems associated with the complexity of jury directions is enhanced skills training for both judicial officers and counsel.

The VLRC noted that '[d]irecting the jury is one of a trial judge's most difficult functions'.[1741] Due to developments in the law and rapid changes to society and technology, even the most competent judges need access to educational resources.[1742] The VLRC also suggested that there is now less resistance to judicial education, and professional development programs are generally accepted and valued by judicial officers.[1743] Former High Court Chief Justice Murray Gleeson, writing extrajudicially, has said:

> Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly-appointed judges and magistrates, and for their continuing education. Of course there should.[1744]

Trial counsel have a role to play in ensuring that a trial is run competently and in the directions that are given to jurors. If trial counsel are to conduct trials competently, they also require appropriate training and professional development.[1745] As noted by the VLRC:

> Counsel have a duty to assist the trial judge determine what directions to give the jury and to formulate the content of directions. Concerns were expressed to the commission that some counsel have not provided sufficient assistance in this regard. Retrials have been ordered because of erroneous directions in cases where counsel did not raise the error with the judge at trial.[1746]

In 2015, the Australasian Institute of Judicial Administration Committee updated *The bench book for children giving evidence in Australian courts*. The manual aims to promote accurate knowledge and understanding of children and their ability to give evidence and to assist judicial officers to enable a fair trial for both the accused and the child complainant.[1747] However, some participants in our private roundtables have told us that there is currently no compulsory training for magistrates or judges regarding sexual offences or understanding myths or misconceptions in some jurisdictions.

Formal training and continuing legal education could provide, at least, greater awareness of current academic literature on victims of child sexual abuse and the impact that the abuse can have on them. The work of this Royal Commission may also play a role in raising awareness of these issues.

Participants in our private consultations have also told us that police investigators who have been trained in getting the 'whole story' of a sexual abuse matter can assist prosecution counsel in setting out the evidence at trial in a way that tells a more nuanced story of the context and impact of child sexual abuse. This presentation of the evidence can assist in avoiding exploitation of myths and misconceptions by explaining apparently 'counterintuitive' behaviour as part of the prosecution case.

The Victorian Department of Justice and Regulation's report *Jury directions: A jury-centric approach* suggested that repetition can assist in juror comprehension. This might also apply to judges and lawyers, provided that what is being repeated is based on current research and not on wrong assumptions.

The discussion in section 11.3.1 might also suggest that appellate judges could also benefit from education on sexual offences, including child sexual abuse, and relevant and up-to-date findings from social science research.

11.5.4 Improving information for jurors

As discussed in section 11.4, jurors may need assistance in better understanding children's responses to child sexual abuse.

In relation to the misconceptions that may affect jurors' reasoning, Cossins and Goodman-Delahunty state:

> Addressing laypeople's reliance on these misconceptions would not only enhance the public's faith in the criminal justice system, it would promote justice for victims in ways that are not presently possible.[1748]

Ways of assisting juries to understand children's responses to child sexual abuse have been discussed in several recent reports.[1749] Cossins and Goodman-Delahunty discuss a number of research studies, which they say suggest that educational information presented by an expert

witness can correct some jurors' misconceptions about child sexual abuse.[1750] Particular judicial directions have also been proposed as another possible method.

We discuss below the following possible options to improve jurors' understanding:

- the use of expert evidence
- particular judicial directions
- the timing of giving judicial directions
- providing educational material to juries.

Expert evidence

Current legal position

The common law opinion rule traditionally tended to exclude expert evidence about the behaviour of child sexual abuse victims on the basis that such information is within the common knowledge or ordinary experience of the jury.[1751]

In 2005, the joint ALRC, New South Wales Law Reform Commission (NSW LRC) and VLRC report *Uniform Evidence Law* recommended the opinion rule be revised to allow expert evidence about child development and behaviour, and the effect of sexual abuse on children.[1752] The report noted this can be important evidence in assisting the jury 'to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour'.[1753]

However, if expert opinion evidence about children was tendered to support a child's credibility, it would breach the credibility rule under section 102 of the Uniform Evidence Act. This rule prevents evidence being admitted about the credibility of a witness, unless it falls under one of the exceptions. As a result, the report recommended that section 79 of the Uniform Evidence Act be amended and that a new exception to the credibility rule be introduced to allow the admission of such evidence.[1754]

The Uniform Evidence Act jurisdictions have now enacted these provisions, which commenced in the different jurisdictions between 2009 and 2013.

The key provision is in section 79(2) of the Uniform Evidence Act. Section 79 provides:

> (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
>
> (2) To avoid doubt, and without limiting subsection (1):
>
> (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

Section 108C was also introduced to create an exception to the credibility rule. It allows expert opinion evidence to be given about the behaviour of the child complainant, with the leave of the court, where the opinion is relevant to the complainant's credibility.[1755]

Western Australia introduced a provision similar to the Uniform Evidence Act provisions in 2008 in section 36BE of the *Evidence Act 1906* (WA). This states that relevant expert evidence on 'child development and behaviour generally', or 'child development and behaviour in cases where children have been the victims of sexual offences', is admissible despite certain other rules of evidence.

In Queensland and South Australia, common law principles continue to apply and there may be difficulties in seeking to have such expert evidence admitted.

Effectiveness of expert evidence

The rationale for sections 79(2) and 108C was to encourage the admission of expert opinion evidence about the behaviour of children to support the credibility of witnesses. The New Zealand Law Commission noted that the purpose of enabling an expert to express an opinion on a child complainant's behaviour was 'to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance'.[1756]

However, some participants in our private roundtables have told us that these provisions are not widely used at trial.

Some participants raised practical difficulties, telling us that appropriate expert witnesses are not readily available in certain jurisdictions, and it is more expensive to bring in expert witnesses from interstate.

Other participants raised tactical difficulties. Some participants told us that, in their experience, juries did not find the evidence helpful because it was too general and that the prosecutor could achieve as much as an expert in their closing address. Other participants said that, if the prosecution introduces an expert witness, the defence will counter with their own expert.

In their 2010 study, Goodman-Delahunty, Cossins and O'Brien examined whether expert opinion evidence about children's behavior and the impact of child sexual abuse, and judicial directions containing the same information, had any effect on outcomes in a simulated trial and jurors' perceptions of the complainant's credibility.[1757]

The researchers found that, misconceptions were substantially reduced by both expert evidence and judicial directions. Misconceptions in the control group, which did not receive expert evidence or judicial directions, decreased only slightly during the case. They did not find any direct effect of expert evidence or judicial directions on convictions. However, the results suggested that expert

evidence and judicial directions indirectly influenced verdicts by enhancing the mock jurors' perceptions of the complainant's credibility and reducing their misconceptions about child sexual abuse, which in turn was related to a higher conviction rate.[1758]

In a later presentation on their research, Goodman-Delahunty and Cossins suggested that expert opinion evidence appears to be underutilised in child sexual abuse cases due to:

- a lack of information about who qualifies as an expert on child sexual assault
- insufficient experts to meet demand
- prosecutors' lack of time to organise an expert witness when prosecutors are assigned to trials shortly before trial
- a lack of information about the impact of such evidence at trial.[1759]

Expert evidence may be less effective where the expert is giving evidence about children generally rather than the complainant in particular. Where an expert has not personally assessed the complainant in preparing their report on child development and child sexual abuse behaviours, the weight that a jury gives to this evidence may be minimal.

For example, the literature review in the Complainants' Evidence Research states:

> Broadly, there are two types of expert evidence that can be presented at trial: educative and specific. An expert giving educative evidence will explain the impact of sexual abuse on children, without expressing any explicit opinion as to whether the complainant in the case at hand was or was not sexually abused. Educative expert evidence testimony may address some of the misconceptions that jurors hold about child sexual abuse. In contrast, an expert giving specific evidence will often approach the task more diagnostically, interview the child victim, and then apply psychological knowledge about child sexual abuse to express an opinion about whether a particular complainant was sexually abused. Studies examining the effect of educative and specific testimony on jurors have shown that jurors are more strongly influenced by specific testimony, and that this influence is particularly potent when the demeanour or reactions of the child witness are congruent with the testimony of the expert …
>
> … the effectiveness of expert evidence may [also] depend on whether it is based on scientific or clinical evidence. Some studies suggest that expert evidence based on clinical expertise leads to significantly higher complainant credibility ratings and higher conviction rates than expert evidence based on scientific expertise.[1760] [References omitted.]

Particular judicial directions

A judicial direction containing educative information about children and the impact of child sexual assault may enhance justice for victims of child sexual assault.

In New Zealand, under clause 49 of the *Evidence Regulations 2007* (NZ), judges may be required to give the following direction when a witness is a child under six years of age:

> If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the

evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

(a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would;

(b) this does not mean that a child witness is any more or less reliable than an adult witness;

(c) one difference is that very young children typically say very little without some help to focus on the events in question;

(d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults;

(e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.

The ALRC and NSW LRC stated in *Family violence: A national legal response*, that there was a strong case for the use of jury directions which would 'summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour'.[1761] They recommended that governments should legislate to authorise jury directions about children's abilities as witnesses and responses to sexual abuse.[1762]

The National Child Sexual Assault Reform Committee also recommended that three mandatory judicial directions, summarising the research in this area and containing the same information that would be given by an expert witness, should be introduced into all Australian jurisdictions.[1763] These directions (relating to sexual offence trials) are as follows:

- **Children's abilities as witnesses:** This direction is based on clause 49 of the *Evidence Regulations 2007* (NZ), quoted above. It is in substantially the same terms except that it is proposed to apply where the complainant is under the age of 16 years rather than under the age of six years as applies in New Zealand.[1764]
- **Very young children's abilities as witnesses:** If the complainant is under the age of five years, the judge must give the jury the following instructions:

  a. although children under the age of 5 years typically report less detail than older children or adults, the information they recall can be just as accurate;

  b. depending on how they are questioned, children under the age of 5 years can be more open to suggestion than older children, although research has shown they have difficulty remembering the suggestions put to them after a short period of time;

  c. the reliability of the evidence of very young children depends on the way they are questioned. It is important, when deciding how much weight to give to a very young child's evidence, to distinguish between open-ended questions aimed at obtaining information, from leading questions that might put words into their mouths.[1765]

- **Children's responses to sexual abuse:** If the complainant is under the age of 16 years, the judge must give the jury the following directions:

  a. there is no one set of symptoms or behaviours that all sexually abused children display. Depending upon the individual child and their circumstances, some children may exhibit a number of symptoms whereas some children may exhibit none at all;

  b. sexual abuse may not result in physical symptoms and physical evidence that can be detected by a medical examination;

  c. very often victims of sexual abuse do not cry out for help, resist or escape from the offender;

  d. they often delay their complaint of abuse for months or years and there may be a number of reasons why a child will delay their complaint, such as threats to themselves or their loved ones, or fear they will not be believed or they will be blamed. They may feel ashamed, embarrassed or responsible for the abuse. They might want to protect the abuser if it is someone they love or trust and they may not know that the abuse is wrong. They may not have the language to describe what has happened to them, particularly if they are very young;

  e. some children may exhibit particular behaviours as a result of being sexually abused that are counterintuitive and may not appear to make sense to the adult layperson;

  f. the behaviours that have been reported in the scientific literature include: delay in complaint for months or years; disturbed sleep patterns and/or nightmares; bedwetting; disturbed behavioural patterns; learning difficulties, fearfulness and general emotional upset; retraction of the complaint; sexualized behaviour; and ongoing contact and/or affection for the alleged offender;

  g. because a child exhibits some or all of these particular behaviours, that does not necessarily mean that sexual abuse has occurred.[1766]

Judges may comment on the evidence in a trial, and they must give the jury any necessary directions on the law. However, judges are not permitted to give directions in the nature of expert evidence about child development or behaviour.[1767] If judges are to give judicial directions of the kind discussed above, the directions are likely to need to be permitted or required by legislation to ensure that judges are able to give them.

When should judicial directions be given?

Many judges confine the giving of directions to the jury to the conclusion of the evidence, unless legislation requires otherwise.

As discussed in relation to expert evidence, in their 2010 study, Goodman-Delahunty, Cossins and O'Brien examined whether expert evidence and judicial directions about children's behavior and the impact of child sexual abuse had any effect on outcomes in a simulated trial and jurors' perceptions of the complainant's credibility. In relation to judicial directions, they found that '(o)nly the judicial direction provided before the child testified effectively enhanced evaluations of the child complainant, compared with no judicial direction'.[1768]

The authors observed that these results 'highlight the importance of the timing of the trial interventions and are consistent with previous research that has suggested that individuals are better able to recall and incorporate information that is provided first compared with information presented later in a sequence'.[1769] This suggests that any judicial directions designed to provide information to jurors about child sexual abuse and child behaviour should be given to the jury before a complainant gives evidence in a child sexual abuse trial.

Early judicial directions may also be in the interests of the accused. In 2009, the VLRC, in its review of jury directions, recommended that the trial judge should have a discretionary power to determine the timing and frequency of the directions given to the jury.[1770] In its report, the VLRC noted this recommendation had broad support and quoted the submission from the Criminal Bar Association of Victoria and Mr Benjamin Lindner, which stated:

> In long, complex trials involving multiple accused it is sensible and conducive to a fair trial, that a judge directs the jury early in the trial as to the importance of separate trials and the meaning of hearsay … Such directions should be repeated after counsel's addresses as part of the Charge. Thus, to ensure a fair trial, a judge might give a direction on certain matters of law and of evidence at convenient points in the trial to ensure fairness. In appropriate cases, a trial judge should give binding directions of law more than once; but always at the end with completeness.[1771] [Reference omitted.]

A corollary of early jury directions is early identification of the issues in the trial. In 2014, the Lord Chief Justice of England and Wales asked Sir Brian Leveson, President of the Queen's Bench Division, to conduct a review of the efficiency of criminal proceedings in England and Wales (Leveson Review). The Leveson Review recommended that the defence should be required to identify the issues in the case immediately after the prosecution opening. Even where the defence opening was simply to put the prosecution to proof on all issues, the Leveson Review considered that this should be explained to the jury. It stated that the benefits of this would include providing the judge with an opportunity to make directions at the beginning of the trial which alert the jury to what they should be looking out for while the evidence is being presented.[1772]

The Leveson Review recommended that such a requirement be given legislative force, suggesting that those cases in which the jury would benefit most from the defence advocate's guidance are precisely those cases in which defence counsel may choose not to assist.[1773]

In Victoria, the Weinberg Report considered issues relating to jury directions, including the timing of directions. In considering the appropriate time to give directions, the report stated:

> Jurors generally process evidence as they hear it, rather than waiting until the end of the trial. This means that directions at the end of the trial require jurors to undo their previous processing of evidence. Expecting jurors to perform this task is unrealistic.[1774] [Reference omitted.]

The Weinberg Report discussed whether there would be benefit in giving directions before hearing the evidence, noting that some psychological theories suggest that pre-instruction should maximise the jurors' ability to retain and apply instructions as they hear and process evidence. The Weinberg Report also indicated that empirical research had demonstrated mixed results as to jurors' ability to comprehend evidence.[1775]

The Weinberg Report found no clear consensus as to whether directions given at the start of the trial are any more effective than those given at the conclusion of the evidence. However, the Weinberg Report noted that research had shown that repetition of jury directions has a beneficial effect on jury comprehension.[1776] Noting that the specific circumstances of each trial will impact on the particular directions that should be given, it concluded that it may be useful for directions to be given in relation to the use of evidence when it is admitted and then again during concluding statements.[1777]

In 2015, the Victorian Department of Justice and Regulation noted research about the importance of the timing of directions which suggested that directions may not be effective if not provided at the right time. It stated:

> Research indicates that repetition of jury directions helps jury comprehension. The way in which directions are communicated to the jury has clear implications for juror comprehension. Ineffective communication techniques compound some of the other problems with jury directions we discuss below, such as their length and complexity. These problems can lead to juror disengagement, and concerns about the basis on which jurors are reaching their verdicts.[1778] [Reference omitted.]

Part 3 of the *Jury Directions Act 2015* establishes a scheme for the trial judge to work cooperatively with the prosecution and defence to establish which directions will be required after the closing arguments by both parties. However, it also includes specific provisions on the timing of particular jury directions.

The Jury Directions Act contains a general provision allowing the trial judge to give a direction (consistent with the Act) that the trial judge considers necessary at any time before the close of the evidence.[1779] The Jury Directions Act also contains provisions regulating the timing of particular directions. For example, as discussed in section 11.3.1, the trial judge must give the direction in relation to delay in complaint (if a direction is required) as soon as is practicable and before any evidence is adduced in the trial. The judge may repeat the direction at any time in the trial.[1780]

Similarly, in criminal proceedings in which self-defence or duress in the context of family violence may be an issue, section 58(1) allows the defence to request the judge to direct the jury on various aspects of family violence. These include that self-defence or duress is, or is likely to be, an issue in trial; and, as a matter of law, evidence of family violence may be relevant in determining whether the accused acted in self-defence or under duress.[1781] Similar provisions about when directions should be made also apply.[1782] The Explanatory Memorandum to the Jury Directions Bill 2015 (Vic) stated that the purpose of requiring directions to be given as soon as is practicable is to ensure that 'any misconceptions jurors may have in relation to family violence are addressed at an early stage'.[1783]

Providing educational material to juries

There may be methods – other than or in addition to expert evidence and judicial directions – that might help to inform and educate juries. For example, a standard video tutorial played to jurors before a child sexual abuse trial could be considered.[1784] This tutorial could provide the sort of information that an expert witness might give. It is not clear whether this would be more or less effective than relevant directions given by the trial judge.

We welcome submissions that discuss the issues raised in Chapter 11.

In particular, we welcome submissions on:

- whether judicial directions and warnings in the nature of those discussed in section 11.3.1 continue to create difficulties in child sexual abuse trials, including institutional child sexual abuse trials, in any jurisdiction
- whether judicial directions should be codified
- whether particular judicial directions, such as the Markuleski direction, should be abolished or reformed
- what education or training would be most effective in ensuring judges – including appellate judges – and lawyers are better informed about child sexual abuse, including from up-to-date social science research
- what method or methods are most effective for improving jurors' understanding of child sexual abuse, including:
  - expert evidence
  - particular judicial directions
  - giving judicial directions early and repeating them through the trial
  - providing other educational material.

12 Sentencing

12.1 Introduction

The sentencing of offenders involves an often complex task of applying the principles and purposes of sentencing to the characteristics of the offence and the subjective characteristics of the offender. Terms of imprisonment must be within statutory limits and will be influenced by sentences imposed for similar offences and, in some jurisdictions, standard non-parole periods or baseline sentences.

The approach to sentencing child sex offenders, and the term of head sentences, have altered significantly in recent times. There has been an upward trend in the proportion of people convicted of child sexual assault offences who receive custodial sentences, and the lengths of sentences for child sexual abuse have increased.[1785]

Parliaments have enacted increased maximum penalties for child sexual offences.[1786] In New South Wales, a large portion of offences in the standard non-parole scheme now consists of child sexual abuse offences.[1787] Sentencing remarks also indicate a growing understanding by the judiciary of the harm that child sexual abuse can cause victims, their families and the broader community.

Research has shown that community members are still often dissatisfied with the length of sentences given to convicted child sexual abuse offenders, although jury members may be less likely to be dissatisfied with the sentence given in the particular case.[1788]

Sentencing sits at the 'end of a long series of decisions', including the initial decision by the complainant to report the abuse to police, the police response, and the finding by the prosecutor that there is a reasonable prospect of conviction followed by a decision to prosecute.[1789] Much of our focus is on pre-conviction concerns and ensuring that victims and survivors are able to report to police, have their reports investigated and, where appropriate, have offenders prosecuted.

However, the sentencing of child sex offenders is an important issue. This is in part because of the role sentencing plays in achieving some of the purposes of the criminal justice system – particularly punishment and deterrence.

In this chapter we outline the general principles and purposes of sentencing. We also look at the sentencing factors that are most relevant in child sexual abuse cases.

In terms of areas of possible reform relevant to institutional child sexual abuse, we discuss:

- whether the approach of New South Wales and South Australia in restricting evidence of the offender's good character should be adopted in all states and territories
- the approach to sentencing historical child sexual abuse offences adopted in England and Wales, which allows for sentencing in accordance with standards that apply at the time of sentencing rather than at the time of the offence.

This chapter draws heavily from research we commissioned on sentencing matters of child sexual abuse in institutional contexts.[1790] The research is published on the Royal Commission website. We outline the research findings below.

12.2 Sentencing research

12.2.1 Introduction

The Royal Commission commissioned research on sentencing in matters of child sexual abuse, with a focus on institutional child sexual abuse. The objective of the research was to examine the factors that inform sentencing policy and judicial decision-making when sentencing institutional child sexual abuse.

This sentencing research resulted in two reports:

- *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research), by Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb, took a broad view on sentencing offenders of child sexual abuse and canvassed issues such as community (mis)perceptions of sentencing; the availability of ancillary orders; and sentencing factors considered by the sentencing court. It also discussed the possibility of institutional offences, which we discussed in Chapter 6.

  To better understand sentencing of child sexual abuse in an institutional context, the researchers conducted a study of 84 institutional child sexual abuse matters finalised in the District Court of New South Wales. The database of sentenced matters was not comprehensive; rather, it constituted a 'collection of institutional abuse cases drawn from many sources and compiled to reveal the dynamics of abuse'.[1791] From this database, the collected remarks on sentencing were reviewed to provide insight into the application of sentencing principles; the use of grooming; and institutional responses to child sexual abuse.

- *A statistical analysis of sentencing for child sexual abuse in institutional contexts* (Sentencing Data Study) by Dr Karen Gelb extended the institutional child sexual abuse study in the Sentencing Research. It expanded the study to include cases from a range of jurisdictions and undertook a more 'nuanced examination of the interactions among the factors measured'.[1792]

12.2.2 Sentencing Research

The key observations of the Sentencing Research include the following:

- The number of offenders sentenced for child sexual abuse offences represents only a small proportion of total offenders.[1793]

- Studies suggest that the rate of repeat offending (of the same type of offence) for convicted child sex offenders is low – generally at about 13 per cent.[1794] The Sentencing Research indicates that low reporting rates, high rates of attrition, and the substantial delays in the reporting of child sexual abuse offences mean that the estimated rate of repeat offending that emerges from these studies is a 'reasonable, if conservative' estimate of sex offender recidivism.[1795] (Note that these studies only count offenders who, after an initial conviction for one or more child sexual abuse

offences, go on to commit further child sexual abuse offences for which they are tried and convicted. They do not count offenders who commit many offences before they are convicted or offenders who are not convicted for subsequent offences.[1796])

- While statutory maximum penalties signal the community's views of the seriousness of a crime, there is a question as to whether maximum penalties make a significant difference to sentencing practices as they are rarely, if ever, imposed.[1797]
- A meaningful comparison of sentencing across Australia is not achievable due to a number of factors identified by the Sentencing Research, including:
    - the substantial differences in how Australian jurisdictions have drafted offences and the respective maximum penalties
    - the factors that influence sentencing for child sexual abuse vary in each jurisdiction – these factors include lower crime rates or differences in sentencing culture
    - different charging practices between jurisdictions, meaning that there may not be significant numbers of similar offences to compare.[1798]

The Sentencing Research identified a number of factors relevant to child sexual abuse that may influence the type and length of sentence that a sentencing court gives to an offender. Aggravating factors may include:

- premeditation[1799]
- offending facilitated by a breach or abuse of trust or authority[1800]
- the exploitation of an offender's standing of good character[1801]
- delay between the date of the offence and the sentencing date if the delay has negatively impacted on the victim or survivor[1802]
- the applicability of any laws relating to mandatory sentences and mandatory non-parole periods, such as those that apply in Queensland, Victoria and the Northern Territory.[1803]

Mitigating factors include the consequences of conviction for the offender, including if they are of old age or ill health.[1804]

A sentence may also be reduced for other reasons. These include:

- a consideration of sentencing practices at the time of the commission of the offence (as opposed to the date of conviction)[1805]
- the willingness of the offender to facilitate the course of justice, for example, by confessing to having committed other offences.[1806]

To better understand the way existing sentencing laws are applied to institutional child sexual abuse, the authors performed a quantitative analysis of 84 New South Wales institutional child sexual abuse cases that were finalised in the District Court of New South Wales.

The analysis comprised 72 offenders (12 of whom were sentenced on two occasions) with sentences handed down between 1989 and 2015. Fifty-one per cent were sentenced before 2003. Over 20 per cent of matters were sentenced 25 years after the sexual assault occurred. The longest period between the offending and sentence was 51.7 years.[1807] The majority of institutions in the study were religious institutions. Table 12.1 shows the researchers' categorisation of the institutions in which the abuse occurred.

Table 12.1: Institutions presented in New South Wales study

Institutions	Number of cases	Percentage of cases
Catholic schools	24	28.6
Catholic church (including Catholic-run homes)	21	25
Schools (unspecified)	7	8.3
Anglican church (including Anglican-run homes)	6	7.1
Sporting clubs	5	6
Scouting clubs	5	6
Uniting schools	3	3.6
Cult/sect	3	3.6
Jehovah's Witnesses	2	2.4
YMCA	2	2.4
Creative arts organisations	2	2.4
Presbyterian schools	1	1.2
Public school	1	1.2
Anglican schools	1	1.2
Hospitals	1	1.2

Other key findings in relation to the sentenced institutional child sexual abuse cases included the following:

- Forty-four per cent of offenders were schoolteachers and 27.4 per cent of offenders were priests.
- Most offenders were sentenced for multiple offences, totalling 707 offences. Twenty-eight per cent of offenders also had matters taken into account on a Form 1,[1808] so that offenders admitted guilt to a further 337 offences.
- Indecent assault on a male was the most common offence (19 per cent).[1809]

12.2.3 Sentencing Data Study

The Sentencing Data Study expanded the database of institutional child sexual abuse offenders to include 283 matters (including the 84 matters from New South Wales analysed in the Sentencing Research). It included matters from across Australian jurisdictions, although even this database represented only 'the tip of the iceberg'.[1810]

The Sentencing Data Study focused on understanding a number of factors that influence sentencing outcomes and also delays between the offending and the sentencing of offenders for committing child sexual abuse in an institutional context. These factors included:

- the age or gender of the victim
- the institutional response to the offence
- the characteristics of individuals who offend against multiple victims.[1811]

Table 12.2 shows some key data from the 283 matters in which offenders were sentenced for child sexual abuse offences in an institutional context.[1812]

Table 12.2: Key data from 283 matters in which offenders were sentenced for child sexual abuse in an institutional context

Guilty plea entered	71% of matters
Full-time custodial sentence imposed	74% of matters
Suspended sentence imposed	15% of matters
Median term for full-time sentence of imprisonment	3 years
Longest term for full-time sentence of imprisonment	21 years
Longest delay from offence to sentence	58 years

The key observations of the Sentencing Data Study included the following:

- **Sentencing outcome:** Seventy-four per cent of offenders received a sentence of imprisonment. The longest term was 21 years. The median was three years.[1813]
- **Delay:** The median delay was 25 years. The longest delay was 58 years.[1814] A longer delay was more likely for offending that took place at a church or religious school.[1815] A greater delay was more likely between the first offence and sentencing:
    - in more recent periods
    - in cases with male victims
    - in cases where the offending was conducted over a long period of time
    - in cases that involved more offences
    - in cases involving more than one victim
    - in offending that occurred in a religious institution.[1816]
- **Victims:** Approximately two-thirds (67.6 per cent) of victims in the database were male. The most common age of victims at the time of offending was between 12 and 16 years.[1817]

- **Offender characteristics:** In over half of the cases, the offender had no prior record. In 9 per cent of matters, the offender had previously been convicted of a sexual offence against a child. This represented 14.6 per cent of all matters where the offender had a previous conviction.[1818]
- **Multiple victims:** In just over 58 per cent of all matters there was more than one victim. Cases with multiple victims were more likely than single victim cases in religious institutions. Multiple victim cases were also more likely to involve penetration and grooming than single victim cases. Accordingly, '[t]here is clearly a pattern among cases with multiple victims of offending, primarily against young males, within institutions steeped in religious authority'.[1819]
- **Various offending behaviour:** In 49.4 per cent of cases the nature of the offending varied to some degree (and included various child sexual abuse offences by the same offender over time).[1820]
- **Guilty plea:** The offender entered a plea of guilty in just over 71 per cent of cases.[1821]
- **Offending characteristics:** Offending was most likely to occur in a school or boys' home, whether religious and non-religious (27 per cent) or a church (23 per cent). Two-thirds of these institutions were Catholic.[1822] Nearly 53 per cent of cases involved indecent assault (one-third involved a penetrative offence). In almost half of the cases, the offending lasted less than five years, while in over 7 per cent of cases, the offending took place over 20 years or more. The average number of offences per case was 8.5 – the maximum was 67 offences. Data was missing in more than half of the cases, but the sentencing remarks in just over 30 per cent of the cases referred to grooming or behaviour that can be recognised as grooming.[1823]
- **Predictors of custodial sentences:** The likelihood of receiving a custodial term was predicted by three variables: the presence of grooming; a high number of offences; and offence type. The number of offences and offence type also impacted on the length of sentence.[1824]
- **Historical sentencing:** The period in which a case was sentenced had a significant impact on the type of penalty imposed. The proportion of cases receiving a custodial term increased, particularly from 1999. However, there was no relationship between the period in which the person was sentenced and the length of the total effective sentence – changes over time have manifested in the decision to incarcerate rather than the length of the incarceration.[1825]

12.3 Purposes and principles of sentencing

12.3.1 Purposes of sentencing

The purposes of sentencing are well established. In every Australian jurisdiction laws govern the sentencing of offenders. Trial judges are guided in sentencing by statute and the decisions of superior courts. Generally speaking, sentencing legislation outlines the purposes for which sentences can be imposed, factors a sentencing court must consider when sentencing, and the type of sentences a court may impose.

The main purposes of sentencing are stated to be:

- **Punishment:** To ensure that the offender is punished for the offence and is held accountable for his or her actions.
- **Rehabilitation:** To promote the rehabilitation of the offender.
- **Deterrence:** To deter the offender from committing more offences (specific deterrence) and to prevent crime by deterring others from committing the same or similar offences (general deterrence).

  Statutory provisions in relation to child sex offences sometimes allow the court to give greater weight to the purpose of general and specific deterrence. For example, the *Criminal Law (Sentencing) Act 1988* (SA) says that, in determining a sentence in a case of an offence involving the sexual exploitation of a child, a court must give proper effect to the 'need to protect children by ensuring that paramount consideration is given to the need for general and personal deterrence'.[1826]
- **Denunciation:** To publicly denounce the conduct of the offender.
- **Community protection:** To protect the community from the offender. Statutory provisions sometimes provide that, for serious offenders, including sex offenders, community protection should be given weight such that a sentencing court may impose a disproportionate sentence, an indefinite sentence or an onerous supervision or detention order. For example, the *Sentencing Act 1991* (Vic) provides that, when sentencing a 'serious sex offender'[1827] for a relevant offence:[1828]

  > the Court, in determining the length of that sentence –
  >
  > (a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
  >
  > (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.[1829]

Legislation in some jurisdictions also refers to the purposes of recognising the harm done to the victim and the community; and accountability of the offender for his or her actions.[1830]

Except for Western Australia, South Australia and Tasmania, states and territories list the statutory purposes of sentencing in their sentencing acts.[1831] In Western Australia, the *Sentencing Act 1995* is silent on the purposes of sentencing.[1832] In South Australia, the *Criminal Law (Sentencing) Act 1988* contains sentencing considerations that a court must give proper effect to in determining the sentence for an offence.[1833] In Tasmania, there is a statutory statement of the purposes of the *Sentencing Act 1997* itself.[1834]

Table 12.3 summarises the statutory purposes by state and territory.

Table 12.3: Statutory purposes of sentencing by state and territory

Purpose	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Punishment	✓	✓	✓	×	✓	×	✓	✓
Rehabilitation	✓	✓	✓	×	✓	✓	✓	✓
Deterrence	✓	✓	✓	×	✓	✓	✓	✓
Denunciation	✓	✓	✓	×	×	✓	✓	✓
Community protection	✓	✓	✓	×	✓	✓	✓	✓
Harm recognition	✓	×	×	×	×	×	✓	×
Accountability	✓	×	×	×	×	×	✓	×

12.3.2 Principles of sentencing

In addition to the statutory purposes of sentencing, the common law has developed a substantial body of general sentencing principles. Some of these principles are also set out in legislation. The principles vary in how they are expressed and applied between Australian jurisdictions.

The main principles of sentencing are as follows:

- **Proportionality:** A sentence ought to be appropriate or proportionate in consideration of all of the circumstances of the offence. Some jurisdictions have adopted the principle of proportionality in their sentencing legislation.[1835] Considering whether a sentence is proportionate requires a court to consider the maximum statutory penalty and the whole of the circumstances of the offence, including the degree of harm caused and the offender's culpability. In the Sentencing Research, the authors comment that determining 'the appropriate level of punishment for any offence … is essentially a value judgement, one that tends to be culturally determined'.[1836]

  Statutory provisions may limit the application of the principle of proportionality. For example, the *Criminal Law (Sentencing) Act 1988* (SA) provides that, when sentencing a 'serious repeat offender', which means a person who has been convicted of at least two separate serious sexual offences against a person under the age of 14 years, the 'court sentencing the person is not bound to ensure that the sentence it imposes for the offence is proportional to the offence'.[1837]

- **Parity:** A sentencing officer should treat like cases alike and different cases differently.[1838] The parity principle supports consistency between sentencing decisions and supports the principle of equality before the law.

- **Totality:** A sentence should reflect the overall criminality of offending. The principle of totality applies in cases of multiple offending by one offender and seeks to avoid the imposition of a 'crushing' sentence.[1839]

  In practice, the principle applies in cases of multiple offending to reduce the total effective sentence imposed on the offender. Sometimes this is done by imposing sentences concurrently; and sometimes it is done by reducing individual sentences so that the total effective sentence when cumulated is less.[1840]

Totality is an established sentencing doctrine, but exactly how it is applied is the subject of academic debate and appeal. Some jurisdictions have enacted a series of presumptions about whether particular sentences are to be served concurrently or cumulatively. These are discussed in section 12.6.2.

- **Imprisonment as a last resort:** A court must not sentence an offender to imprisonment unless it is satisfied that no penalty other than imprisonment is appropriate. This principle is set out in some jurisdictions' sentencing legislation.[1841] For example, the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that:

  > A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.[1842]

  Some jurisdictions have removed this principle when sentencing for child sex offences. For example, Queensland removed the principle in 2003,[1843] and the *Penalties and Sentencing Act 1992* (Qld) now provides that:

  > In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.[1844]

- **The De Simoni principle:** An offender is only to be sentenced for an offence for which he or she has been convicted, so a sentencing court cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[1845] In practice, this principle means that, in cases where the prosecution has accepted a plea of guilty to a lesser charge than the offence first charged, the prosecution must amend the 'facts sheet' to remove any evidence of the more serious charge. This means that a sentencing court cannot consider factors which are relevant to a more serious offence (such as an aggravated version of the basic offence) not charged.

- **Parsimony:** A sentence must be no more severe than is necessary to meet the purposes of sentencing. This principle does not apply in all Australian jurisdictions. It is applied by legislation in Victoria,[1846] but it has been rejected by courts in New South Wales.[1847] The New South Wales Court of Criminal Appeal has held that the principle of parsimony is inconsistent with the range of sentences a judge may impose and the discretions properly open to sentencing judges.[1848]

Most jurisdictions' sentencing legislation states that a combination of two or more purposes can apply.[1849] Sentencing legislation in the Australian Capital Territory also states that the order in which the purposes appear in the legislation does not imply that any single purpose should be presumed to have greater emphasis than another.[1850]

The High Court said of the purposes section in the New South Wales sentencing legislation:

> The purposes there stated are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* in applying them.[1851] [References omitted.]

12.4 Penalties available for child sexual abuse offences

There is a wide range of sentencing options for criminal offences – for example, imprisonment, community-based sanctions, home detention and fines. There is a wide range of child sex abuse offences to which different penalties can apply.[1852]

The Sentencing Data Study shows that the majority of offenders in the sample studied received a sentence of imprisonment.[1853]

New South Wales, Queensland and South Australia have a maximum penalty of life imprisonment for certain sexual offences against children in the lowest age category or with particular vulnerabilities.[1854]

In addition to imprisonment, other custodial sentences include:

- a suspended sentence, where detention is avoided subject to ongoing good behaviour
- home detention, where a sentence is served at the offender's home address under strict supervision
- intensive corrections orders, which require the offender to comply with particular conditions, such as attending counselling treatment, complying with a curfew and avoiding particular activities that increase the risk of reoffending (for example, drinking alcohol or taking drugs).

Offenders may also be sentenced to various non-custodial sentences, including:

- an order to perform community service
- a bond for the offender to maintain good behaviour
- monetary fines.

In some cases, the court may not record a conviction at all. For example, section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) gives the court the discretion not to record a conviction. However, the New South Wales *Sentencing bench book* notes that the scope for such action narrows if the offence is objectively serious and general deterrence and denunciation are important factors in sentencing for the offence.[1855]

In addition, each jurisdiction has a sex offender register, governed by statute.[1856] Inclusion in the register is a mandatory step following conviction for a range of sexual offences, including all sexual offences involving children. Upon registration, sex offenders are required to comply with various reporting requirements. In some jurisdictions, judges also have a discretionary power to order a person convicted of any offence to comply with the reporting obligations.[1857] Sex offender registers are discussed further in Chapter 14.

12.5 Sentencing factors

12.5.1 Introduction

A sentencing hearing follows a conviction, regardless of whether the person entered a guilty plea or was found guilty at trial. The sentencing court generally hears evidence regarding the culpability of the offender. It is the role of the sentencing judge to determine the length and type of sentence, usually assisted by submissions from the prosecution and defence.

All states and territories have legislation that outlines the factors sentencing courts can take into account in sentencing an offender. The provisions vary in detail and levels of prescription.

For example, the New South Wales legislation provides a detailed list of the mitigating and aggravating factors that the court can take into account.[1858] Aggravating factors look to the seriousness of the offence,[1859] the criminality of the offender[1860] and the identity, vulnerability or occupation of the victim.[1861] If the offender's culpability for the offence was lowered due to actions beyond the control of the offender,[1862] the otherwise good behaviour of the offender[1863] or the offence not causing substantial harm,[1864] this may mitigate the severity of the sentence. There are special rules regarding the use of good behaviour and character where the offence is a child sexual offence. These are discussed below.

Other jurisdictions tend to either list a number of neutral factors that a court must have regard to in sentencing (which are not expressed to be aggravating or mitigating)[1865] or provide that the court must take into account any aggravating or mitigating factors, without identifying specifically what these are.[1866]

Generally, aggravating factors raised in sentencing must be proven by the prosecution beyond reasonable doubt, and mitigating factors need to be shown by the offender to the balance of probabilities.[1867]

Aggravating elements can also be included in the offence. Where the particular aggravating factor (such as a breach of trust or the young age of the victim) is an element of the offence, the court is not to treat it as a separate aggravating factor at sentencing.[1868]

12.5.2 Key sentencing factors for child sexual abuse offences

The factors discussed below are commonly raised when sentencing for child sexual abuse offences, including institutional child sexual abuse.

The factors are arranged depending on whether they relate to the nature of the offence; the characteristics of the offender; or the impact of the offence on the victim.

Sentencing factors relating to the nature of the offence

The Sentencing Research emphasised the central role that the nature of the offence has to the sentencing decision: the more serious the offence, the less weight is given to mitigating factors.[1869] The seriousness of an offence will depend upon 'all the facts and circumstances, including the

duration of the offence and the kind of act committed. … The court must take into account all the surrounding circumstances of the offence, including the breach of trust and the age of the child'.[1870]

The Sentencing Research also stated that the seriousness of an offence is given primary expression by the legislatures through the maximum available penalty.[1871] Child sexual abuse offences generally attract maximum penalties in the higher range. However, the Sentencing Research suggests that the sentence quantum imposed by the court is rarely responsive to an increased maximum penalty.[1872]

The seriousness of the offence may also be expressed through:[1873]

- **Mandatory minimum sentences:** A mandatory minimum sentence is a fixed minimum penalty prescribed by legislation for committing a particular criminal offence. Where mandatory minimum sentences have been implemented, the stated aims have been to increase consistency in sentencing and improve public confidence in the courts by ensuring that sentences reflect community views.[1874] Mandatory minimum sentences are usually attached to serious, highly visible criminal offences.

  The imposition of statutory mandatory (minimum) sentences for child sexual assault matters is rare. Queensland introduced a mandatory sentence of life imprisonment (20 years before being eligible for parole)[1875] for repeat serious child sex offenders in 2012.[1876] The penalty of life imprisonment cannot be mitigated or varied under any law.[1877] An alternative penalty of an indefinite sentence is available to the court.[1878]

- **Standard non-parole periods:** Standard non-parole periods aim to give a 'further important reference point' to sentencing judges in regard to the appropriate non-parole period to be set for certain offences.[1879] New South Wales has had a standard non-parole period scheme since 2003, which currently includes 14 child sexual abuse offences.[1880]

  Baseline sentences were introduced in Victoria in 2014. Baseline sentences are the median sentence for the nominated offence. They attach a minimum non-parole period (usually of 60 per cent of the total effective sentence). Four child sexual abuse offences are included in the scheme, including persistent sexual abuse and sexual penetration of a child.[1881]

  No other jurisdictions currently have a standard non-parole period or equivalent scheme.

There are other sentencing factors relating to the nature of the offence that may be particularly relevant in child sexual abuse offences, including institutional child sexual abuse offences.

If there is a degree of premeditation in the offending, this may increase the culpability of the offender.[1882] In child sexual abuse offences, premeditation may be demonstrated particularly through grooming behaviour.

Particularly in institutional child sexual abuse, offending may involve an abuse of a position of trust or authority by the offender. That abuse of trust or authority can be an aggravating factor which is taken into account in sentencing,[1883] or it can be an element of the offence itself. Where an abuse of trust or authority is present, it will often offset mitigating factors, such as good character evidence.

The Sentencing Research noted that offenders who were in a position of authority receive a more severe sentence if prosecuted for offences in which breach of trust or abuse of authority was an element of the offence rather than being considered only as an aggravating factor at sentencing.[1884]

Sentencing factors relating to the characteristics of the offender

An offender's degree of criminal responsibility for the criminal act can be affected by numerous factors. Culpability may be less where the offender has a mental illness or cognitive impairment,[1885] resulting in a decreased or varied sentence.

Characteristics of an offender that may impact on the sentencing decision include the following:

- **Remorse:** Remorse (or contrition) will usually result in a discount on sentence.[1886] Many factors are taken into account in mitigation of sentence because they demonstrate the remorse of the offender.
- **Personal history:** In some circumstances, **a**n offender's experience of sexual abuse as a victim may be a mitigating factor in sentencing.[1887]
- **Age and health of offender at sentencing:** The court may take into account an offender's old age where the sentence may be more onerous due to age and illness or may end up being a life sentence.[1888] This factor may be particularly relevant in matters of historical child sexual abuse where the offender at the time of sentencing may be elderly and infirm.
- **Consequence of a conviction:** We discuss the possibility of continuing detention or supervision, and placement on the sex offender registry, in Chapter 14. Generally, the sentencing court cannot know, for example, whether the offender will be rehabilitated at the completion of their total sentence, so the possibility of continuing detention or supervision is not a factor to be considered at sentence. However, placement on the sex offender register is a consequence of conviction for all child sexual abuse offending.

  Generally, placement on the sex offender registry requires the offender to report to police any changes in address and employment status for a prescribed period after the offender has completed his or her sentence. New South Wales,[1889] Victoria[1890] and South Australia[1891] have instituted provisions that prevent sentencing courts from taking into account an offender's placement on the sex offender registry in mitigation of sentence. The sentencing courts in other jurisdictions do not appear to take into account placement on the sex offender registry in mitigation of sentence, although this is not prescribed by statute.
- **Prior criminality:** Repeat offending affects the sentencing decision because it may indicate:
  - a diminished likelihood of rehabilitation
  - an increased need for specific deterrence
  - the need for an increased emphasis on community safety concerns.

  The Sentencing Research states that the offender's prior criminality 'has a powerful influence in sentencing. It can increase the statutory powers of the sentence, the choice of sanction and the weight given to the various purposes of sentencing'.[1892]

  An offender's record of prior convictions is a statutory aggravating factor in New South Wales, particularly where the offending constituted a personal violence offence.[1893] As noted above,

repeat serious child sexual abuse offending may result in a mandatory sentence of life imprisonment in Queensland.

At common law, an offender's prior criminal history is not permitted to lead to a sentence disproportionate to the offence for which the offender is being sentenced.[1894] This approach has been adopted in legislation in some jurisdictions.[1895]

- **Prior good character:** Good character evidence can be a relevant factor in sentencing. Where there is evidence that the offender is otherwise of 'good character', this can assist the sentencing court in the determination of whether:
  - the offender has a greater amenability to rehabilitation
  - there is a reduced need for specific deterrence
  - the offender poses a low risk to the community.

  Good character evidence can operate to show that the offender's actions were out of character and that the offender is unlikely to reoffend.[1896]

  Most jurisdictions have legislated to require that an offender's good character be taken into account in sentencing.[1897] Good character evidence is generally assessed independently from the actual offence – it is raised as 'otherwise' or 'previous' good character.[1898] Good character is generally assessed in a two-step process:

  - Is the offender otherwise of good character?
  - If so, what weight can be given to his or her good character in mitigation of the sentence?[1899]

  Sentencing judges do not usually quantify the discount given for good character; it is instead considered in the matrix of sentencing factors.[1900]

  However, allowing prior good character as a mitigating factor in sentencing for child sexual abuse offences can be highly problematic. We discuss this further in section 12.6.1.

Sentencing factors relating to the victim

The culpability of the offender may be increased by the vulnerability of the victim[1901] and the consequences of the offending on the victim. The vulnerability of the victim may also arise in relation to a breach of trust or abuse of authority, discussed above.

In matters of child sexual abuse, the courts and legislatures have indicated that the younger the victim, the greater the culpability of the offender.[1902] As well as the age of the victim, the character and the status of the victim are relevant factors to the exercise of the sentencing discretion.[1903] Further, some jurisdictions have legislation to require the courts to have regard to any personal circumstances of the victim of the offence.[1904]

The effect of the offence on the victim has also become important factor in assessing the nature of the offence in child sexual abuse matters.[1905] An understanding of the full and long-term effects of child sexual assault on the victim may have resulted in increased sentences for child sexual abuse offences over time.[1906]

The consequences of the offence for the victim may also be expressed to the court through a victim impact statement.

All jurisdictions allow victim impact statements to be considered by the sentencing court.[1907] Victim impact statements are made after a guilty conviction has been entered but before sentencing.[1908] They provide an opportunity for victims to outline their experiences of the sexual abuse and to tell the sentencing court about the impact the abuse has had on their lives. Generally speaking, victim impact statements include a description of the physical, financial, social, psychological or emotional consequences to the victim of the offences.

Depending on the jurisdiction, victim impact statements can be read to the court by a victim, tendered in writing and handed up to the judge, or read by someone close to the victim in certain circumstances. Recent developments in some jurisdictions also allow for victim impact statements to be delivered via closed circuit television (CCTV) or delivered in court in the absence of the offender.[1909]

There are differences between states and territories in the provisions that regulate the reception, form, content and use of victim impact statements. In each jurisdiction, there are rules in legislation or common law, or guidelines provided to victims, about what content can be included in a victim impact statement.

Details of the conduct of the offender which would denote a more serious offence cannot be taken into account by the sentencing judge, even if no objection is taken to the material being included in the statement. To do so would be in breach of the De Simoni principle of sentencing, discussed above.[1910] In New South Wales in 2005, in *R v H*,[1911] the New South Wales Court of Criminal Appeal held that a victim impact statement should only refer to the impact on the victim of the offence before the court.[1912]

We have heard from victims and survivors in private sessions and public hearings that they have been required to narrow the scope of their victim impact statement, and some victims and survivors have felt that this limited their capacity to fully explain the impact of the abuse on them.[1913]

The Australian Capital Territory and the Northern Territory allow the defence to cross-examine a person who makes a victim impact statement on the contents of the statement in some circumstances.[1914]

In all Australian jurisdictions, children can provide their own victim impact statements. In most jurisdictions, this can be done in writing or orally.[1915] Generally speaking, legislation permits others to:

- help a child victim write a victim impact statement
- write a victim impact statement on a child victim's behalf
- present a victim impact statement to the court on a child victim's behalf.[1916]

In practice, we understand that many children who are the victims of child sexual offences may not read victim impact statements in open court. However, many children write victim impact statements with assistance, and those statements are read by someone else or handed up to the sentencing court to be read.

Discount for assistance to justice

The sentencing court may consider discounting a final head sentence in acknowledgment of assistance to justice that the offender has given. This is not a sentencing factor as such, but it affects the final sentence given.

Discounts are routinely given for the utilitarian value of a guilty plea and for an offender's assistance to authorities. All states and territories except Tasmania have enacted legislation enabling sentence discounts to be given for guilty pleas.[1917] The discounts given for early guilty pleas have been prescribed by legislation in some jurisdictions, and they are outlined by the common law in New South Wales.[1918] The maximum discount for an early guilty plea is 25 per cent in the majority of jurisdictions[1919] and 40 per cent in South Australia.[1920]

An offender may receive a discount on sentence for assisting authorities – usually providing information regarding the charged or other offences.[1921] The amount of the discount will depend on factors including the quality of the information and any consequences suffered by the offender, such as harsher custodial conditions (for example, in protective custody).[1922] A discount may also be available where the offender aided the conduct of the trial – for example, by agreeing to limit the facts in issue and reduce the number of witnesses required to give evidence.[1923]

We discussed in Chapter 7 the concerns that victims and survivors may have about guilty pleas, particularly where they have been negotiated so that the offender pleads guilty to a lesser offence. However, unless the crime was so serious to warrant no discount, generally offenders who enter an early guilty plea or who otherwise assist authorities will receive a discount on sentence.

Guilty pleas are important for securing convictions in child sexual abuse prosecutions. They can be significant in some cases in avoiding the need for complainants to give evidence, potentially reducing distress for complainants. They can also be significant in contributing to reduced delays in finalising particular prosecutions and in reducing delays in prosecutions more generally. In its 2014 report *Encouraging appropriate early guilty pleas*, the New South Wales Law Reform Commission argued that the introduction of a graduated statutory sentencing discount scheme would provide a clear incentive for a defendant to plead guilty early.[1924]

12.6 Possible areas for reform

We have identified some possible areas for reform of sentencing for child sexual abuse, including institutional child sexual abuse, from the sentencing research we commissioned and the accounts of victims and survivors in private sessions and public hearings.

12.6.1 Excluding good character as a mitigating factor

In section 12.5.2, we noted that the offender's prior or other good character (apart from the offending behaviour) can be a mitigating factor in sentencing.

Allowing good character as a mitigating factor can be highly problematic in sentencing for child sexual abuse offences. In particular:

- **Use is based on certain assumptions:** It has been argued that there is no empirical support for the notion that prior good character suggests a low risk of reoffending. Further, prior good character judged by lack of prior convictions can be a fallacy. A lack of prior convictions (especially in child sexual assault) does not necessarily mean a lack of prior bad behaviour.[1925]
- **Accepting an offender's otherwise good character may belittle the harm done by the offence:** Acknowledgement of the offender's good character can minimise the 'vindicatory aspects of criminal proceedings if the offender is regarded as not being fully responsible for the offence, and is consequently treated more leniently'. In the eyes of the victim and the community, accepting the offender's good character in mitigation 'potentially deletes the "wrongfulness" message of this crime'.[1926]
- **Without the offender's good character, the offending would have been less likely to take place:** The offender may have used his or her reputation and good character to facilitate the grooming and sexual abuse of a child and to mask their behaviour. This may be particularly so in matters of institutional child sexual abuse.[1927]

Good character in a matter of institutional child sexual abuse was discussed by the High Court in 2001 in *Ryan v The Queen*[1928] (*Ryan*). In that case, a New South Wales priest was convicted of numerous child sexual abuse offences committed over a period of more than 20 years.[1929] The sentencing judge refused to take account of his otherwise unblemished character and reputation, stating that high standards of behaviour were to be expected of a priest. District Court Judge Nield stated:

> [W]hatever he had done and achieved, he is not a good man. The prisoner is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult … How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered a good man? … His unblemished character and reputation does not entitle him to any leniency whatsoever.[1930]

The New South Wales Court of Criminal Appeal dismissed the appeal, stating that the offender created, and then abused, a position of trust and that the appellant's good work did not warrant the extension of significant leniency.[1931]

The offender then appealed to the High Court, which found that the appellant's good works were a minor factor to be weighed at sentencing; however, as the offences were conducted in the course of his duties as a priest, involving a breach of trust, the weight given to his good character should be minimal. Accordingly, the appellant was not entitled to significant leniency but was entitled to *some* leniency for his otherwise good character.[1932]

In 2008, New South Wales legislated to overcome the effect of the High Court's decision in *Ryan*. Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which commenced in 2009, provides:

> In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

The provision applies to offending that occurred before it commenced but not to matters already convicted but not yet sentenced.[1933]

The provision has operated to exclude good character evidence in mitigation of sentence in matters of institutional child sexual abuse. In 2015, for example, the New South Wales Court of Criminal Appeal found that an offender who was convicted of sexual offences against an eight-year-old girl committed in the context of his work as a supervisor in after-school care could not enter good character evidence in mitigation of sentence under to section 21A(5A).[1934] The offender's prior good character was not allowed to mitigate his sentence, as his prior good character assisted him to hold a position as a childcare worker, which he abused by committing the offences against the victim.[1935]

Most institutional child sexual abuse offending in New South Wales may come within section 21A(5A) because prior good character may be likely to give the offender access to the institution. However, the requirement that the good character in question specifically *aid* the offence may limit the application of the provision, both in some institutional offending and in offending that is not in an institutional context.

For example, in 2015 the New South Wales Court of Criminal Appeal found that a stepfather who had abused his nine-year-old stepdaughter was able to enter good character evidence to mitigate his sentence because, while the relationship the offender had with the victim's mother and the subsequent trust that was created engendered an environment in which the offence could be committed, the offender's good character did not assist in the commission of the offences.[1936]

In 2014, South Australia enacted section 10(3)(ba) of the *Criminal Law (Sentencing) Act 1988* (SA).[1937] It prescribes that the sentencing court must not have regard to the good character or lack of previous convictions of a defendant if the offence is a certain child sexual abuse offence[1938] and the court is satisfied that the defendant's alleged good character or lack of previous convictions was of assistance to the defendant in the commission of the offence.[1939] This has been applied to sentencing for child sexual abuse in an institutional context.[1940]

The position adopted by New South Wales and South Australia is similar to the position that now applies in England and Wales, although it goes further in allowing good character to be considered an aggravating factor. In 2013, the sentencing guidelines in England and Wales were amended so that, where previous good character had been used to facilitate an historical sexual offence, mitigation due to good character is generally not allowed, and good character is instead to be considered an aggravating factor.[1941]

Jurisdictions other than New South Wales and South Australia have not enacted legislation to displace the High Court's decision in *Ryan*, which remains the law in those jurisdictions.[1942] However, where prior good character is raised in mitigation in types of matters where a breach of trust is apparent, it appears to be given very little weight.[1943] Indeed, the use of a person's good character and position of trust and authority to facilitate the offending can be raised as an aggravating factor in sentencing.[1944]

A number of jurisdictions have reviewed the operation of good character as a mitigating factor in sentencing child sexual abuse offences, often focusing on the tension between recognising the general mitigating factor of good character and the fact that good character was often used as a means of facilitating the offending. It was on this basis that the Victorian Sentencing Advisory

Council noted that in 2016 the appropriate impact of the offender's prior good character in cases of child sexual abuse was currently 'unsettled and unsatisfactory'.[1945] The Queensland Sentencing Advisory Council has recommended reform similar to that adopted in New South Wales, but this recommendation has not been implemented.[1946] The Tasmanian Sentencing Advisory Council has also recommended reform.[1947]

Wendt and Stevens analysed sentencing transcripts in South Australia before the commencement of the South Australian reform in relation to the use of good character mitigation in matters of child sexual abuse. They found that discussion of the offender's standing in the community, including discussion of the offender's family and work commitments and their involvement in community activities, featured heavily in good character mitigation defence arguments in matters of child sexual abuse.[1948] Wendt and Stevens argued that the sentencing stage is extremely important where there is a high prevalence of child abuse, low reporting and high attrition. They stated:

> it is absurd that a defendant convicted of child sexual abuse is constructed as a person of good character within the criminal justice system – the societal institution responsible for denunciating such crimes and deterring other members of society from committing such offences.[1949]

In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrators' good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend in spite of complaints or allegations being made.

Although the sentencing courts appear to give only slight consideration to good character in cases of child sexual abuse, it may be appropriate for all states and territories to introduce legislation similar to that applying in New South Wales and South Australia. Consideration could also be given to whether all states and territories should follow the approach of England and Wales and allow prior good character to be raised as an aggravating factor in cases where it has facilitated the offending.

12.6.2 Cumulative and concurrent sentencing

The issue of whether sentences are imposed concurrently or cumulatively (consecutively)[1950] is relevant in matters where an offender is convicted and sentenced for more than one count on the indictment or on multiple indictments, or where the offender is still serving a sentence for a prior conviction.

Where an offender is convicted of more than one offence, sentences can be directed to be served:

- **Concurrently:** This means that sentences are served at the same time, so that the shorter sentence is subsumed into the longest sentence (the base sentence). There is a presumption in favour of concurrency.
- **Cumulatively or consecutively:** This means that each sentence for each conviction is served one after the other, upon a base sentence. The sentences for each conviction may be reduced to properly reflect the totality principle.
- **Partially concurrent and partially cumulative:** This means that some sentences are served concurrently with the base sentence while others will be served after the term of the base sentence has ended, or that sentences 'overlap' so that one sentence starts before the other

sentence has finished. A combined term may also be presented in terms of an aggregate sentence in some jurisdictions.

The final total effective sentence in all options must adhere to the principle of totality discussed in section 12.3.2. Without some concurrency, the total effective sentence may end up being disproportionately severe to the offending behaviour. Equally, if all sentences are concurrent and without any cumulation, the total sentence may too lenient to properly reflect the increased criminality associated with multiple offences or victims.[1951]

The imposition of the total effective sentence in matters which include multiple convictions is a complicated area. Generally, the presumption of concurrency applies where more than one offence arises out of a connected serious of facts on the same indictment. Otherwise, where there is an overlap with the way the counts are presented, the offender could be subjected to double punishment.[1952]

Cumulation or partial cumulation may be appropriate for sentences between indictments or for sentences for counts within the same indictment that do not show one continuing episode. However, as noted in the Sentencing Research, 'much will depend upon the nature and number of the charges, the exercise of prosecutorial discretion, the number of victims, and the length of time over which the offending occurred'.[1953]

Issues of cumulative and concurrent sentencing often arise in sentencing child sexual abuse offenders. The majority of offenders sentenced for child sexual abuse offences have been convicted of more than one offence.[1954] The Sentencing Data Study indicated that, in the 283 institutional child sexual abuse matters analysed, the offenders were sentenced for an average of eight counts on the indictment.[1955]

A number of survivors have expressed dissatisfaction about concurrent sentencing in private sessions and in public hearings.

For example, in Case Study 38 in relation to criminal justice issues, Mr Mark Lawrence gave the following evidence:

> For all 38 charges, the judge added up over 100 years' worth of gaol time. But due to concurrent sentencing, Doyle only got seven years' imprisonment with a non-parole period of four and a half years. At the time, I did not understand what concurrent sentencing meant. I was disappointed with this lenient sentence, but instead of getting angry, I decided to use this opportunity to push for harder sentencing. Since then, I've become an advocate for sentencing reform.[1956]

Mr Lawrence also told the public hearing:

> I was shattered that Doyle got the benefit of concurrent sentencing. Offenders should serve separate sentences for each charge they are convicted for. Courts need to impose punishment that reflects the public abhorrence of child sexual abuse.[1957]

Mr Kevin Whitley gave the following evidence about the same offender:

> The judge ordered many of Doyle's sentences to be served concurrently. Again, I was confounded with this concept. Concurrent sentencing suggests that the law views the rape of

> one victim or a dozen victims the same. It simply made no sense to me and had no basis in logic.[1958]

Mr Whitley also gave evidence that:

> I do not understand the logic behind concurrent sentencing. I work in business; if someone buys a hundred of something from me, they get a discount. It appears that the same logic applies in criminal law, so if I'm going to rape someone, I may as well rape ten women because I'm still going to get the same sentence. Concurrent sentencing is illogical and is not a deterrent. Around the same time of Doyle's sentence, a man was sentenced to more time for fraud charges. This just doesn't make sense. It appeared to me from this example that the law values money and property more highly than children.[1959]

All states and territories other than Victoria continue to have a presumption in favour of concurrent sentencing. Victoria legislated in 1993 to reverse the presumption in favour of concurrency when sentencing serious child sexual abuse offenders.

In states and territories other than Victoria, there is a common law presumption in favour of imposing concurrent sentences.[1960] Most jurisdictions have statutory provisions that mirror this presumption, although there is usually an accompanying statutory provision giving the sentencing court discretion to impose cumulative, aggregate or partially cumulative sentences.[1961] The New South Wales Law Reform Commission has observed that the only reasons for imposing cumulative or partly cumulative sentences will be either 'because legislation requires it, or, more generally, because a maximum sentence is not available to make the effective total sentence for all the offences long enough to reflect the principle of totality or to denounce separate crimes'.[1962]

Using New South Wales as an example, section 55 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for a presumption in favour of concurrent sentencing. The presumption is to be displaced in favour of consecutive sentencing where the offence to be sentenced occurred in a correctional setting or while escaping from a correctional centre.[1963] The court is also given a statutory discretion to direct sentences to be served consecutively.[1964]

The sentencing provisions in New South Wales require the sentencing court to impose a separate sentence for each offence when sentencing for multiple offences, unless the court imposes an aggregate sentence.[1965] If the court imposes separate sentences, the court then decides whether the presumption in favour of concurrency prevails or whether it will accumulate any or some of the sentences. Where sentences are accumulated, the court generally staggers some or all of the starting dates of the sentences.[1966]

The legislative framework for sentencing in Victoria, South Australia, Tasmania and the Northern Territory also allows for aggregate sentencing in indictable matters.[1967]

Relevant to child sexual abuse matters in New South Wales, the New South Wales Court of Criminal Appeal has held that:

- where multiple sexual offences arise out of one event, the court is to identify the appropriate sentence for each act, and some degree of accumulation may be necessary to address the criminality[1968]

- it is open for a court to make the sentence for each offence with a different victim wholly cumulative upon the non-parole period of the offence before it[1969]
- a sentencing judge may err where the judge applies wholly concurrent sentences for multiple discrete offences.[1970]

Victorian legislation also has a statutory presumption that prison sentences be served concurrently.[1971] However, Part 2A of the *Sentencing Act 1991* (Vic) provides for an exception in relation to 'serious offenders', which includes 'serious sexual offenders'.[1972] Here the presumption is altered in favour of cumulative sentencing.[1973]

A 'serious sexual offender' is an adult offender who has been convicted (either in the current or another trial)[1974] and received a prison sentence for either:

- two or more sexual offences
- persistent sexual abuse of a child under 16 years
- committing the incidents which constituted the course of conduct charge
- a course of conduct charge for a sexual offence *and* a violence offence.[1975]

There is also a statutory exception to the principle of totality. Section 6D of the *Sentencing Act 1991* (Vic) directs that, in determining the length of a prison sentence for serious offenders, the sentencing court 'must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances'.[1976]

In *DPP v Bales*,[1977] the offender was a Christian Brother who was convicted after entering guilty pleas to 34 charges of child sexual abuse that had occurred between 1971 and 1985. He was sentenced at the first instance to a total effective sentence of six years, with a three-year non-parole period. The Director of Public Prosecutions (DPP) appealed the sentence, arguing that the base sentence for the most serious charge was manifestly inadequate, and the orders for cumulative sentences resulting in the total effective sentence were inadequate (as was the non-parole period).

Relevantly, the Victorian Court of Appeal found that the orders for cumulative sentences made in respect of the more serious offences, which received nine-month sentences to be served cumulatively at two months each, were 'insufficient to mark the individual denunciation of the offending in question which s 6E requires … the sentence failed to provide for orders making the provision for cumulation which was necessary to reflect the seriousness of the relevant offences consistent with the policy of s 6E'.[1978]

The appeal was allowed, and the offender was resentenced to a total effective sentence of eight years and five months. The most serious charge attracted a term of two years and six months. The other serious charges were to be served cumulatively at four or three months (rather than two), giving an additional 17 months.

The issue arises as to whether there might be benefit in other states and territories introducing legislation to make provision for a presumption in favour of cumulative sentencing for child sexual abuse offences that is similar to the presumption in Victoria.

12.6.3 Sentencing standards in historical cases

Introduction

In most Australian jurisdictions, an offender is sentenced with reference to the sentencing standards that existed at the time of the offending, including in relation to the maximum penalty, non-parole period and the prevailing sentence lengths accepted by the courts at the time of offending.

The use of historical sentencing standards is particularly relevant to matters of institutional child sexual abuse, which are often prosecuted many years, even decades, after the offending occurred.[1979]

The concerns with applying sentencing standards at the time of offending in historical cases include the following:

- Applying historical sentencing standards can result in sentences that do not align with the criminality of the offence as currently understood. The sentences for child sexual abuse offences have increased over time. When the court sentences to the standard existing at the time of the offending, sentences can be shorter than they would be under current sentencing standards,[1980] which can be distressing for victims and may undermine community confidence in the administration of justice.
- The sentencing court may be prevented from considering some aggravating features recognised today, such as grooming.[1981] It may also be prevented from ordering wholly or partially cumulative sentences in cases with multiple offending.[1982]
- Applying historical sentencing standards can also be complicated, especially if relevant sentencing remarks or statistics are not available. Where statistics are not available or reliable, the court is to sentence with regard to the legislative policy current at the time, often visible in the maximum sentence.[1983]

Australian jurisdictions generally sentence by applying historical sentencing standards. However, Victorian legislation directs the sentencing court to have regard to current sentencing practices, and South Australia provides for current sentencing standards to apply in cases of multiple or persistent child sexual abuse, regardless of when the offending occurred.

England and Wales have implemented more substantial reform. While the statutory maximum penalty that applied at the time of the offence continues to apply, they otherwise sentence in accordance with the sentencing standards that apply at the time of sentencing.

Current approaches

Applying historical sentencing standards

Under this approach, supported in obiter by the High Court in *Radenkovic v The Queen*,[1984] the sentencing court is to impose a sentence commensurate with the maximum sentence and applicable standards of the time. The New South Wales Court of Criminal Appeal has held that, where an offender is exposed to harsher punishment than that which existed at the time of the offending and reliable statistics or source material exist so to reconstruct the previous sentencing regime, a 'sentence should be imposed that reflects the applicable statutory maxima and sentencing patterns'.[1985] This approach has also been adopted in Queensland and, with qualifications, in the Northern Territory.[1986]

Partial application of historical sentencing standards

In Victoria, legislation directs the sentencing court to have regard to the maximum penalty for the offence and also current sentencing practices, among other things.[1987] Current sentencing practice has been found to include procedural elements such as pre-sentence reports and victim impact statements; and the imposition of certain sentence types (such as suspended sentences).[1988]

The Victorian Court of Appeal has found that the statutory list of matters to which the court must have regard when sentencing an offender is not exclusive. The sentencing practices at the date of the offending may also be a factor to which the court can have regard when sentencing, as the principle of 'equal justice' (that a person should not be sentenced to a substantially higher sentence than an offender who committed a like offence at the same time) may still require the sentencing court to have regard to sentencing practices at the time of the offending.[1989] However, reference only to the historical statutory maximum in concert with current sentencing considerations, such as current community attitudes, would not be in error, especially where no further information regarding differential sentencing practices at the time of the offence exists.[1990]

Exclusion of historical sentencing standards

South Australian legislation requires sentencing courts to apply sentencing standards set out in the 1997 case of *R v D*[1991] in matters of persistent or multiple child sexual abuse, regardless of when the offending occurred.[1992] Due to the nature and harm of child sexual abuse offences, a majority of the South Australian Court of Criminal Appeal determined that heavier sentences should be imposed for matters of child sexual abuse (although they reduced the sentence in the case the subject of the appeal). The majority considered that:

- unlawful sexual intercourse with children under 12 (multiple, over a period of time) should attract as a starting point a head sentence of about 12 years, subject to reduction for a plea of guilty, cooperation with the police, genuine contrition and other mitigating factors
- unlawful sexual intercourse with children over 12 (multiple, over a period of time) should attract as a starting point a head sentence of about 10 years imprisonment.[1993]

The law was subsequently codified after the South Australian Court of Criminal Appeal held that the heavier sentences required by *R v D* could not apply to offending that occurred before the judgment in 1997.[1994]

In *R v Marien*,[1995] the South Australian Court of Criminal Appeal said of the effect of the legislation:

> Section 29D does not fetter the Court's discretion to determine the sentence appropriate to each individual case, having regard to all the circumstances of the offending and matters personal to a defendant. The effect of section 29D does no more than require the Court to have regard to the decision in R v D. Section 29D(1)(b) gives retrospective effect to the decision in R v D.
>
> R v D provides a notional starting point of approximately 12 years, subject to various factors personal to the defendant. Doyle CJ was concerned with the need for the range of penalties for this particular offence to be lifted in those cases concerning unlawful sexual intercourse of children below 12 years of age, where there have been multiple offences over a period of time. Nevertheless, a sentence in the general vicinity of 12 years with a higher or lower starting point may be appropriate, depending upon the facts and circumstances of each case.[1996] [References omitted.]

The court referred to the trial judge noting that he had taken into account the principles in *R v D* but stated 'he does not explain why, in this case, he has departed so significantly from that decision'. The court stated that it considered a starting point of 12 years imprisonment was appropriate, and it allowed the DPP's appeal against the leniency of the sentence.[1997]

England and Wales have implemented more substantial reforms. The reforms followed decisions in the England and Wales Court of Appeal[1998] and an understanding of how earlier legislative reforms in relation to sexual offending had been implemented by the courts.[1999]

In 2011, the England and Wales Court of Appeal delivered the guideline judgment of *R v H and Others*,[2000] which involved a number of historical abuse cases. The decision noted that, in these types of cases, criminal conduct may often span different legislative provisions and 'while the substantive law and sentencing provisions have been changing, a variety of different sentencing regimes have been in force'.[2001]

The Lord Chief Justice directed judges deciding these cases to return to first principles, contained within Part 12 of the *Criminal Justice Act 2003* (UK):

> In principle, the defendant must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Nevertheless as the offence he committed years earlier contravened the criminal law in force at the date when it was committed, he is liable to be convicted of that offence and no other, therefore the sentence is limited to the maximum sentence then available for the offence of which he has been convicted. Changes in the law which create new offences, or increase the maximum penalties for existing offences do not apply retrospectively to crimes committed before the change in the law. In short, the offence of which the defendant is convicted and the sentencing parameters (in particular, the maximum available sentence) applicable to that offence are governed not by the law at the date of sentence, but by the law in force at the time when the criminal conduct occurred. … In such circumstances what we describe as retrospectivity would be unlawful.[2002]

The Lord Chief Justice explained the extent of the ban on retrospectivity by reference to a 2005 decision of the House of Lords in *R (Uttley) v Secretary of State for the Home Department*.[2003] In the context of prisoner release, the House of Lords held that an infringement of Article 7(1) of the *European Convention on Human Rights* (prohibiting the imposition of a heavier penalty than one 'applicable' at the time when the offence was committed) would only arise 'if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed … under the law in force at the time that his offence was committed'.[2004]

Relevantly, the court in *R v H and Others* determined that, for sexual abuse cases, the appropriate approach to sentencing includes the following:

(a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.

(b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.[2005]

In 2012, the Sentencing Council for England and Wales commenced a detailed consultation process as part of a broad review of sentencing issues regarding sexual offences generally.

In December 2013, the Sentencing Council issued the guideline on sexual offences, which came into force on 1 April 2014.[2006] The guideline affirmed the approach of the court in *R v H and Others*.[2007]

The guideline applies to sexual offences and provides in respect of sentencing:

> The offender must be sentenced in accordance with the sentencing regime applicable at the **date of sentence**. Under the Criminal Justice Act 2003 the court must have regard to the statutory purposes of sentencing and must base the sentencing exercise on its assessment of the seriousness of the offence.[2008]

The guideline explicitly states that the court is not to attempt to establish the likely sentence had the offender been sentenced shortly after the date of the offence; instead, it directs the court to prioritise the culpability of the offender and the harm caused or intended when considering the sentence.[2009] However, the sentence is limited to the maximum sentence at the time of the offending, provided that the maximum is not higher than the current one.[2010]

The Sentencing Council press release on the guideline stated that the revised sexual assault offences and guideline will apply to 'all adult offenders, regardless of when offences took place, so while offenders will be subject to the law at the time of the offence, the guideline will bring a modern and victim focused approach to how historic offenders are dealt with by the courts'.[2011]

The Sentencing Council also stated that public protection was a key element in the development of the broad sentencing guideline, and that it 'reinforces the importance of proper punishment and the

prevention of re-offending, either through significant custodial sentences or rigorous treatment programmes that will address the offender's behaviour'.[2012]

Discussion

Jurisdictions that have departed from the absolute historical standards approach have been criticised for breaching the principle against retrospectivity. Some stakeholders have told us in private roundtable discussions that using current standards to sentence for historical offences may be unfair. They have suggested that, at the time of offending, the community, including the offender, may not have been alert to the damage that child sexual abuse can cause and may not have considered the offending to be as serious as it is now generally understood to be. Consequently, where historical standards are not absolutely adhered to, the offender may be sentenced unfairly. As discussed above, the courts and the Sentencing Council for England and Wales considered that fairness to the offender was secured by the continued application of the maximum penalty that applied at the time of the offending (or any lesser penalty adopted subsequently).

We have also heard survivors' accounts of confusion and anger when the offender receives a sentence for sexually abusing them that is very light compared with current standards. This may be compounded by an understanding that the delay in reporting is a feature of the offending and is caused by the offending behaviour. Delay is likely to be a feature particularly in institutional offending where, as we discussed in section 3.4.2, research shows that the longest delays in reporting are occurring when the alleged perpetrator was a person in a position of authority.[2013]

It may be difficult to accept that an offender should benefit from a lighter sentence because the effect of their offending resulted in the victim substantially delaying reporting. This is especially so considering that an offender may receive a lighter sentence due to the passage of time between the offending and sentence, especially where the offender had demonstrated good behaviour in the intervening period[2014]or is of advanced age or ill health.

It is also necessary to consider whether adopting the approach now applying in England and Wales might have a negative impact on guilty pleas. Of the 283 institutional child sexual abuse matters analysed in the Sentencing Data Study, more than 70 per cent were resolved with a guilty plea.[2015] Many of these matters involved historical offending.

England and Wales have not reported a decrease in guilty pleas for historical child sexual assault since the commencement of the guideline. However, there is a lack of data or reviews in relation to the period following the commencement of the guideline.

It is not clear that higher penalties result in fewer guilty pleas. In 2012, the Queensland Sentencing Advisory Council examined whether amendments to legislation in 2003 had affected the rate of guilty pleas.[2016] The amendments had removed the principle of imprisonment as a last resort for child sex offenders, included specific sentencing factors for some child sexual offences and increased maximum penalties for the offences of indecent treatment of a child and maintaining a sexual relationship with a child.[2017]

The Sentencing Advisory Council found a general decline in the proportion of offenders who entered a guilty plea to the offence of maintaining a sexual relationship with a child and an increase in the

proportion of offenders who entered a guilty plea to the other offences under consideration, including indecent treatment of a child. However, the Sentencing Advisory Council noted that the increase in guilty pleas began before the 2003 amendments and it said that it was unlikely to be related to the amendments.[2018]

It suggested that the decline in the number of offenders pleading guilty to maintaining a sexual relationship with a child may be partly explained by the 2003 amendment that increased the maximum penalty for some forms of the offence, and by a 2004 Queensland Court of Appeal decision which reviewed the range of sentences that could be expected for this offence. There was an increase in guilty pleas on indecent treatment offences following the amendments.[2019]

The Sentencing Advisory Council also noted that caution was required in interpreting the data given the small numbers of offences involved, and the influence of other factors including legislative reform, changes in the characteristics of the cases being finalised by the courts and changes in the way in which data is collected.[2020]

Regardless of the sentencing standards applying to historical cases, a guilty plea would still be eligible to receive a discount for the utilitarian benefit of the plea, as discussed in section 12.5. This may provide a sufficient incentive for offenders to enter a guilty plea, regardless of the likelihood of a more severe sentence.

We welcome submissions that discuss the issues raised in Chapter 12.

In particular, we welcome submissions on:

- whether provision should be made to exclude good character as a mitigating factor in sentencing for child sexual abuse offences, similar to the approach of the provisions in New South Wales and South Australia – and whether provision should be made for good character to be an aggravating factor, as in England and Wales, where good character facilitated the offending
- whether there should be a presumption in favour of cumulative sentencing for child sexual abuse offences, similar to the approach of the provisions in Victoria
- whether child sexual abuse offences should be sentenced in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales.

13 Appeals

13.1 Introduction

Appeals play an important role in the criminal justice system. They provide an avenue for parties to correct errors in individual matters. They also enable the appellate courts to provide guidance to trial courts on the correct way to apply the law in similar cases, which improves consistency across the criminal justice system. Appellate courts develop 'a body of case law that provides guidance for lower courts in undertaking their task, while recognising the proper scope of judicial discretion'.[2021]

In 2001 in his *Review of the criminal courts of England and Wales*, the Rt Hon. Lord Justice Auld wrote that the main criteria of a good criminal appellate system are:

- it should do justice to individual defendants and to the public as represented principally by the prosecution;
- it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice and such as would damage the integrity of the criminal justice system;
- it should be readily accessible, consistent with a proper balance of the interest of individual defendants and that of the public;
- it should be clear and simple in its structure and procedures;
- it should be efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law;
- it should be speedy.[2022]

An important aspect of criminal appeals is the balance between finality and fairness. Finality is necessary, as the defendant, the complainant and the public expect criminal proceedings will come to an end at some point. However, fairness requires that 'adequate appeal rights are available to both the defendant and the prosecution to review and correct errors of fact and law. It also requires that due regard be had to principles of good process'.[2023]

While a criminal appeal following a conviction for child sexual abuse offences may be traumatic for the complainant, a defendant's right to appeal is enshrined in the criminal law. It is fundamental to the integrity of the criminal justice system and the ongoing development of principles of law.

Each state and territory's legislation governing appeals in criminal matters allows a convicted person to appeal against their conviction as of right on a question of law alone; or with the appeal court's leave or a certificate from the trial judge on questions of fact or mixed law and fact. A convicted person is allowed to appeal against their sentence with the leave of the court. Some offenders appeal only against their sentence, while other convicted persons appeal against both their conviction and sentence.

The prosecution is allowed to appeal against a sentence imposed by the sentencing court. The appeal court may impose a higher sentence or remit the matter for resentencing in a sentencing

court. Generally, appellate courts recognise the sentencing court's discretion in imposing a sentence and, unless there is an error of law, they will allow a prosecution appeal only if the original sentence is seen as 'manifestly inadequate' and outside the range of sentences that the sentencing court could have imposed. The New South Wales Prosecution Guidelines provide that:

> [Prosecution appeals against sentence] are and ought to be rare, as an exception to the general conduct of the administration of criminal justice they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.[2024]

The prosecution is generally not allowed to appeal against an acquittal. If a jury determines that the accused is not guilty, that not guilty verdict cannot be challenged on appeal. However, there may be appeal rights on questions of law in judge-alone trials. Legislation has been introduced to provide a limited exception to the principle of 'double jeopardy', which prevents a person being retried for an offence of which they were acquitted. This legislation may permit an application to be made in particular and limited circumstances for an appellate court to order a retrial of a person acquitted of a very serious offence.[2025] This process is very different from the normal appeals process.

In most jurisdictions, the prosecution is allowed to appeal against interlocutory judgments or orders, at least in some circumstances. The accused may also appeal against interlocutory judgments or orders with the appeal court's leave or a certificate from the trial judge. Interlocutory appeals may be particularly important for the prosecution if a trial judge makes orders that could have a significant impact on the prosecution's case. We discuss interlocutory appeals by the prosecution in section 13.4.1.

In this chapter, we consider:

- what we have heard from survivors of institutional child sexual abuse about the impact of criminal justice appeals
- the results of research regarding appeals
- key issues relating to the experiences of survivors and emerging from the research; and opportunities for reform.

We note that appeals are not necessarily indicative of problems in the criminal justice system. In particular, if we recommend significant reforms to criminal and evidence laws in our final recommendations on criminal justice and our recommendations are implemented, there might be an increase in appeals as defendants and the prosecution seek clarity about the correct interpretation of any new provisions.

13.2 The impact of appeals on victims and survivors

It is clear from our private sessions that appeals following the conviction and sentencing of offenders for child sexual abuse offences have had significant negative impacts on survivors. Some survivors have told us they do not understand how the offender's conviction could be overturned on appeal, while others have said that the appeal made them feel like the criminal justice process was 'a never ending story' that continued for years and years.

Survivors told us of the importance to them of being able to move on with their lives once a conviction was secured. If there was a successful appeal, survivors told us of feeling that they have 'to do it all again'. Survivors feel as though their life is 'on hold' while they are waiting to go to court again for a retrial following an appeal. For some survivors, this can create feelings that the abuse is happening again, and their nightmares, insomnia and distress may return and continue through the retrial.

Survivors told us that going through a retrial and giving evidence again was very difficult. Some have felt frustrated at having to have to tell their story again. Some are anxious that the outcome may be different.

Some survivors told us that they felt the appeal process and outcome were not adequately explained to them. Others told us they were not informed of an appeal until after it had been heard and determined.

In Case Study 38, we heard from a number of survivors regarding the impact that an appeal can have.

Mr Philip Doyle was convicted of 38 counts of child sexual abuse offences in 2012, and his appeal against his conviction was dismissed in 2014. Mr Mark Lawrence, who was one of five complainants in respect of whom Mr Doyle was convicted, noted that, aside from being told of the appeal grounds and the hearing date, he had no involvement in the appeal process. Mr Lawrence gave evidence that he felt frustrated by not knowing what the outcome would be:

> In about January 2014, I telephoned the police to express my frustration at the fact that it had been over six months since the hearing and the appeal judgment still hadn't been delivered. I told them that I could not get on with my life without the judgment.[2026]

Mr Doyle subsequently appealed to the High Court. Mr Lawrence gave evidence that:

> I couldn't believe it. He [the investigative police officer] told me that I wouldn't have any role in the appeal. He said it would be decided by seven judges and it was now out of our hands. I was angry that Doyle could drag this on for so long.[2027]

In August 2013, Mr David Rapson was convicted in a joint trial of five charges of rape and eight charges of indecent assault relating to eight complainants. Mr Rapson lodged an appeal against his conviction and was granted new trials in respect of three groupings of complainants in February and March 2015. Mr Rapson was convicted of 11 offences in relation to six complainants. He was acquitted in relation to the seventh complainant.

The complainant in respect of whom Mr Rapson was initially convicted but later acquitted, Mr James Brandt, gave evidence that, when notified of the successful appeal and need for a retrial, he was emotionally shattered. He felt uninformed about how Mr Rapson had managed to appeal and get a retrial. He did not wish to give his evidence again, and the retrial of the charges relating to him took place using a recording of his evidence from the first trial.[2028]

We also heard evidence from CDW, the mother of CDX. CDX was abused by CDV, a schoolteacher at an independent school in Perth. CDV was convicted in a joint trial in 2010, but his appeal was successful in part – the convictions in respect of three complainants, one of whom was CDX, were overturned. CDV was retried and CDX again gave evidence in the retrial. CDV was convicted. CDW read the appeal judgment herself and gave evidence that:

> [I] was in shock and disbelief to learn that [CDX] had to face a retrial on a mere the [sic] technicality to do with the adequacy of the trial judge's Longman Direction to the jury. The entire appeal process left me feeling betrayed, re-traumatised and completely let down because I could not understand why [CDX] had to go through it all again.[2029]

13.3 Research on appeals

In 2011, the Judicial Commission of New South Wales published research on conviction appeals in New South Wales for indictable matters for the years 2001 to 2007.[2030] The research found that child sexual assault appeals represented nearly a quarter (22.5 per cent) of all successful conviction appeals and almost 70 per cent of all successful sexual assault appeals in New South Wales between 2001 and 2007.[2031] It also found that the success rate for child sexual assault appeals was significantly higher than for sexual assault appeals involving an adult victim.[2032]

Judicial misdirection was reported to be present in more than half of all successful sexual assault appeals (53.8 per cent), regardless of whether the case involved a child or adult complainant.[2033] In particular, Longman misdirections (discussed in Chapter 11) were, by far, the most common type of misdirection leading to successful appeals, arising in 46.4 per cent of misdirection cases.[2034] As noted in Chapter 11, legislative changes in 2006 were designed to make a significant difference to how and when Longman directions should be given, but these changes were made too late to be properly examined in the Judicial Commission research.

In light of the findings of the Judicial Commission, the Royal Commission commissioned a study of appeals in child sexual assault matters in New South Wales from 2005 to 2013 (the Appeals Study). It has been published as part of the report *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research). The Appeals Study considered the outcomes of appeals in 291 child sexual assault matters in the New South Wales Court of Criminal Appeal. The focus of the Appeals Study was on the trends in appeals against conviction rather than appeals against sentence.

The Appeals Study found that child sexual abuse appeals are 'not uncommon'.[2035] A significant number of child sexual abuse cases give rise to an appeal against conviction and/or sentence. While the numbers fluctuated each year, the research estimated the rate of appeal in child sexual abuse cases between 2005 and 2013 at almost 17 per cent of all child sexual abuse convictions.[2036]

The vast majority of the cases included in the Appeals Study involved an appeal by the accused. Almost 85 per cent of cases involved an appeal only by the accused.[2037]

Over the study period, a greater portion of appeals by the accused were appeals against sentence than against convictions. However, that was not consistent in every year.

The study found an overall success rate of 28.1 per cent in conviction appeals, although the rate fluctuated greatly given the small numbers involved (for example, only two out of 13 appeals were successful in 2009, whereas 10 out of 23 appeals were successful in 2006).[2038] The Appeals Study found that the vast majority (76.9 per cent) of successful conviction appeals resulted in a new trial.[2039]

In relation to the key issue of Longman directions, the Appeals Study found:

> Fifteen cases in our sample raised an appeal related to a *Longman* direction; most of these, were historical child sexual abuse cases (nine out of 14 [one case could not be classified as historical or non-historical]). Of these 15 cases, only four were successful on the basis of a *Longman* misdirection. All four were historical cases, with delay ranging from six to 20 years …
>
> Three of the successful *Longman* appeals were decided on the basis of the pre-amended legislation, and a fourth case, *ST v The Queen*, centred on the misapplication of the new legislation by the trial judge. This suggests that reforms have been successful in reducing *Longman*-related misdirections.[2040] [References omitted.]

The Appeals Study suggested that, while no other specific judicial directions emerged as significant problems over the period covered, judicial misdirections may continue to be a source of error in child sexual assault trials, generating a basis for overturning convictions.[2041]

Of the study's sample of 291 cases, only 29 related to institutional child sexual abuse, which limited any findings that could be made regarding these matters. Eighty-four cases involved historical child sexual abuse (defined as those cases where the victim reported the abuse to police as an adult). Delay was raised as an issue on appeal in more than 60 per cent of these historical cases.[2042]

Overall, historical child sexual abuse appeals (both against conviction and sentence, including by the Crown) were marginally more successful than non-historical child sexual abuse appeals between 2005 and 2013: appeals in cases involving historical abuse were successful in 59.3 per cent of cases, while appeals in cases involving abuse that was not historical were successful in 54.5 per cent of cases.[2043]

Few substantive differences were found between historical and non-historical child sexual abuse appeal cases in the sample, suggesting that there are not particular problems in one type of case or the other.

13.4 Issues in relation to appeals

13.4.1 Interlocutory appeals by the prosecution

While the prosecution cannot appeal against an acquittal, in some jurisdictions there are provisions that allow the prosecution to appeal against interlocutory decisions, which are judgments or orders made by the trial judge before or during the trial. These appeals are described as interlocutory appeals.

The prosecution is most likely to bring an interlocutory appeal if the trial judge's judgment or order is likely to have a significant adverse effect on the prosecution's case.

For example, in institutional child sexual abuse cases, the prosecution may bring an interlocutory appeal if the trial judge rules that tendency or coincidence evidence is inadmissible and that a joint trial should be severed so that separate trials are required. We discussed this issue in Chapter 10.

The case of *R v PWD*[2044] is an illustration of an interlocutory appeal in an institutional child sexual abuse case in New South Wales. PWD was charged with 10 sexual offences against four boys

between 1977 and 1992, when the boys were students and boarders at a Catholic college in Bathurst, New South Wales, and the accused was the president (that is, principal) of the college.

In a pre-trial ruling the trial judge excluded the asserted tendency evidence of the other complainants and two other students because it lacked significant probative value, or, alternatively, its probative value was outweighed by its prejudicial effect. Separate trials were ordered.

Before the trials commenced, the New South Wales Court of Criminal Appeal upheld an interlocutory appeal by the New South Wales Director of Public Prosecutions (DPP). The court found that the evidence of the four complainants was cross-admissible and the evidence of two tendency witnesses was admissible as tendency evidence. The court ordered that there be a joint trial. A joint trial was held in respect of the 10 charges. The accused was acquitted of all charges.

Only New South Wales, Victoria, the Australian Capital Territory and the Commonwealth provide for a general right of appeal by the prosecution against interlocutory decisions made during the course of a trial.[2045] Some other states have appeal rights but only in respect of specific interlocutory decisions.[2046]

The provision in New South Wales is a general right of appeal, but, to appeal any decision or ruling on the admissibility of evidence, the DPP must show that the ruling eliminates or substantially weakens the prosecution's case.[2047]

Queensland's appeal provision is limited to the Attorney-General referring a point of law that has arisen under a ruling in relation to specific matters, including the quashing or staying of the indictment, the joinder of accused or joinder of charges and deciding questions of law, including the admissibility of evidence.[2048]

Western Australia has a specific provision relating to separate trial decisions, allowing both the prosecution and the defence to appeal orders either joining or refusing to join two or more matters in a single trial.[2049] The provision provides that, if an accused unsuccessfully appeals an order for a joint trial, the joinder cannot then be a ground of appeal if the accused is convicted at the joint trial.

In 2014, the New South Wales Law Reform Commission (NSW LRC) considered the issue of whether the New South Wales DPP should be required to obtain leave to bring an interlocutory appeal. The NSW LRC stated:

> The DPP and the Attorney General may appeal an interlocutory judgment or order as of right, whereas any other party requires the leave of the CCA [the New South Wales Court of Criminal Appeal] or a certificate of the trial judge. This difference may be explained by the more serious consequences for the DPP and the Attorney General of an erroneous interlocutory decision than for a defendant.
>
> The CCA has noted that the DPP's appeal right under s 5F(3A) should be exercised with restraint, to avoid the undesirable situation of trials being aborted, and it does not appear that this right is being abused. However, at the moment the CCA cannot decline to hear an interlocutory appeal from the DPP or the Attorney General, notwithstanding the impact that the appeal might have on the trial.[2050] [Reference omitted.]

The NSW LRC recommended that the leave requirement for interlocutory appeals should apply to all interlocutory appeals, including those from the DPP and the Attorney-General.[2051] It stated:

> A general requirement for leave would allow the CCA [the New South Wales Court of Criminal Appeal] to have greater control over the interlocutory appeals that come before it. We have recommended that leave be required for conviction and sentence appeals to the CCA, and a leave requirement for interlocutory appeals would be consistent with our intended scheme. The DPP and the Attorney General's lack of recourse following the trial would continue to be relevant to the court's discretion in determining whether to grant leave.[2052]

It is not clear to us that the NSW LRC's recommendation – that interlocutory appeals by the prosecution should require the court's leave – should be supported.

Given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial. It may be that the DPP's right to bring an interlocutory appeal should be broadened in those jurisdictions that do not currently have the broadest general right for the DPP to bring an interlocutory appeal.

13.4.2 Inconsistent verdicts

A ground of appeal that is commonly raised in child sexual abuse cases is what is referred to as 'inconsistent verdicts'. This ground may arise where, in a trial involving multiple counts, the jury returns a guilty verdict on one or more counts and a not guilty verdict on one or more other counts.

Particularly in child sexual abuse cases where the only evidence of the abuse is the evidence given by the complainant, the offender may argue that a verdict of not guilty on one or more counts shows that the jury must not have believed the complainant. The offender may then argue that the verdicts of guilty on one or more other counts are therefore 'unsafe' because the jury should have had doubts about all of the complainant's evidence.

The High Court has considered the approach an appellate court should take when determining an appeal in which it is argued that a verdict is unreasonable because the jury returned 'inconsistent verdicts' on a number of occasions.

The leading High Court case is *MFA v The Queen*[2053] (*MFA*), decided in 2002. In *MFA* the High Court reaffirmed principles it had previously stated in 1996 in *Mackenzie v The Queen*[2054] (*Mackenzie*) and resolved the status of its 1997 decision in *Jones v The Queen*[2055] (*Jones*).

In 1996 in *Mackenzie*, the High Court set out six principles that governed the approach an appellate court should take when it was submitted that a conviction on one or more counts was unsafe or unsatisfactory because the jury had returned guilty verdicts on some counts and not guilty verdicts on others. *Mackenzie* involved perjury offences.

The principles were set out in the joint judgment of Gaudron, Gummow and Kirby JJ as follows:

- There is a distinction between cases of legal or technical inconsistency and cases of suggested factual inconsistency. Legal inconsistencies occur when there are two verdicts which in law cannot stand together. Where this occurs it must be inferred that the jury misunderstood the directions, compromised amongst themselves or fell into some other unidentifiable error. The verdicts must accordingly be set aside.[2056]

- Factual inconsistencies may arise both between different verdicts affecting the same accused and different verdicts affecting co-accused or persons tried separately in relation to connected events.[2057]

- Where inconsistency arises in the verdicts on different counts of the originating process, 'the test is one of logic and reasonableness'.[2058]

- Courts are reluctant to accept a submission that the verdicts are inconsistent out of respect for the function which the law assigns to juries. Therefore, if there is a proper way by which an appellate court can reconcile the verdicts, that conclusion will generally be accepted. If there is some evidence to support the verdict that is said to be inconsistent, it is not for the court to substitute its opinion of the facts for one which was open to the jury. The court may take the view that the jury simply followed the instruction to give separate consideration to each count and to apply to each count the requirement that all the elements be proved beyond reasonable doubt. Alternatively, the court may conclude that the jury has taken a 'merciful' view of the facts on one count and that this is a function that has always been open to juries.[2059] Their Honours approved of the remarks of King CJ in *R v Kirkman*.[2060]

- Nevertheless, there will be a residue of cases where the different verdicts returned represent an affront to logic and common sense which is unacceptable and strongly suggest a compromise of the performance of the jury's duty. Only where the inconsistency rises to the point that an appellate court considers intervention necessary to prevent a possible injustice will a conviction be set aside. Hard and fast rules cannot be stated; it will depend on the facts of the case.[2061]

- It is for the person making the submission that the verdicts are inconsistent to establish the inconsistency.[2062]

The court held that the verdicts in *Mackenzie* were not irreconcilable. There were a number of explanations available for the verdict pattern, including:

- a direction that it was open to find the defendant not guilty on the more serious charge and guilty on the lesser charge

- a direction on the appropriately high onus the Crown bore to prove each element

- the availability of some objective evidence to support the lack of the mental state required for the accused to be guilty of the more serious offence.[2063]

In 1997, the High Court again considered this issue in *Jones*.[2064] *Jones* involved convictions for child sexual assault offences where a jury had found the accused guilty of two counts and not guilty of one count.

The majority of the High Court held that the not guilty finding on the second count damaged the complainant's credibility with respect to all counts.[2065] Justices Gaudron, McHugh and Gummow stated that implicit in the acquittal on the second count was a rejection of the complainant's account of events said to give rise to that count. The rejection of her evidence on that count diminished her overall credibility.[2066]

Justices Gaudron, McHugh and Gummow held that the fact that the jury gave different verdicts on the three counts demonstrated that the convictions were unsafe and unsatisfactory, and they should

therefore be set aside.[2067] The court in *Jones* did not refer to the earlier decision in *Mackenzie* or the principles stated in *Mackenzie*.

The decisions in *Mackenzie* and *Jones*, decided by the High Court within nine months of each other, resulted in confusion in lower courts as to the correct approach and principles to be applied when faced with appeals on the ground that the verdicts were inconsistent.

The High Court resolved the uncertainty in 2002 in *MFA*.

MFA concerned multiple counts of sexual offending against a single complainant. The jury acquitted on seven counts and convicted on two relating to a single occasion. The High Court held that the verdicts were not unreasonable pursuant to the test established by s 6(1) of the *Criminal Appeal Act 1912* (NSW).

Two sets of joint reasons were published. The joint reasons of McHugh, Gummow and Kirby JJ made clear that they agreed with the joint reasons of Gleeson CJ, Hayne and Callinan JJ on this issue. They stated, '[u]pon the application of the test in *M*, the operation of the principles in *Mackenzie* and the significance of the decision in *Jones*, this Court speaks with a single voice'.[2068] Thus *MFA* effectively provides a unanimous approach on 'inconsistent verdicts'. The 'test in *M*' is a reference to the test stated by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*.[2069]

The combined effect of the two sets of reasons in *MFA* was to:

- confirm that inconsistency is an element of the test in *M v The Queen*[2070]
- reaffirm the principles set out in *Mackenzie*[2071]
- confine the decision in *Jones* to its facts. There was no standalone principle to be drawn from *Jones*.[2072]

On the relationship between *Jones* and *Mackenzie*, Gleeson CJ, Hayne and Callinan JJ stated:

> It appears … that some judges have taken *Jones* as authority for the proposition that where multiple offences are alleged involving the one complainant, then verdicts of not guilty on some counts necessarily reflect a view that the complainant was untruthful or unreliable, and that an appellate court should consider the reasonableness of guilty verdicts on the basis that the complainant is a person of damaged credibility. That view is erroneous. It overlooks the attention to factual detail in the reasoning of *Jones*. It also overlooks the principles stated in *MacKenzie*, which were not qualified in *Jones* … *Jones* is not to be understood as establishing a set of legal propositions, separate or different from the test formulated in *M*, which must be applied in deciding whether a conviction on one or more counts of sexual offences, when the accused was acquitted on other counts, is unreasonable, or cannot be supported, having regard to the evidence.[2073] [References omitted.]

The period between *Jones* and *MFA* was characterised by a division in New South Wales courts over the meaning of *Jones*. The case of *R v RAT*[2074] in 2000 effectively established, on the basis of *Jones*, that if a jury is 'for any reason not satisfied beyond reasonable doubt that the complainant is telling the truth in relation to one count, it is not open to them to be satisfied that she (or he) is telling the truth in relation to any other count'.[2075]

However, in 2001, the New South Wales Court of Criminal Appeal convened a five-judge bench to resolve the issue in *R v Markuleski*.[2076] The court overruled *R v RAT* and other cases which had

adopted the same view of *Jones*, finding that the view of *Jones* taken in *R v RAT* was not what the High Court intended. The court referred to the general principles that governed this area had been set out by the High Court in authorities before *Jones* – in particular, in *Mackenzie*.[2077]

Chief Justice Spigelman stated that the question of whether failure to accept the complainant's evidence on one count should lead to reasonable doubt with respect to other matters 'must depend on the full range of relevant circumstances'.[2078] His Honour said:

> By reason of the wide range of matters of fact and degree that must be considered in making a credibility finding that conclusion [on the facts in *Jones*] does not, in my opinion, follow in every such case unless the court is positively satisfied that there is some relevant difference in the quality of the complainant's evidence.[2079]

The appellate courts in each jurisdiction now accept that verdicts of not guilty on some counts do not necessarily reflect the view that the jury found the complainant to be untruthful or unreliable.

However, this does not remove all disagreement in these appeals. Judges may differ in how they apply *MFA* and how they view the complainant's evidence and any other evidence in the case.

For example, in 2007 in *Norris v The Queen*,[2080] each judge applied *MFA*, but there were considerable differences in their reasoning and in their views of the complainant's evidence.

The case involved four alleged sexual offences on a child aged 11 and 12. The appellant was convicted of the first two offences, which occurred when the complainant was babysitting the appellant's sons at the appellant's house. The appellant was found not guilty on the latter two counts, one of which was alleged to have occurred when the complainant voluntarily attended the appellant's house on her own (after the events of counts 1 and 2) and the last of which was alleged to have occurred when the appellant visited the complainant's house with a friend, while the complainant's older sister was present. The complainant reported the offences to police some 20 years after they allegedly occurred.

Justice Howie found that not guilty verdicts on two counts 'could only mean that the jury must have had a doubt about the credibility of the complainant on those two counts', and this should have caused them to doubt her credibility on all counts.[2081] His Honour could not identify an alternative reason for the different verdicts. He concluded:

> My decision is based upon a consideration of all the evidence, including the delay in the complaint and other matters touching upon the complainant's credibility but in the light of the jury's failure to accept her evidence to the requisite degree in counts 3 and 4. I accept that minds might reasonably differ in making such an assessment, as is the case whenever this Court is considering a ground of appeal based upon a consideration of the evidence to determine whether a verdict was unreasonable.[2082]

Justice Hall stated that the not guilty verdicts on counts 3 and 4 could only rationally have been based on either the fact that the jury was unable to accept the complainant's evidence as reliable and not merely by reason of inconsequential inconsistencies in her evidence; or the jury was not prepared to convict on the complainant's evidence alone without something more.[2083] Hall J considered that the only rational explanation for the acquittal on count 3 was that the jury was not prepared to accept that within a week of the occurrence of two sexual assaults the complainant willingly visited the appellant's home unaccompanied by an adult.[2084] In relation to count 4, Hall J considered that the only rational inference was that jury were not prepared to accept the

complainant's account that, after being assaulted three times, she would voluntarily leave others in the lounge room, go outside to be alone with the defendant and then willingly accompany him to the bedroom.[2085]

Justice Hall was also influenced by the delay in reporting the offences. His Honour held that, despite there being no criticism in the appeal of the judge's directions, it was necessary for the court, in giving due consideration to the totality of the evidence, to evaluate the circumstances of the delay.[2086] In this case:

> the absence of corroboration, the jury's verdicts of acquittal on Counts 3 and 4 and the circumstances of delay and the absence of a sufficient explanation for delay in reporting the alleged events all, in my opinion, support the conclusion that the convictions on Counts 1 and 2 were unsafe and unsatisfactory.[2087]

Justice McClellan, Chief Judge at Common Law, was in dissent. His Honour applied the principles and the test set out in *Mackenzie* and *MFA*. He found particularly significant the statement in *MFA* identifying that verdicts of not guilty on some counts do not necessarily reflect a view that the jury found the complainant to be untruthful or unreliable and do not require appellate courts to consider the reasonableness of the guilty verdicts on the basis that the complainant's credibility is damaged.[2088]

His Honour considered that the verdicts could be properly reconciled by the fact that, for the two counts on which a guilty verdict was given, there was reliable evidence providing support for the complainant's account of relevant surrounding events; while for the two counts on which a not guilty verdict was given, there was no evidence supporting the complainant's account of events.[2089]

Justice McClellan noted that the jury had been told to consider the evidence on each charge separately, that they needed to be satisfied beyond reasonable doubt that the complainant had been honest and accurate in the details she gave, and that 'it would be dangerous to convict' on the unsupported evidence of the complainant.[2090]

13.4.3 The importance of recording complainants' evidence

As discussed in section 13.2, survivors have told us of the stress and trauma of having to give their evidence again at a retrial following a successful appeal.

We discussed in Chapter 9 the provisions that apply in each jurisdiction allowing vulnerable witnesses (variously defined) to give evidence with the assistance of 'special measures'. Special measures include the prerecording of evidence (in some cases, evidence in chief only and, in other cases, all of the evidence including cross-examination and re-examination) or giving evidence via closed circuit television (CCTV). As discussed in Chapter 9, these special measures have assisted victims and survivors who have used them to give their best evidence.

In circumstances where evidence can be given via a recording or CCTV, there should be no barrier to reusing the recording or to using a recording of the evidence given by CCTV in any retrial. This would avoid the need for the complainant to give evidence again. The relevant provisions in each jurisdiction provide for recordings of evidence to be admitted in subsequent proceedings in this way.[2091]

As discussed in Chapter 9, some complainants may not have access to special measures or may choose to give their evidence in person. In Case Study 38, we heard evidence of a survivor choosing to give evidence in open court so he could face up to his abuser, which meant that he then had to give evidence again when a retrial was ordered.[2092]

In New South Wales, sections 306B and 306I of the *Criminal Procedure Act 1986* (NSW) provide that the prosecutor may tender as evidence in a new trial a record of the original evidence of a complainant in prescribed sexual offence proceedings, whether the new trial is following an appeal or discharge of a jury. If such a record is available, the complainant may elect to give further evidence, but is not compellable to do so.[2093]

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

The record of the complainant's evidence used in a new trial must be the best available evidence. That is, an audio visual recording of the evidence should be used, or, if that is not available, an audio recording of the evidence should be used, or if neither of those are available, a transcript of the evidence may be used.[2094]

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

Victoria has similar provisions, providing that a recording of the direct testimony of a complainant in sexual offence proceedings is admissible in any new trial.[2095] In contrast, it does not appear that other jurisdictions have equivalent provisions, resulting in circumstances where the complainant has to give their evidence again, such as in the example referred to above from Case Study 38, which took place in Western Australia.

It may be desirable for reliable audiovisual recordings to be made of evidence given live in court in child sexual abuse matters, and for all jurisdictions to have legislative provisions allowing these recordings to be tendered in subsequent trials. In circumstances where the complainant is unable or unwilling to give evidence again, it may facilitate a retrial where otherwise the matter would not be able to proceed.

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

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

Despite the legislation in New South Wales and Victoria, we note comments made in the Victorian Court of Appeal (Weinberg AP, Ashley and Coghlan JJA) in May 2016 in *Clark (a Pseudonym) v The Queen*.[2096] The case involved six child sexual abuse charges in relation to one complainant. There had

been three trials, with the jury in each trial unable to reach a verdict on any charge. When the DPP took the unusual step of proceeding with the fourth trial, the accused sought a permanent stay of proceedings. The accused then sought leave to appeal against the trial judge's refusal to grant the stay.

The point of concern for us arises because the complainant's evidence was prerecorded in full and had been replayed at each trial. It was proposed that it would also be replayed at the fourth trial.

The court referred to the prosecution's submissions that the complainant was very keen for the matter to proceed and:

> the fact that a tape-recording would be played 'really [didn't] change the matter, because [the complainant] too would be foreseeably anxious about the outcome when every single trial (sic) has been empanelled'.[2097] [Reference omitted.]

The court's reasons include exchanges during argument on the appeal as follows:

> Accepting that the attitude of a complainant is a circumstance relevant to the question whether a permanent stay should be granted, the complainant's professed position in this case draws attention to an odd and discriminatory feature about this matter …
>
> In argument in this Court, there was the following interchange between the Bench and the Chief Crown Prosecutor:
>
> > COGHLAN JA: ... You know, we just don't see this sort of position.
> >
> > MR SILBERT: Your Honour, it is clearly
> >
> > COGHLAN JA: And one of the reasons we wouldn't have seen it in the past, I suspect is, if you were genuinely looking at the complainant giving evidence for the fourth time
> >
> > MR SILBERT: Yes, you wouldn't do it.
> >
> > COGHLAN JA: I don't think the matter would have proceeded.
> >
> > MR SILBERT: No, you wouldn't do it and it is
> >
> > WEINBERG AP: *You wouldn't go through it if she was to be crossexamined a fourth time*.
> >
> > MR SILBERT: Absolutely not.
>
> That led on to Weinberg AP saying:
>
> > Is there not something ironic about the fact that a statutory procedure which was put in for the, I would imagine, primary purpose of protecting a complainant has a kind of unanticipated effect so far as an accused is concerned, the complainant isn't asked the question, 'Do you want to go on again because all you have to do is press the replay button', and again and again. *Somebody said she's got no skin in the game, I think I've found that expression used somewhere. Whereas for the accused, there is the ordeal of standing trial, being in the dock each time in the hands of a jury, once, twice, three times and then a fourth time*,

which elicited this reply from the Chief Prosecutor:

> Can't argue with that either, your Honour.

We should mention also this interchange between Ashley JA and the Chief Prosecutor:

> ASHLEY JA: It's got another odd feature to it, perhaps, that the consequence of the *ability to press the replay button in a sex offences case*, means that relative to other charges in the criminal calendar, an accused in such a case faces a risk, this case being the preeminent illustration, which an accused, in other situations, murder, manslaughter, aggravated burglary, call it what you will
>
> MR SILBERT: Doesn't face.
>
> ASHLEY JA: doesn't face and there seems to be something wrong about that.

Now, as we have emphasised, the exercise of the prosecutorial discretion was not under review by the judge, and we are not now seeking to criticise the exercise of that discretion because it appeared to take advantage of legislative provisions which had another purpose. *But the apparently discriminatory operation of criminal law procedures – because a 'push button' trial could be had – this bearing upon oppression and unfairness to the applicant, was a matter which was pertinent to the judge's weighing exercise*. It was a matter opened up, though not squarely so, by the applicant's counsel below. It was a matter connected with submission (4) noted at paragraph [68] of these reasons. It was a matter which deserved attention in the judge's ruling. But in argument, the judge had adopted a very different standpoint, saying to applicant's counsel:

> I don't know whether it's a good idea to discourage the Crown to rely on taped evidence, but anyway.

Applicant's counsel did not demur. But the real point was lost.[2098] [References omitted. Emphasis added.]

Everything we have heard from survivors in private sessions, public hearings and submissions leads us to be confident that no survivor would be unaffected by a trial or retrial. The use of prerecorded evidence goes some way toward reducing the often extraordinary stress and distress that complainants face in proceeding with a prosecution.

13.4.4 Prosecution discretion following a successful appeal against conviction

As discussed in section 13.3, the Appeals Study found that more than three-quarters of the conviction appeals that succeeded resulted in the New South Wales Court of Criminal Appeal ordering a retrial. In the other successful conviction appeals, the court ordered that the defendant be acquitted.

Following the ordering of a retrial by the court, the DPP retains a discretion whether or not to proceed with a new trial.

The DPP guidelines in each jurisdiction include principles that are central to the decision to continue or discontinue a prosecution. However, the guidelines do not necessarily provide principles guiding

whether the DPP should retry a matter where a conviction at trial has been overturned and a retrial ordered.

The principles guiding the decision whether to proceed with a retrial may be substantially the same as the principles guiding an initial decision to prosecute, with some allowance for the impact of the reasons why the appeal was successful.

Given the impact on complainants of the decision whether or not to proceed with a retrial, it may be beneficial for prosecution guidelines to explicitly address this issue and to require consultation with the complainant and the relevant police officer before the DPP decides whether or not to retry a matter after a conviction has been overturned.

13.4.5 Monitoring appeals

We discussed in section 11.5.2 the possible codification of judicial directions and that, if governments pursue codification, they would need to keep appellate decisions on judicial directions, particularly in relation to sexual offending including child sexual abuse, under ongoing scrutiny so that they could introduce amendments to update the legislation as required.

This purpose may apply more broadly. Individual appellate decisions might reveal that the courts are relying on mistaken assumptions about sexual offending, including child sexual abuse. In addition, an increased number of appeals might indicate that the law requires clarification, possibly by legislation if the appeal courts do not provide sufficient clarification. This might be particularly important if there are a significant number of appeals raising the same issue. The discussion in section 13.3 in relation to appeals in New South Wales concerning Longman directions and the legislative response provides an example.

It may be beneficial if the relevant government agencies monitor the number, type and success rate of appeals generally, and the issues raised, to identify areas of the law in need of reform. This may be particularly important following any significant reforms to crimes or evidence legislation – including any such reforms arising from implementation of any recommendations the Royal Commission makes – to ensure that the reforms are working as intended.

We welcome submissions that discuss the issues raised in Chapter 13.

In particular, we welcome submissions on:

- whether reform is needed in any state or territory to expand the prosecution's right to bring interlocutory appeals
- whether there are any remaining difficulties in relation to 'inconsistent verdicts' which we should consider addressing
- whether the provisions for recording complainants' evidence at trial for use in any retrial should be expanded or otherwise reformed
- whether prosecution guidelines should explicitly address the issue of decision-making on whether or not to bring a retrial after a successful appeal by the defendant, including requiring consultation with the complainant and the relevant police
- any issues in relation to monitoring appeals and appellate decisions to ensure that the law and any reforms are working as intended.

14 Post-sentencing issues

14.1 Introduction

This chapter discusses the following three criminal justice responses that can occur at sentencing or after a child sexual abuse offender has been sentenced:

- treatment for adult offenders who have committed child sexual abuse offences while they are serving their sentences, either in custody or in the community
- indefinite sentences and supervision or detention orders
- risk management measures applying on release of child sexual offenders, including sex offender registration schemes.

Generally, these measures aim to protect the community through treating offenders, keeping offenders in custody or restricting offenders' activities in the community.

Only a few survivors have raised concerns with us about any of these measures in relation to institutional child sexual abuse.

We have held private sessions with survivors who were at the time of the private session in prison for sex offending. These discussions provided insights into some sex offender treatment programs.

In relation to sex offender registration:

- Some survivors have told us that they were pleased when the person who offended against them was ordered to be placed on a sex offender registry because they felt that that would help to protect other children by preventing the offender from reoffending.
- Some survivors have told us that, where a prosecution has not proceeded or has not resulted in a conviction, they are concerned that the alleged perpetrator is not on the register and, without monitoring, may reoffend.
- A few survivors have told us that placement on the register has not prevented registered sex offenders from reconnecting with communities and having access to children in a faith-based community and in Aboriginal and Torres Strait Islander communities.

In April 2016, we held a public roundtable on adult sex offender treatment programs to:

- obtain information on current programs and approaches
- consider current evidence for the effectiveness of treatment programs
- discuss any implications for institutional child sexual abuse.

Some of these measures may be relevant for, or interact with, Working with Children Check (WWCC) schemes and clearances. We released our *Working with Children Checks report* in 2015.[2099] It is published on the Royal Commission's website.

We have not considered the operation of parole for child sex offenders or work release schemes operated by corrective services agencies. These issues have not been raised with us, and it is not clear to us that they have any particular relevance or implications for institutional child sexual abuse, or child sexual abuse, as opposed to criminal offending generally. However, any interested parties who wish to raise issues in relation to these matters are welcome to do so in submissions to this consultation paper.

14.2 Adult offender treatment programs

14.2.1 Introduction

Sex offender treatment programs are therapy sessions that offenders attend in prison and sometimes in the community. Programs aim to enhance rehabilitation and reduce the risk of the offender reoffending when released into the community. Most programs are available only for offenders who acknowledge their offending conduct, although some 'deniers' programs' are also provided.

Treatment programs for adult sex offenders may be part of the criminal justice system's response to child sexual abuse, including in an institutional context. All Australian states and territories operate programs for adults convicted of sexual offences, including child sexual abuse offences. These programs are generally operated by the government agency with responsibility for prisons and corrective services.

In our criminal justice work, we are only considering treatment programs for those who committed sexual offences as adults.

The Royal Commission has a separate work stream in relation to children with harmful sexual behaviour. These include:

- those who commit sexual offences when they are under 18 years of age
- children who engage in harmful sexual behaviour and who are below the age of criminal responsibility (we discuss the age of criminal responsibility in Chapter 15)
- children who engage in harmful sexual behaviour that either does not constitute a criminal offence or is assessed as not warranting a criminal justice response.

This work stream is considering a number of matters, including treatment programs for children. Our work to date indicates that child-to-child sexual abuse is an important topic for us to examine. Treatment programs for children who engage in harmful sexual behaviour may be particularly important because these children will inevitably continue to be in institutional contexts with other children. In a relatively small number of cases, they may be in juvenile justice institutions, but others may live in out-of-home care and will be in schools and in the full range of sporting, cultural, religious and other institutions in which children participate.

14.2.2 Current programs and approaches

In addition to holding the public roundtable referred to above, we obtained from each state and territory, under summons or notice to produce, information about the adult sex offender treatment

programs that they operate and any reviews or evaluations that have been conducted in relation to those programs.

Corrective services agencies operate adult sex offender treatment programs in each state and territory. In most jurisdictions, the programs are run within corrective facilities. Most of the programs are group programs. Some programs adopt a 'closed group' format, which means that a fixed group of people undertake the program. Participants are the same from start to finish (with the exception of any who drop out of the program). Some programs adopt a 'rolling group' format, which allows people to enter at any time and to drop out and re-enter at later points. This allows participants, over time, to complete the same units but not necessarily at the same time or in the same order.

In New South Wales, Victoria, Western Australia and the Australian Capital Territory, corrective services agencies also run programs for adult sex offenders living in the community. These include 'maintenance programs' for offenders who have completed some treatment in a correctional facility and for whom continued therapy is a condition of release. There are also programs for offenders who were unable to complete treatment in a correctional facility for some reason and for whom treatment in the community is a condition of release from custody.

Most corrective services agencies offer programs based on an assessment of the offender's risk of reoffending, which will be assessed as either low, medium or high. We understand that most agencies use the 'Static-99' risk assessment tool, which is an internationally recognised actuarial tool for predicting the risk of sexual and violent recidivism in convicted adult male sex offenders. The Static-99 is widely used internationally as a sex offender risk assessment instrument.

We were told at the public roundtable that there is a national working party on sex offender treatment that meets annually to share information. The working party also sets out best-practice principles for all jurisdictions to follow, keeping in mind differences in resources and requirements.[2100]

Table 14.1 sets out the adult sex offender treatment programs that we understand are currently provided by states and territories.

Table 14.1: Sex offender treatment programs currently provided in Australian states and territories

Jurisdiction	Program
New South Wales	Custody-based Intensive Treatment (CUBIT) Program Custody-based Intensive Treatment (Outreach) – CORE Moderate Custody-based Deniers Program Custody-based Maintenance Program Self-regulation Program: Sex Offenders for Offenders with Intellectual Disabilities Community-based Maintenance Program*

Victoria	Better Lives Program (BLP) Treatment Readiness Disability Pathways Sexual Offending Program (DP-SOP) Old Me New Me Social Problem Solving and Offence Related Thinking (SPORT) Program Better Lives Program (BLP)* Crossroads: A Dialectical Behaviour Therapy-Informed Skills Program* Disability Pathways Sexual Offending Program (DP-SOP)* Maintenance Change*
Queensland	Preparatory High Intensity Medium Intensity Adapted [for offenders with low cognitive abilities] Aboriginal and Torres Strait Islander Maintenance
Western Australia	Intensive Sex Offending Treatment Program Medium Intensity Sex Offender Program Good Roads Aboriginal Sex Offender Program Sex Offending Deniers Program Sex Offending Intellectual Disabilities Program Community Based Sex Offender Treatment Program* Community Based Maintenance Program* Community Based Intervention (CBI) (Sex Offender)*
South Australia	Sexual Behaviour Clinic Sexual Behaviour Clinic-ME [for offenders with mild to borderline cognitive functioning] Owenia House* Community Transitions Circle of Support and Accountability Program*
Tasmania	New Directions Sex Offender Treatment Program Community Based Sex Offender Case Management and Interventions*
Australian Capital Territory	Adult Sex Offender Treatment Program Adult Sex Offender Treatment Program*
Northern Territory	Sex Offender Treatment Program Sex Offender Treatment Program – Responsivity Safety Victims Planning Program Maintenance Group Programs

**Program delivered in a non-custodial setting*

Some of these programs have undergone a formal evaluation. Table 14.2 lists published evaluations and those received by us under summons or notice.

Table 14.2: Reviews and evaluations

Jurisdiction	Review/evaluation
New South Wales	AC Woodrow & DA Bright, 'Effectiveness of a sex offender treatment program: A risk band analysis', *International Journal of Offender Therapy and Comparative Criminology*, 2010, pp 1–13. J Goodman-Delahunty, *The NSW pre-trial diversion of offenders (child sexual assault) program: An evaluation of treatment outcomes,* Charles Sturt University, November 2009.
Victoria	J Graffam, T Bartholomew, T Carvalho, A Shinkfield & D Edwards, *Final report – The Corrections Victoria Sex Offender Program: Promoting psychological and behaviour change through structured intervention*, Deakin University, School of Psychology, 2008.
Queensland	S Smallbone & M McHugh, *Outcomes of Queensland Corrective Services sexual offender treatment programs*, School of Criminology and Criminal Justice, Griffith University, 2010.
Western Australia	Government of Western Australia, Department of Corrective Services, *Short-term impact evaluation of sex offender treatment programs: Prison group August 2009 to May 2010.*
South Australia	M Proeve, *Sexual Behaviour Clinic: A review and discussion paper*, October 2010. H Dobbin, *Pilot SBC-me Program Oct 2011–Nov 2012 evaluation report*, May 2013.
Tasmania	Queensland Corrective Services, *Review of sexual offending programs*, Risdon Correctional Centre, 2009.

Our public roundtable on adult sex offender programs included participants from government corrective services agencies as well as academics and researchers in the field of sex offender therapy. The New South Wales Office of the Children's Guardian, which is responsible for the WWCC scheme in New South Wales, also participated.

Some of the issues raised during the roundtable, in private sessions and in research are as follows:

- **Diversity:** Sex offenders, including child sex offenders, are a heterogeneous cohort. They are a 'population of people whose individual circumstances and the reasons for their offending vary enormously'.[2101]

- **The impact of prison culture:** The prison environment, and culture among prisoners, can prevent a child sex offender from actively participating in programs. Dr Stephen Wong, Adjunct Professor, Centre of Forensic Behavioural Science at Swinburne University of Technology, told the public roundtable:

> Because in the institution, in custody, there is always tension between sex offenders and non-sexual offenders and non-sexual offenders look down on sex offenders, to put it mildly, and there's a pecking order and within this pecking order, even within sex offenders, the rapists tend to be at the highest level and the child sex abusers at the very low level. Quite often in treatment they may feel very unsafe in terms of disclosing about their offending and engaging in therapy and therefore it makes it much more difficult to carry out treatment in a custodial setting, in particular, with child sex offenders. That is one reason why I think the

> evidence is showing that there is more efficacy treating in the community than in an institution.[2102]

The difficulties child sexual offenders may face in disclosing their child sexual offences in group therapy while in gaol were also raised with us in private sessions.

This issue was also discussed in a recent research paper on the preventive detention of sex offenders in Australia. The authors interviewed professionals involved with implementing post-sentencing detention for sex offenders, who noted that placing sex offenders with child sexual offenders in the same treatment program was a 'major failing of the in-prison treatment program': child sexual offenders cannot honestly discuss their crimes for fear of being exposed to the greater prison population.[2103]

- **Effectiveness:** Despite some of the difficulties in in-prison treatment programs, participants at the roundtable suggested that there is considerable rehabilitative value in starting treatment in custodial settings and continuing treatment in the community on release.[2104] However, we were told that treatment programs cannot operate successfully in a vacuum and cannot address the risk alone. Adult sex offender treatment programs are not a 'cure' but, rather, form a part of necessary intervention and management measures that aim to reduce the risk of reoffending.[2105]

  There is a requirement to 'wrap around' all services on release of an offender. This includes support services and programs from corrective service agencies and the non-government sector. Dr Henry Pharo, Director, Offender Rehabilitation Services in the South Australian Department for Correctional Services, told the public roundtable:

  > I think it is important for the discussion to consider all of these things that are important and if we look at the desistance literature, it shows that cognitive shift is one thing, so changes in people's thoughts is really important and I think that can be achieved through prison programs, but those people who do successfully avoid re-offending in the community are those who are able to actually re-integrate with society, maintain employment, establish social connections with their community and things like that.
  >
  > I just think it is important to consider programs in the community as being more than just them needing to come along to attend a maintenance program. It is that whole-of-systems approach again that we're talking about.[2106]

- **Measures of effectiveness:** For policymakers, the key measure of effectiveness may be the reduction in rates of recidivism. In relation to sex offender treatment, sexual reoffending or other violent reoffending, this measure may be more important than general reoffending. However, low reporting rates of sexual offending may limit the value of measuring recidivism where there may be a significant risk that reoffending may not be detected.

  It was suggested that recidivism is too blunt an instrument to ascertain the success of a program,[2107] and that programs should be designed and evaluated with regard to attitudinal change and individual effectiveness.[2108]

  For example, one study in New Zealand considered gains measured through changes in the attitudes of those who had completed a program, such as reductions in their belief of rape myths or increases in their empathy towards relevant victim types.[2109] Other assessments may focus on program completion or program satisfaction measures.

14.2.3 Implications for institutional child sexual abuse

Completion of a sex offender treatment program may be regarded as a step to rehabilitation and risk management. Completion of a program may sometimes be put forward in support of an application for parole or in answer to an application that an offender's detention should be extended (discussed in section 14.3).

At our public roundtable, we raised the issue of whether the successful completion of an adult sex offender treatment program should have any impact on a convicted sex offender's eligibility for a WWCC clearance.

In our *Working with Children Checks report*, we recommended that all jurisdictions should make provision for an automatic WWCC refusal for certain offences committed by adults, including the following child sexual abuse offences:

- the indecent or sexual assault of a child
- child pornography related offences
- incest where the victim was a child.[2110]

These offences cover many, but not all, child sexual abuse offences. We recommended that offences not included in the list for an automatic WWCC refusal should trigger a risk assessment.[2111]

In relation to risk assessment, we recommended an inclusive list of criteria for assessing risks to children.[2112] In the text, we stated that:

> We believe the standardised criteria should be consistent with those set out in the risk assessment guide; endorsed by the Commonwealth, state and territory governments to bring consistency and rigour to risk assessments; and applied to criminal history, disciplinary and misconduct information.[2113] [Reference omitted.]

The criteria we referred to were those published in the Community and Disability Services Ministers' Conference *National framework: Creating safe environments for children – Organisations, employees and volunteers*, 'Schedule: An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking'.[2114] The guide suggests that an evidence-based assessment of risk could be informed by asking a number of questions, including:

> Have the applicant's circumstances changed since an offence was committed?
>
> What is the attitude of the applicant to their previous offending behaviour, and what relevant information can be provided by the applicant?[2115]

Ms Louise Coe, Director, Child Safe Organisations from the NSW Office of the Children's Guardian, told the public roundtable that the NSW Office of the Children's Guardian is not aware that the New South Wales Civil and Administrative Tribunal (NCAT) – the tribunal that can review the NSW Children's Guardian's decision to refuse a WWCC clearance – has determined in any review that the participation in a sex offender or intervention program was a persuasive factor in granting an enabling order.[2116] An enabling order entitles an otherwise ineligible person to apply for a WWCC clearance.

Ms Coe told the roundtable that the New South Wales Office of the Children's Guardian is aware of three matters where the applicant had engaged in a sex offending treatment program and appealed to NCAT for an enabling order. She said NCAT still refused to grant an enabling order in those matters, on the basis that the more persuasive factors were:

- one applicant said he continue to have fantasies
- another applicant showed a lack of insight
- in the third matter, given the seriousness of the offending, the program was not considered to ameliorate the risk to children.[2117]

Ms Coe also told the roundtable that, in 2014, the New South Wales Children's Guardian engaged the Australian Institute of Criminology to conduct a literature review to inform how they made decisions. She said that, in relation to research on the effectiveness of treatment programs, the literature review was to the effect that:

> the literature that they examined at that time identified that there were very few methodologically rigorous evaluations of programs for either sex or violent offenders and on that basis they couldn't comment on the effectiveness of such programs.[2118]

If a person applies for a WWCC clearance after completing a sex offender treatment program, Ms Coe told the public roundtable:

> While we would consider [the fact] that there has been positive engagement in a treatment program, there are a number of other factors which may weigh more heavily on whether someone should be granted a clearance or not, but as we've said, if someone has engaged in sex offender programs they must have a conviction and when we conduct a risk assessment at the Office of the Children's Guardian, we don't look at those convicted sex offenders, we're looking at people that may have charges or may have a workplace finding, a sustained workplace finding that there was sexual misconduct.[2119]

This means that, at least in New South Wales, as those who have completed a sex offender treatment program would have received a custodial sentence for a sexual offence, they would be automatically disqualified from being granted a WWCC clearance. Therefore, completion of a treatment program could not affect the grant of a clearance, as the legislation would prevent a clearance being granted.

Dr Wong told the public roundtable:

> In sex offender treatment, obviously, it is not about cure, it is about managing risk, teaching the person to manage risk. One of the often-used things to get them to learn is about avoiding high-risk situations. That is, you don't get yourself sort of being drawn into situations where there are children around … so if a person has that profile and comes to me and says 'I would like to apply for a job to work with children', then I would have a lot of questions to ask about: 'Why would you want to do that?' 'Why would you want to put yourself again in a risky situation, when you have already been told "don't do that"'?[2120]

Similarly, Mr Ashley Phelan, Manager, Offender Intervention Unit in Queensland Corrective Services, told the public roundtable:

> We define treatment as a starting point. At no point is it considered an end point. It is a starting point.
>
> If we had a teacher who may generally have an interest in teaching, then there are many cohorts that that person can teach to and it doesn't necessarily have to be children. I would be concerned with a teacher, who was a child sex offender, who specifically wanted to teach with children. If your passion was teaching, there are many avenues in which you can still engage in your profession or your passion, which could be teaching adults, for instance. So we would be very concerned.[2121]

Many participants at the roundtable agreed with a summary proposition put by Justice McClellan as follows:

> treatment should be seen as a potential positive for anyone, but it should never be assumed that treatment is a cure. Is that correct?[2122]

14.3 Extended sentences

14.3.1 Introduction

Most states and territories have legislation that enables indefinite, continued or extended detention and supervision of people who are found to pose a high risk of reoffending. Most legislative provisions are directed at serious sex offenders, and we understand that a large proportion of applications under the provisions relate to child sex offenders.

Continued supervision or detention orders are applied for by the state close to the expiry of an offender's sentence.

Indefinite sentences are nominal sentences that are reviewed and reapplied until the person is deemed fit for release. They are initially imposed at the time of sentencing after the offender has been convicted. Some jurisdictions provide for indefinite detention in addition to or instead of indefinite sentences.

14.3.2 Supervision and detention orders

New South Wales, Victoria, Queensland, Western Australia, South Australia and the Northern Territory have legislative regimes that permit the court to make extended supervision and detention orders, which are imposed at the end of a person's sentence.[2123] These were developed to address the circumstance where a serious sex offender is considered to still have a propensity to reoffend at the end of their sentence.[2124]

Extended supervision orders require an offender who has been convicted of a serious sex offence to be supervised under certain conditions in the community at the end of their sentence.

Extended detention orders require the continued detention in prison of serious sex offenders (and violent offenders in New South Wales and South Australia)[2125] who are found to pose an unacceptable risk of harm if in the community.

The main purpose of the legislative regimes is to enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences, and who present an unacceptable risk of harm to the community, to be subject to ongoing detention or supervision. The secondary purpose of the provisions is to facilitate the treatment and rehabilitation of these offenders.[2126]

Applications are generally made during the last six months of the offender's custodial total effective sentence by the relevant Attorney-General or secretary of the justice agency, depending on the jurisdiction.[2127] In the majority of jurisdictions, 'custody' is defined to include release on parole.[2128] An offender on parole may be returned to prison in the case of an order for continued detention, but it is more likely than an offender on parole might be the subject of a continued supervision order at the end of the parole term.

The Supreme Court in the relevant jurisdiction must be satisfied that the offender poses an unacceptable risk of committing a similar offence or harming the community before it makes an order. The standard of proof is said to be lower than 'beyond reasonable doubt'.[2129] Risk is assessed by reference to assessment reports and other supporting evidence, including whether the offender has participated in a rehabilitation program.[2130]

Supervision orders may require an offender to report to and receive visits by specified individuals, obey any curfews or not commit an offence or move to a new address without prior written consent.[2131] Failure by the offender to comply with the requirements of an extended supervision order is a criminal offence in all jurisdictions except South Australia.[2132]

The legislative regimes that permit continued detention and supervision have had a complicated history, and provisions facilitating continued detention have been challenged before the High Court.[2133]

The current form of provisions were introduced first in Queensland in 2003, followed by Western Australia and New South Wales in 2006 (with further significant amendments in New South Wales in 2013 and 2014[2134]), Victoria in 2009, the Northern Territory in 2013 and South Australia in 2015.

They continue to be the subject of some academic criticism, mainly focused on human rights concerns.[2135] The risk that continued detention and supervision orders may infringe on the principle of finality in sentencing if the detention is framed as a punitive measure has also been raised. However, detention can be authorised as a non-punitive measure, in which case the principle of finality is less likely to be considered relevant. For example, McSherry, Keyzer and Freiberg state:

> Post-sentence preventive detention legislation that authorises imprisonment may be seen as contrary to the principle of finality of sentence. If an order for indefinite detention is made at the time of sentence, then the offender at least knows that there is a nominal term and there is a system for periodic review. By contrast, post-sentence preventive detention schemes operate at the end of the offender's sentence, leading to uncertainty as to how long the offender must remain in prison after the sentence expires.
>
> However, this principle may be considered irrelevant if it is accepted that post-sentence preventive detention is non-punitive. Since the majority of the High Court in *Fardon* has held that the Queensland post-sentence scheme is not akin to a sentence of imprisonment, the principle of finality of sentence may be bypassed.[2136] [Reference omitted.]

There was little if any public information available on the use of supervision and detention orders before the Royal Commission sought information under summons or notice to produce for use in the *Sentencing for child sexual abuse in institutional contexts* (Sentencing Research).

Table 14.3 provides a summary of the supervision and detention provisions and their use.

In a 10-year period (2004–2014), no successful applications for continued detention for child sexual assault offenders were made in Victoria, and the majority of applications in New South Wales during the same period related to supervision orders.[2137]

Table 14.3: Summary of supervision and detention order provisions and their use[2138]

Jurisdiction	Legislation	Standard of proof	Period of order	Applications made between 2004 and 2014	Proportion relating to child sexual assault offenders
New South Wales	*Crimes (High Risk Offenders) Act 2006* (NSW)	High degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision (s 5B2)	Five years maximum, subject to further application (s 18)	85	69 (81%)
Victoria	*Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)	Whether the risk of committing a relevant offence is less than a likelihood of 'more likely than not' (s 9(5))	Three years maximum, subject to review (s 40, s 65)	164	116 (71%)
Queensland	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)	Satisfied to a high degree of probability by acceptable and cogent evidence that the prisoner is a serious danger to the community (s 13)	Indefinite until rescinded by the court (s 14)	157	95 (61%)
Western Australia	*Dangerous Sexual Offenders Act 2006* (WA)	Satisfied to a high degree of probability by acceptable and cogent evidence that there is an unacceptable risk that the person would commit a serious sexual offence (s 7)	Indefinite until rescinded by the court (s17, s 25)	56	42 (75%)
Northern Territory	*Serious Sex Offenders Act 2013* (NT)	Satisfied to a high degree of probability that there is acceptable and cogent evidence of sufficient weight that a person is a serious danger to the community (s 7)	Indefinite until revoked or expires (s 10, s 16)	n/a	n/a

14.3.3 Indefinite sentences or detention

Indefinite sentences or detention can be brought about by different means. The Sentencing Research outlined the following different approaches to give effect to indefinite sentencing or detention:

- nominal, reviewable sentences provide for indefinite sentences
- sentences where a person is incapable of controlling their sexual instincts provide for indefinite detention
- dangerous criminal declarations provide for indefinite detention.[2139]

Nominal, reviewable sentences

Nominal, reviewable sentences are currently available in Victoria, Queensland, Western Australia and the Northern Territory.[2140]

These enable sentencing courts to give a nominal sentence to serious, repeat offenders of certain categories of offences, where it is considered that the offender poses a serious danger to the community. Risk of harm is assessed in reference to the offender's character, history, age, health and mental health and the nature and gravity of the current and previous offences.[2141]

Generally, at the completion of the nominal sentence the offender must be reviewed, at which time, on application, the court may order further imprisonment. The offender must then be periodically reviewed as prescribed by legislation, and at each review the indefinite sentence can be lifted or retained.

The provisions attempt to balance, on the one hand, a person's right to certainty and liberty and, on the other hand, recognising the limitations of the courts' ability to predict ongoing dangerousness at the time of sentencing.[2142]

Indefinite sentences have been criticised for:

- among other things, breaching the principles of proportionality and finality and the principle of imprisonment as a last resort
- imposing retrospective punishment for previous acts
- breaking the 'link between crime and punishment'.[2143]

There was little if any public information available on the use of these sentences before the Royal Commission sought information under summons or notice to produce for use in the Sentencing Research.

Table 14.4 provides a summary of the nominal sentencing provisions and their use.

These provisions are rarely used. The authors of the Sentencing Research consider that supervision and detention orders discussed in section 14.3.2 allow for a timely assessment of dangerousness and that jurisdictions may prefer them rather than nominal, reviewable sentences.[2144]

Table 14.4: Summary of nominal sentencing provisions and their use[2145]

Jurisdiction	Provision	Review period	Number of orders between 2004 and 2014
Victoria	*Sentencing Act 1991* (Vic) ss 18A, 18B, 18H, 18M	At the end of the nominal sentence and then every three years.	0
Queensland	*Penalties and Sentences Act 1992* (Qld) ss 163, 171, 173	After 50 per cent of the nominal sentence has been served (in most cases) and then every two years	8 (applications)
Western Australia	*Sentencing Act 1995* (WA) s 98(1); *Sentencing Administration Act 2003* (WA) s 12A(5)	One year after the sentence has begun and then every three years	2
Northern Territory	*Sentencing Act* (NT) ss 65, 72, 74	No later than six months after 50 per cent of the nominal term has been served and then every two years	2 (applications)

Detention of persons incapable of controlling their sexual instincts

Provisions in South Australia and Queensland permit the preventative detention of certain convicted sex offenders where it is shown that the offender is incapable of controlling (or unwilling to control) his or her sexual compulsions.[2146]

Detention is to take place in an 'institution', which in Queensland means a prison, watch-house or an institution prescribed by regulation. It is defined in South Australia as a prison, or any place declared by the Governor by proclamation. In relation to a young person, it also includes a training centre.[2147] In South Australia, the decision to retain the offender in custody must be reviewed every 12 months,[2148] and the offender may be released on licence. In Queensland, the detained offender must be examined every three months, with a report to be furnished to the director of mental health.[2149]

The South Australian provision allows the Attorney-General to apply to the Supreme Court for an order to detain a person while they are in prison serving their sentence or at the time they are being sentenced. At least two legally qualified medical practitioners must inquire into the mental condition of the person and report to the court on whether the person is incapable of controlling, or unwilling to control, his or her sexual instincts.

Section 23(5) of the *Criminal Law (Sentencing) Act 1988* (SA) provides:

> The paramount consideration of the Supreme Court in determining whether to make an order that a person to whom this section applies be detained in custody until further order must be the safety of the community.

Based on information obtained by the Royal Commission under summons or notice, the Sentencing Research records that, in South Australia, in the 10-year period from 2004 to 2014, 26 applications

were made under s 23, 17 (65 per cent) of which were for child sexual abuse offenders. Five orders were granted.[2150]

The Queensland provision appears to be used less than the South Australian provision. Queensland also has provisions enabling extended supervision and detention orders and nominal reviewable sentences, and they may be used instead of this provision. Based on information obtained by the Royal Commission under summons or notice, in the 10-year period from 2004 to 2014, no orders were made. However, during that period, three people who had been already been detained under the provision for child sexual abuse offending remained detained.[2151]

Dangerous criminal declaration

The only provision regarding indefinite detention in Tasmania permits an offender, deemed by the court to be a 'dangerous criminal', to be held in custody after the term of his or her sentence.[2152] The offender must be reviewed every two years, and any discharge is unconditional – without licence or continued supervision.[2153]

The declaration is made in regard to some violent criminals[2154] and is not specific to sexual offenders. Based on the information obtained by the Royal Commission under summons or notice, the Sentencing Research records that, of the seven declarations currently in force, five relate to sex offenders (although the proportion of child sex offenders in this group is unknown).[2155]

14.4 Risk management on release

14.4.1 Introduction

This section refers to the ongoing risk management of child sex offenders at the end of their sentence, including at the end of their parole period or supervision order. Ongoing consequences of a conviction for a child sexual abuse offender include placement on a sex offender registry with corresponding reporting obligations and an inability to work in child-related employment.

Our particular interest is in legal obligations that aim to protect children in institutional contexts from contact with a convicted child sexual abuse offender after his or her sentence or order has expired.

14.4.2 Child sex offender registries

New South Wales was the first jurisdiction to implement a child sex offender registration scheme, which commenced in 2000. An Australian Child Protection Offender Reporting scheme has since been established by legislation in each Australian state and territory. Each jurisdiction has a register, variously named the 'child protection register';[2156] 'sex offender register';[2157] 'community protection offender register';[2158] the 'register of child sex offenders';[2159] the 'child sex offenders register';[2160] and the 'child protection offender register'.[2161]

We will use 'sex offender register' to refer to registries in each jurisdiction.

This national scheme requires child sex offenders, and other defined categories of serious offenders against children, to keep police informed of their address and other personal details for a prescribed period of time after the expiry of their sentence.[2162]

At the time of sentence, a person convicted of a registerable offence will be given notice of their requirement to report. This means that they are placed on the sex offender register and have reporting obligations. A registerable offence generally covers all indictable child sexual offences, which are usually split into classes of seriousness.[2163] Registered offenders may be required to report to police for different periods of time depending upon the class of their offence. Repeated offences drawn from different incidences of offending attract a reporting obligation for life.[2164]

A person on a sex offender register must report to police certain personal information – and any changes to the information – such as name, date of birth, address, whether any child resides with them, work details, details of any club they participate in that has child membership, car details, any information regarding an intention to leave the state, and details of internet connectivity.[2165] Police are able to inspect properties to ensure that information on the register is correct and up to date.[2166]

A registerable person must report to any police station within seven days of release[2167] and usually annually thereafter[2168] (except where something changes within that year – a child commencing to reside with the person must be reported within 24 hours and everything else must be reported within seven days of the change).[2169] Failure to comply with the reporting obligations is a criminal offence.[2170]

A number of jurisdictions identify the objectives of the sex offender register as being to keep police informed of details so to reduce the likelihood of reoffending; and to facilitate the investigation and prosecution of any future offences. [2171] In Victoria, South Australia and the Australian Capital Territory, the relevant legislation also states that a key objective of the scheme is to prevent registered sex offenders from working in child-related employment.[2172]

14.4.3 Interaction with Working with Children Check schemes

As discussed in section 14.2.3, we made recommendations about WWCC schemes in our *Working with Children Checks report*.[2173] If these recommendations are implemented, there are likely to be relatively few categories of child sexual abuse offence that, when committed by an adult offender, do not trigger automatic disqualification from eligibility to hold a WWCC clearance.

However, under current WWCC, without the implementation of our recommendations, some WWCC schemes do not automatically disqualify people who are currently registered on the sex offender register or convicted of certain offences from obtaining a WWCC clearance. This may be because it is possible for, say, a teenager to be put on the sex offender registry because they conducted a sexual relationship with a person of similar age, who was below the age of the consent (for example, a 19-year-old and a 15-year-old in a consensual relationship that may also have involved 'sexting'). In these types of cases, an assessment of the 19-year-old person may be more appropriate than automatic disqualification.

We are nonetheless interested in any gaps between the two schemes and invite further input where required.

In all jurisdictions, a person who is currently registered on the child sex offender registry will generally be unable to hold a WWCC clearance.

The legislative provisions reflect three different approaches:

- In New South Wales and Western Australia, while the legislation does not explicitly prohibit registered sex offenders from working in child-related employment, this is the practical effect of the WWCC legislation.
- In Victoria and Queensland, the WWCC provisions explicitly disqualify registered sex offenders from applying to work with children.
- In the remaining jurisdictions, and in Victoria in addition to the provisions in the WWCC legislation, the sex offender registration legislation provides that it is an offence for registered sex offenders to work or to apply to work in child-related employment.

Implementation of our recommendations on WWCC schemes would strengthen some of the current provisions preventing convicted child sexual offences – who would be on the sex offender registers – from seeking or obtaining WWCC clearances. However, it does not appear that there are significant gaps in the interaction between sex offender registration and current WWCC schemes, subject to the conduct and outcome of any risk assessments permitted under the current WWCC schemes.

If there is delay in implementing our recommendations on WWCC schemes, the interaction between sex offender registration and current WWCC schemes might possibly be strengthened in some jurisdictions by amending sex offender registration legislation to prohibit registered sex offenders from working or applying to work in child-related employment.

We welcome submissions that discuss the issues raised in Chapter 14.

We also welcome submissions that identify any additional post-sentencing issues in relation to institutional child sexual abuse offenders that we should consider that are not raised in Chapter 14.

15 Juvenile offenders

15.1 Introduction

It is apparent that there is a significant level of sexual abuse committed by children on other children.

In our *Interim report*, we stated:

> Some child sexual abuse occurs between peers. We are aware there is a range of complex factors that will influence whether a child shows abusive behaviours, including whether they have experienced prior abuse or maltreatment. We have heard – through submissions and discussions at our first roundtable, held in April 2014 – that this is an area of concern and could have significant implications in institutions and out-of-home care.
>
> Australian police statistics from 2003–04 show that children under 17 committed 9 to 16 per cent of all the child sexual abuse offences recorded.[2174] [References omitted.]

Child-to-child sexual abuse may involve peers, but it can also involve sexual abuse committed by a child of a different age, particularly older children who abuse younger children.

We have heard from many victims and their families and survivors of their experiences of being sexually abused by other children in institutions.

For example, in Case Study 30 on the experiences of former child residents at Victorian youth training and reception centres between the 1960s and early 1990s, we heard evidence that some survivors who were placed in those residential institutions witnessed older child residents sexually abusing younger residents and experienced such abuse themselves on many occasions.[2175]

The criminal justice system will only respond to child-to-child sexual abuse if the child perpetrating the abuse is old enough to be held criminally responsible for their actions. Children under 10 cannot be charged or prosecuted. For children between 10 and 13 years of age, the prosecution bears the burden of proving that they should be held criminally responsible for their actions.

Even for children over the age of criminal responsibility, different considerations may arise if the sexual offending is 'consensual' and between children of similar ages.

However, in institutional contexts, there may be a risk that child-to-child sexual abuse is not taken as seriously as it should be. Institutional staff, as well as parents or carers of the children, may not recognise or understand the seriousness of the behaviour and they may downplay the abuse.

If children are reported to the police and a criminal justice response is pursued, the criminal justice system typically treats juvenile offenders differently from adult offenders. Children are usually tried in different courts. If they are convicted, children are sentenced in accordance with different sentencing principles and they are eligible for different types of sentences. If children receive a custodial sentence, it may be served in a juvenile detention facility rather than an adult prison.

Treatment is likely to be a significant priority for many children with harmful sexual behaviour. This may be particularly the case for children who are below the age at which they will be held criminally responsible for their actions. It might also be a consideration for some children who are dealt with in the criminal justice system. We are considering the issue of treatment for children with harmful sexual behaviour in a separate project and we will report on it separately to our work on criminal justice.

Apart from the issue of treatment, the criminal justice system's response to child-to-child sexual abuse has not been raised with us as a significant issue.

Concerns have been expressed by some about what are considered to be inadequate responses to the issue by police as well as by institutions, child protection agencies and others. However, the response sought by those expressing these concerns has focused on access to treatment and, if necessary, diversion from the criminal justice system rather than a traditional criminal justice response of investigation, charging and prosecution. These concerns will be considered in our separate project on treatment for children with harmful sexual behaviour.

In this chapter, we discuss the data and research we have on juvenile child sexual abuse offenders and how the criminal justice system responds to them.

15.2 Data on juvenile offending

It has been suggested that there is a void in the literature when it comes to how juvenile sex offending is dealt with by the criminal justice system in Australia and overseas.[2176]

There are considerable difficulties in gauging the prevalence of child sexual abuse offences committed by children. There are the common problems of under-reporting of sexual abuse and child sexual abuse offences generally and high rates of attrition of reports within the criminal justice system. There may also be additional difficulties with data about child sexual abuse offences committed by children.

For example, the Australian Bureau of Statistics (ABS) definition of 'child sexual abuse' in its 2012 Personal Safety Survey precluded the collection of data about juvenile offenders, as the definition specified child sexual abuse as an 'act *by an adult* involving a child (before the age of 15 years) in sexual activity' (emphasis added).

Despite these difficulties, some data is available.

Both Australian and international research over several decades has shown that, of the complaints of child sexual abuse that are reported to the police, only a small proportion result in prosecution and conviction (the most consistent figures range between 8 per cent and 15 per cent).[2177] The statistics are generally lower for juvenile offenders and show a decreasing trend over time in the number of prosecutions finalised.

A very small proportion of offences dealt with by Australian courts are juvenile sex offences. Of a total of 588,167 defendants for all criminal matters finalised in Australian criminal courts in 2014–15, only 729, or 0.1 per cent, were defendants in sexual assault and related matters finalised in Children's Courts.[2178]

Sex offence matters also made up a very small proportion of the case load of Children's Courts. In 2014–15, only 2.6 per cent of defendants finalised in the Children's Courts were defendants in sex offence matters, compared with 0.9 per cent in Magistrates Courts and 18.6 per cent in the higher courts.[2179]

The Australian Bureau of Statistics data on the finalisation of sex offence cases in the Children's Courts in 2014–15 shows that prosecutions against juveniles were more likely to be withdrawn when compared with prosecutions for other offences. Of juveniles charged and prosecuted for sexual offences, 7.1 per cent resulted in an acquittal, 46 per cent were proven guilty and 24.5 per cent were withdrawn by the prosecution. The percentage of sex offence matters withdrawn by the prosecution was more than 2.5 times the percentage withdrawn for other matters prosecuted in the Children's Courts (9.1 per cent).[2180]

The research report, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* (Delayed Reporting Research), by Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM, studied police and court data collections in New South Wales and South Australia.

In relation to the New South Wales data for the period 1994 to 2014, the Delayed Reporting Research found as follows:

- Between 1994 and 2014, 10.4 per cent of persons prosecuted for at least one sexual offence against a child were finalised in the New South Wales Children's Court compared with 46.9 per cent in the Local Court and 42.6 per cent in the higher courts.[2181] In their analysis of the data, the researchers observed:

  > There has been considerable fluctuation in the number of defendants in the Children's Court with finalised charges of sexual assault and indecent assault, the two most common charges of sexual offences against children and young persons in that court. The pattern for indecent assault matters broadly followed the trends for sexual assault matters, with steady increases in both from 2011 to 2014. Forty-eight young persons were committed to a higher court for the more serious offences of sexual assault and indecent assault.[2182]

- A slightly lower proportion of people were dealt with in the Children's Court through a defended hearing than in the higher courts (32.0 per cent in the Children's Court compared with 35.2 per cent in the higher courts) and fewer were sentenced after a plea of guilty (37.1 per cent compared with 47.1 per cent). The researchers observed that a higher proportion of matters in the Children's Court had all charges dismissed without hearing (27.4 per cent compared with 14.9 per cent), most commonly where no evidence was offered by the prosecution. Further, fewer than half of the sex offenders prosecuted in the Children's Court were convicted (47.9 per cent) compared with 62.3 per cent in the higher courts.[2183]

In relation to the South Australian data for the period 1992 to 2012, the researchers reported as follows:

- Between 1992 and 2012, 57.5 per cent of all charges of sexual offences in the Youth Court were dismissed prior to hearing (most commonly the Crown made applications for no further proceedings and with no evidence and no hearing).[2184]

- Of the cases of sexual offences heard in the Youth Court, only 9.7 per cent resulted in conviction of at least one charge, 3.3 per cent of cases resulted in a not guilty verdict or dismissal and 29.6 per cent were proven but with no conviction recorded.[2185]

Despite making up a very small proportion of matters finalised in the courts, recorded crime statistics show that juvenile offenders are responsible for a significant proportion of sexual offences, and they offend at a much higher rate than the general offender population. In 2014–15, for matters where the principal offence was sexual assault, the overall offender rate in Australia for people proceeded against by police was 36.6 per 100,000. The offender rate for juveniles was significantly higher than the overall rate, at 54.5 for 10- to 14-year-olds and 83.3 for 15- to 19-year-olds. All other age demographics recorded significantly lower offender rates.[2186]

During 2014–15, males between the ages of 10 and 17 were responsible for 17.4 per cent of all recorded sex offences by men, and females between the ages of 10 and 17 were responsible for 74.2 per cent of all recorded sex offences by females, with females between the ages of 13 and 15 responsible for 57.4 per cent of all recorded female sex offences.[2187]

The data shows that children between the ages of 10 and 14 commit sex offences at 1.5 times the rate of the general population and that those between the ages of 15 and 19 commit sex offences at more than twice the general population rate. Males between the ages of 10 and 17 were responsible for a significant proportion of all recorded sex offences and, while females in general commit far fewer sex offences, almost three-quarters of recorded sex offences by females in 2014–15 were attributed to females between the ages of 10 and 17.

Of course, this data includes sexual offending against adults. It also only counts sexual offending which was reported to police and in respect of which police initiated court or non-court proceedings.

Our police data project, discussed in section 3.2.1, may provide information about reports to police of child sexual abuse offences allegedly committed by children under the age of 18 years.

We undertook a much smaller data project in relation to multidisciplinary and specialist police data, discussed in section 3.4.3. That project sampled 100 matters accepted by the New South Wales Joint Investigation Response Team (JIRT) Referral Unit (JRU) where the initial report involved possible child sexual abuse. It found that 19 of the 100 matters sampled involved possible child sexual abuse in an institutional context. Of these 19 matters, 11 involved allegations against adults and eight involved allegations against children under 18 years of age.

15.3 Age of criminal responsibility

In all Australian jurisdictions, the minimum age of criminal responsibility of a child is 10 years. That is, children under the age of 10 cannot be charged or prosecuted for acts which would – with the required mental element – constitute crimes.

From the age of 10 until a child turns 14, there is a common law presumption against criminal responsibility. That is, it is presumed – unless the prosecution proves otherwise – that a child in this age group does not possess the necessary knowledge or capacity to know that his or her conduct was wrong.

These principles are often referred to by the common law term *doli incapax*, meaning 'incapable of crime'.

The principles apply across all Australian jurisdictions, either in legislation or as part of the common law. Table 15.1 sets out the basis for the rules in each jurisdiction.

Table 15.1: Legal basis for age of criminal responsibility by jurisdiction

Jurisdiction	Legal basis for age of criminal responsibility
Commonwealth	Under 10 years: *Crimes Act 1914* (Cth) s 4M; *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code* (Cth)) s 7.1 10 to under 14 years: *Crimes Act 1914* (Cth) s 4N; *Criminal Code* (Cth) s 7.2
New South Wales	Under 10 years: *Children (Criminal Proceedings) Act 1987* (NSW) s 5 10 to under 14 years: common law[2188]
Victoria	Under 10 years: *Children, Youth and Families Act 2005* (Vic) s 344 10 to under 14 years: common law[2189]
Queensland	Under 10 years: *Criminal Code Act 1899* (Qld) sch 1 (*Criminal Code* (Qld)) s 29(1) 10 to under 14 years: *Criminal Code* (Qld) s 29(2)
Western Australia	Under 10 years: *Criminal Code Act Compilation Act 1913* (WA) Appendix B, sch 1 (*Criminal Code* (WA)) s 29 10 to under 14 years: *Criminal Code* (WA) s 29
South Australia	Under 10 years: *Young Offenders Act 1993* (SA) s 5 10 to under 14 years: common law[2190]
Tasmania	Under 10 years: *Criminal Code Act 1924* (Tas) sch 1 (*Criminal Code* (Tas)) s 18(1) 10 to under 14 years: *Criminal Code* (Tas) s 18(2)
Australian Capital Territory	Under 10 years: *Criminal Code 2002* (ACT) s 25 10 to under 14 years: *Criminal Code 2002* (ACT) s 26
Northern Territory	Under 10 years: *Criminal Code Act* (NT) sch 1 (*Criminal Code* (NT)) s 38(1) 10 to under 14 years: *Criminal Code* (NT) s 38(2)

The presumption against criminal responsibility for children from the age of 10 until they turn 14 varies slightly between the jurisdictions that have established the presumption by legislation. It is generally based on either the child's actual knowledge that his or her conduct was wrong or on the capacity to know.[2191] The burden of proof is on the prosecution to prove that knowledge or capacity.

An example of the requirement of actual knowledge is found in the Commonwealth legislation:

> (1) A child aged 10 years or more but under 14 years old can only be liable for an offence against the law of the Commonwealth if the child knows that his or her conduct is wrong.
>
> (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.[2192]

An example of the statutory presumption based on the child's capacity to know is found in the Queensland legislation:

> A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had *capacity to know* that the person ought not to do the act or make the omission.[2193] [Emphasis added.]

The test to be applied by the prosecution to rebut the presumption of *doli incapax* was considered by the New South Wales Court of Criminal Appeal in 1996 in *R v CRH.*[2194] One of the grounds of appeal in that case was whether the trial judge correctly rejected a claim that the appellant was *doli incapax* at the relevant time. The appellant (who was either 12 or 13 at the time of the offence) was found guilty of having sexual intercourse with a six-year-old child.

The evidence relied on by the Crown in rebuttal of the presumption of *doli incapax* was the complainant's evidence of the episodes of sexual abuse, including her evidence that during one of the episodes of abuse, when the appellant heard the complainant's sister walk into the room, he pulled a blanket over the complainant's head and told the sister that the complainant was hiding. The appellant had made no admissions to the police or anybody that he had committed any of the acts for which he stood charged, and evidence was not called from the complainant's sister.

The trial judge accepted that the behaviour of covering the complainant's head during the act of sexual abuse indicated the appellant's knowledge that what he was doing at the time was wrong, and the judge refused the application of *doli incapax* on that basis.

Justice Newman in the New South Wales Court of Criminal Appeal quoted the following passage from the then recent decision of the House of Lords in *C v Director of Public Prosecutions:*[2195]

> A long and uncontradicted line of authority make two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that when doing the act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has been variously expressed, as in *Blackstone*, 'strong and clear beyond all doubt or contradiction,' or, in *Rex v Gorrie* (1918) 83 JP 136, 'very clear and complete evidence' or, in *B v R* (1958) 44 Crim App R 1, 3 per Lord Parker CJ, 'it has often been put this way, that … "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt."' …
>
> The second clearly established proposition is that evidence to prove the defendant's guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however, horrifying or obviously wrong that act may be. As Erle J said in *Reg v Smith (Sydney)* (1845) 1 Cox CC 260: 'a guilty knowledge that he was doing wrong – must be proved by the evidence, and cannot be presumed from the mere commission of the act …'.[2196]

Justice Newman then reviewed 'such Australian authority as exists' and concluded that it was consistent with the law as expressed by Lord Lowry in *C v Director of Public Prosecutions*. Justice Newman, with Smart and Hidden JJ agreeing, held that the trial judge ought to have accepted the application for *doli incapax* made on behalf of the appellant as the evidence was insufficient to rebut the presumption of *doli incapax* beyond reasonable doubt.[2197]

The prosecution can rely on evidence to rebut the presumption of *doli incapax* that may be considered highly prejudicial or inadmissible in other circumstances.[2198] Evidence that may rebut the presumption of *doli incapax* includes the following types of evidence:

- admissions by the accused during police interviews, including admissions in relation to earlier acts of misconduct
- evidence of previous criminality (if it is admissible) or previous warnings about similar conduct sufficient to give the child knowledge from the time of the warning that the conduct was wrong
- if there are no admissions, evidence of surrounding circumstances from which such consciousness may be inferred, such as attempts to run from police or to hide facts (although such actions may be consistent with naughtiness as much as wickedness)
- in more serious cases, expert psychiatric assessments of a child's mental development may be conducted
- evidence of the child's home background and upbringing
- statements from teachers.[2199]

All states and territories make provision for treating children who are prosecuted for criminal offences as juveniles rather than as adults. While the terminology and definitions vary, in each state and territory other than Queensland, children under 18 years of age are treated as juveniles in the criminal justice system.[2200] In Queensland, children under 17 years of age are treated as juveniles in the criminal justice system.[2201]

15.4 Reporting and investigating juveniles

15.4.1 Encouraging reporting

It seems likely that the introduction of mandatory reporting laws, discussed in section 6.3.2, have encouraged the reporting of sexual activity by children in institutional contexts. For example, where teachers are mandatory reporters, they may be obliged to report underage sexual activity between children.

It is possible that some adults do not recognise harmful sexual behaviour by children towards other children as possibly involving a criminal offence or being sufficiently serious to warrant reporting to police.

It is not clear to us that, beyond mandatory reporting, there is a need for special steps to be taken to encourage reporting to police of allegations of child sexual abuse made against children – who are or may be old enough to be criminally responsible for their actions – beyond the steps discussed in section 3.6.3 in relation to reporting generally.

In section 6.3.3, we discuss possible criminal offences for failure to report. The current Victorian offence of failing to disclose a sexual offence committed against a child under the age of 16 years applies only to offences committed by adults.[2202] As discussed in section 6.3.3, the appropriate ages

for the sexual offence – both in relation to the person allegedly committing the sexual offence and the alleged victim – have been subject to some debate and discussion.

15.4.2 Police investigations

In June 2016, we convened a public roundtable on multidisciplinary and specialist policing responses. At the roundtable, some police representatives provided information about how they approached investigations of alleged child sexual abuse where the alleged offender may be a child.

Acting Detective Superintendent Garry Watts, Child Safety and Sexual Crime Group, State Crime Command, Queensland Police Service, told the roundtable that the police response would depend on the age of the children involved and the foreseeable action that would be taken against the child, such as whether a caution would be appropriate in the circumstances.[2203] Where a juvenile sex offender had previous convictions for similar offences, or where the case involved multiple victims, the police investigation would follow the same course as investigations where allegations are made against adults.[2204]

Detective Senior Sergeant Craig Gye, Dandenong Sexual Offences and Child Abuse Investigation Team, Victoria Police, explained that the Victorian approach would be similar to Queensland, where the investigation would not differ significantly from investigations involving adult suspects, although considerations specific to juvenile offending would be kept in mind. These considerations include matters such as the therapeutic treatment orders that are available in Victoria for offenders under the age of 15 and defences available in that jurisdiction for consensual activity by children where there is no more than a two-year difference in ages.[2205]

Detective Superintendent Greig Newbery, Commander, Child Abuse Squad, NSW Police Force, stated that JIRT does not investigate consensual adolescent peer sex; these matters are referred to the relevant Local Area Command and generally do not proceed to a charge.[2206] However, JIRT does receive a number of referrals for child-on-child sexual assault, sometimes in a school context.[2207]

Where allegations are made against juveniles as opposed to allegations against adults, we heard that there may be differences in how police provide information to others connected with the institution. In relation to providing information, Detective Inspector Mark Twamley, Sex Crime Division, Western Australia Police, told the roundtable:

> When there's an incident where the alleged perpetrator is a person in authority, like a teacher, then there's obviously a high public interest in those sorts of matters, so we would devolve a communication plan relevant to that level of interest.
>
> When it comes down to juvenile-on-juvenile, peer-on-peer, in a consensual environment obviously there's very little public interest in that, and so our communication on it would be very limited, if at all, certainly communication with the school and within the school environment, because there are obviously educational and welfare impacts that need to be considered.
>
> But certainly where there are elements of non-consensual sexual behaviour and elements of violence, then that ups the ante again and we would develop a further communication plan that may involve the broader school community, if the perpetrator was unknown. If the

perpetrator was known, well, then obviously the level of communication would probably be lesser.[2208]

15.5 Prosecution of juveniles

15.5.1 Jurisdiction and court structure

As discussed in section 15.3, states and territories treat offenders who are under 18 years of age – or under 17 years of age in Queensland – as a 'child' for the purpose of prosecution.

The Australian Institute of Criminology's overview of the juvenile court system explains:

> In all States and Territories, there are specialised children's courts that have jurisdiction over offences committed by young people. The courts may be constituted by a specialised children's court magistrate or judge, or by a magistrate constituting a children's court and exercising the powers under the relevant legislation. In most jurisdictions, they are modified courts of summary jurisdiction with enlarged powers to deal with matters summarily.[2209]

The children's courts have broad jurisdiction to hear and determine sexual offences committed by children; however, it will depend on the specific offence or charge, and some jurisdictions refer the most serious sexual offences to an adult court.

In New South Wales, the Children's Court has jurisdiction to hear and determine any offence by a child other than a serious children's indictable offence.[2210] It can hear and determine cases of sexual assault, aggravated indecent assault and indecent assault but not cases involving the most serious sexual offences, such as aggravated sexual assault. Children charged with serious sexual offences are generally referred to the District Court of New South Wales.[2211] The District Court of New South Wales is to deal with the child found guilty of a serious indictable offence according to law,[2212] and alternatives to sentencing, such as cautions and conferences, are not available for those serious offences.[2213]

In Victoria, the Children's Court has jurisdiction over all sexual offences[2214] unless the court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily.[2215] Such an occurrence is rare.[2216]

In Queensland, the Children's Court has jurisdiction for all indictable offences involving a child generally.[2217]

The Western Australian Children's Court has exclusive jurisdiction to hear and determine offences alleged to have been committed by a child.[2218]

In South Australia, the Youth Court has broad jurisdiction to hear and determine cases of child sexual abuse by a youth, with some exceptions.[2219] A youth charged with an indictable offence can be dealt with in the same manner as an adult if he or she chooses to be so treated after obtaining legal advice, or if the Youth Court or Supreme Court determines the youth should be dealt with in the same manner as an adult because of the gravity of the offence or because the offence is part of a pattern of repeat offending.[2220] However, it appears that offences by children are rarely transferred

from the Youth Court to an adult court: from 1999 to 2004, no sexual offences were transferred to an adult court.[2221]

In Tasmania, the Youth Justice Division of the Magistrates Court has jurisdiction to hear and determine a charge against a youth under the age of 18 years.[2222] Where an offender is at least 14 years of age and under 18 years, serious sexual offences (such as rape and aggravated sexual assault) must be dealt with in the Supreme Court.[2223]

In the Australian Capital Territory the jurisdiction of the Children's Court includes any offence not carrying a maximum penalty of life imprisonment.[2224]

The Northern Territory Youth Justice Court has exclusive jurisdiction over all charges in respect of summary or indicatable offences allegedly committed by a youth.[2225]

Warner and Bartels observe that, regardless of the jurisdiction of the children's courts, a child may elect to have some indictable offences determined by a jury, although it seems that this rarely happens.[2226]

Courts that exercise criminal jurisdiction with respect to children are required to adhere to principles specific to the rights of a child in most circumstances, other than serious offences in some jurisdictions.

For example, in Western Australia, s 7 of the *Young Offenders Act 1994* (WA) sets out 13 principles in performing functions under the Act (including the functions of courts in criminal court proceedings). Principles most relevant to the prosecution stage of the criminal justice system are as follows:

- There should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences.
- A young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct.
- A young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult.
- The community must be protected from illegal behaviour.
- Victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so.
- Responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons and be supported in their efforts to do so.
- When dealing with a young person for an offence, consideration should be given to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so.
- A young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time.

- In dealing with a young person for an offence, the age, maturity and cultural background of the offender are to be considered.
- A young person who commits an offence is to be dealt with in a way that:
  - strengthens the family and family group of the young person
  - fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons
  - recognises the right of the young person to belong to a family.

While there are differences between states and territories, generally court processes may be modified where a juvenile is being prosecuted. The court may have an obligation to explain the proceedings to the child, and proceedings will generally follow the simpler procedures applying in the lower courts (magistrates or local courts), even for more serious offences. The proceedings may take place in a closed court and there may be greater restrictions on publishing the proceedings.[2227]

15.5.2 Alternatives to prosecution

Warner and Bartels observe that:

> In accordance with article 40.3 of the Convention on the Rights of the Child and rule 11 of the Beijing Rules, which create a preference for diversion over formal judicial proceedings, there is a strong emphasis on diversion in each of the Australian jurisdictions.[2228]

Most Australian jurisdictions set out these juvenile justice principles in their legislation. For example, in Queensland:

> If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.[2229]

Typically, diversion is used for less serious offences, and it is not available in most jurisdictions for serious indictable offences, including serious sexual offences.

One of the main methods used to divert young people away from formal court proceedings is police cautioning. Cautioning may be informal or formal and may be regulated by legislation or administrative guidelines. Typically, a formal caution involves the young person admitting the conduct and then the police order giving the young offender a warning at the police station in the presence of a family member.[2230] Typically, cautioning is only available for minor offences at the discretion of the police officer, with few exceptions.[2231]

Conferencing is generally available in all states and territories for juvenile offending, although it may not be available for sexual offences by juveniles. Warner and Bartels state that:

> In NSW and Western Australia, most sexual offences cannot be referred to a conference. In some other jurisdictions, by contrast, it is theoretically possible for serious sexual offences to be referred. For example, in Tasmania, the police can refer rape or aggravated sexual assault

to a conference if the alleged offender is under the age of 14, and indecent assault and sexual intercourse with a young person can be referred to a conference in all cases. However, in practice, it is unusual for sex offences cases to be referred for conferencing. In fact, South Australia appears to be the only Australian jurisdiction to routinely refer juveniles charged with sexual offences to a conference.[2232]

In South Australia, under the *Young Offenders Act 1993* (SA), if a youth admits the commission of a 'minor offence', the police officer may refer the matter for a family conference to be convened. Referrals may also be made by the Youth Court. Under s 4, an offence is defined to be a 'minor offence' if, in the opinion of the police officer in charge of the investigation, it should be dealt with as a minor offence because of:

- the limited extent of the harm caused through the commission of the offence
- the character and antecedents of the alleged offender
- the improbability of the youth reoffending
- where relevant – the attitude of the youth's parents or guardians.

Under s 11, a family conference will include:

- the Youth Justice Co-ordinator as chair
- the youth and their legal representative, if they have one
- a representative of the Commissioner of Police
- any persons who were invited and who attend the conference.

Under s 10, the youth justice coordinator will invite to the conference:

- the youth's guardians and any other relatives nominated by the police
- any other person who has a close association with the youth who the police nominate
- the victim of the offence and, if the victim is a youth, the victim's guardians.

The victim is also invited to bring along a person of their choice to provide assistance and support.

Under s 12, a family conference has a number of powers, including to:

- administer a formal caution
- require the youth to undertake to apologise and/or pay compensation to the victim
- require the youth to undertake to carry out community service.

Section 11 provides that, if possible, a family conference should act by consensus and that a decision by a family conference is not to be regarded as validly made unless the youth and the representative of the Commission of Police concur in the decision.

According to the Courts Administration Authority of South Australia, the statutory guidelines and philosophy of family conferences in South Australia are as follows:

> In exercising its powers, the family conference is bound by the object of the Young Offenders Act to secure for youths who offend against the criminal law the care, correction and guidance necessary for their development into useful members of the community and the proper realisation of their potential. The conference is also required to balance the issues of the youth being made aware of their legal obligations, with outcomes being sufficiently deterrent and the community being protected.
>
> The Young Offenders Act requires a particular commitment to preserving and strengthening family relationships, not unnecessarily interrupting the youth's education and employment, and not impairing a youth's sense of racial, ethnic or cultural identity.
>
> The aims of a family conference are to:
>
> - divert young offenders from the court system
> - make young offenders aware of the consequences of their behaviour
> - make young offenders accept responsibility for their behaviour
> - provide victims with the opportunity to participate actively in the process of seeking reparation
> - arrange compensation, where appropriate, for material damage
> - involve the family and close friends of the young person in the process of dealing with the consequences of their behaviour
> - allow all participants to deal with the issues surrounding the offence at all levels including the legal and emotional issues
> - to set the scene for future restoration of trust between the young offender, people close to him or her, and others affected by the offence.[2233]

15.6 Sentencing of juveniles

15.6.1 Principles of sentencing

We discussed the purposes and principles of sentencing generally in section 12.3.

While these purposes and principles are relevant to sentencing for both adult and child offenders, certain elements are given greater or lesser weight in sentencing juveniles.

Historically under the common law, the rehabilitation of a young offender was given more weight than considerations such as punishment and general deterrence.[2234] However, the circumstances of a case, such as the seriousness of the offence or the adult-like behaviour of the child,[2235] could operate to bring the balance of these principles closer to their application to adult offenders.

Article 40(1) of the United Nations *Convention on the Rights of the Child* (CROC) requires parties to recognise the right of every child who is accused or convicted of a criminal offence to be treated in a manner consistent with 'the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

Rehabilitation of the offender is the central focus of juvenile sentencing provisions in Australia. Some jurisdictions establish this principle in legislation. For example, in the Australian Capital Territory, s 133C(1) of the *Crimes (Sentencing) Act 2005* (ACT) states:

> in sentencing a young offender, a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes ...[2236]

In New South Wales, s 6(f) of the *Children (Criminal Proceedings) Act 1987* (NSW) states that a person exercising functions under the Act is to exercise those functions having regard to the principle that 'it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties'.[2237]

In Western Australia, the principles set out in s 7 of the *Young Offenders Act 1994* (WA) include the following principles relevant to sentencing or detention (in addition to principles discussed in relation to prosecution in section 15.5.1):

- Detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary.
- Detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner.
- Punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

The different purpose and emphasis in sentencing juveniles is reflected in the different options that are available to courts when sentencing juvenile offenders.

Article 37(b) of the CROC states that 'the detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

There are a number of policy considerations underlying this requirement, including the view that incarceration increases the chances of recidivism – and reduces the prospects of rehabilitation – by placing juvenile offenders who may have committed less serious offences in an environment with more serious offenders. Detention is also regarded as being more stressful for children than adults, due to their greater vulnerability to both physical and emotional harm, and can have serious social and developmental consequences.[2238]

Legislation in each state and territory provides that detention is to be viewed as a measure of last resort when sentencing a juvenile offender.[2239]

15.6.2 Sentencing options

Non-custodial sentencing options

As discussed in section 12.4, there are a number of non-custodial sentencing options available to courts. These options are generally available for juvenile offenders as well as for adult offenders.

However, there may be restrictions on the extent of some of these options when sentencing a juvenile offender. For example, in New South Wales adult offenders can be sentenced to perform a maximum of 500 hours of community service,[2240] while the maximum number of hours for juvenile offenders ranges from 100 to 250 hours depending on the age of the offender and the seriousness of the offence.[2241] Similar restrictions on community service hours apply in other jurisdictions.

Similarly, in all jurisdictions except Queensland and the Northern Territory there is a limit on the maximum fine that can be imposed on a juvenile offender,[2242] and all jurisdictions require courts to consider the child's financial circumstances before imposing a fine.[2243]

In addition, some jurisdictions have additional sentencing options that can only be imposed against juvenile offenders.

We discussed cautions and conferences as alternatives to prosecution to divert young offenders from the criminal justice system in section 15.5.2.

In some jurisdictions, courts may also use conferences as an alternative to sentencing or as a quasi-sentencing option. For example, in Tasmania, after the guilt of a young offender has been established through a successful prosecution, it is open to the court to order the offender to attend a community conference rather than proceeding to sentence.[2244] The effect of a successfully completed community conference, including the offender completing all undertakings, is a dismissal of the charge. If the conference is unsuccessful then the matter will return to court for sentencing.[2245]

Probably the most important non-custodial sentencing option for juvenile offenders sentenced for sexual offences is community service and supervision orders. In 2011–12, community service / supervision orders were the most commonly imposed form of sentence for juvenile sex offenders, accounting for 43.9 per cent of sentences imposed for sex offences, compared with 28.3 per cent of sentences for all offences.[2246] The Australian Bureau of Statistics has not published comparable data for more recent periods.

Community service and supervision orders are regarded as the most onerous sentencing option after a detention (or custodial) order. Their comparatively high rate of use in relation to sexual offences suggests that juvenile sexual offending is treated more seriously than many other offences committed by juveniles.

Sanctions that are commonly imposed on both adult and young offenders, such as good behaviour bonds, probation, and community service, are all examples of community service and supervision

orders. In some jurisdictions there are also community-based supervision orders that can only be imposed on juvenile offenders. The focus on rehabilitation in sentencing juvenile offenders is most apparent in these orders, which combine the punitive effect of restrictions on liberty with elements focused on rehabilitation, such as attendance at specified programs.

These orders provide courts with alternatives to detention that may offer significant benefits for juvenile offenders in terms of their reintegration into society.[2247]

Examples of community-based supervision orders are the Youth Supervision Order (YSO) and Youth Attendance Order (YAO) in Victoria. In Victoria, after a finding of guilt, the court may release a young offender, with or without conviction, on a YSO.

Under a YSO, offenders must:

- report to a youth justice unit (for up to six hours per week)
- not reoffend
- not leave Victoria without written permission from a youth justice worker
- report changes such as change of address, school or employment
- participate in community service or other programs if so directed.[2248]

If an offender breaches a YSO, the court may vary, add, or substitute conditions, direct compliance with the order, or replace the order with any sentence the court thinks fit.[2249]

For more serious juvenile offenders, the court may impose a YAO. A YAO is a direct alternative to detention. It may be ordered against convicted offenders who are over the age of 15 and who would otherwise be sentenced to detention as a result of the gravity or habitual nature of their offending.[2250] The legislation specifies that the objects of a YAO are to provide the person with activities and requirements which:

- take into account the gravity of the person's behaviour
- penalise the person by imposing restrictions on liberty
- require the person to make amends for the offence through community service
- provide opportunities for rehabilitation.[2251]

Mandatory conditions under a YAO are comparable to those under a YSO but include more onerous attendance requirements: the person must attend at a youth justice unit for a period not exceeding 52 weeks, for no more than three attendances totalling 10 hours each week, of which no more than four hours can be spent on community service.[2252]

Breach of a YAO can result in the court imposing additional conditions on the YAO or revoking the YAO and replacing it with any sentence the court thinks just.[2253] Given that the YAO is the most serious non-custodial sentencing option, the most likely outcome where a court revokes a YAO is an order for detention.

Another two examples of community-based supervision orders are the Youth Community-Based Order (YCBO) and Intensive Youth Supervision Order (IYSO) in Western Australia. In Western Australia, a court may impose a YCBO on a young offender, under which the offender is required to attend education or rehabilitation courses, perform community service work and report for supervision not more than once per week.[2254]

For more serious juvenile offenders, the court may impose an IYSO. There are two key differences between an IYSO and a YCBO. First, offenders may be required to report for supervision more frequently under an IYSO. Secondly, an IYSO can be made in conjunction with a custodial sentence, effectively serving as a form of suspended sentence.

Where an IYSO is made alongside a custodial sentence, it becomes known as a Conditional Release Order (CRO). If an offender successfully completes the CRO, the offender is not liable to serve the sentence of detention unless proceedings are commenced for another offence within six months after the end of the CRO and the proceedings result in a finding of guilt.[2255]

Custodial sentencing options

In all Australian jurisdictions it is open to the courts to sentence juvenile offenders to a period of detention in a juvenile correctional facility.

While detention is used as a measure of last resort in most Australian jurisdictions, custodial sentences are imposed on juvenile offenders when no other sentencing option is considered appropriate.

Apparently reflecting the seriousness with which sexual offences are viewed by society, a custodial sentence is more likely to be imposed for juvenile sexual offenders than for juvenile offenders generally. In 2011–12, 15.7 per cent of juvenile sexual offenders were sentenced to custody in a detention centre compared with 6.1 per cent of juvenile offenders in general.

In some jurisdictions, as an alternative to full-time custody in a correctional facility, courts may have the option of sentencing a young offender to forms of detention such as custody in the community[2256] and periodic detention.[2257] In 2011–12, 5.9 per cent of juvenile sexual offenders were sentenced to custody in the community compared with 1.9 per cent of juvenile offenders generally.[2258]

Juvenile offenders may be sentenced to detention in different facilities depending on their age. In some jurisdictions, juveniles may be ordered to serve their detention in an adult correctional facility.

Juvenile detention

In general, young offenders under 18 are detained in separate facilities to adult detainees, although there are variations across jurisdictions.

For example, in New South Wales, a court may order that a person under the age of 21 who has been sentenced to a term of imprisonment serve the sentence as a juvenile offender.[2259] In Victoria, children between the ages of 10 and 14 may be sentenced to be detained at a youth residential centre, while offenders between the ages of 15 and 21 may be detained in a youth justice centre.[2260]

While community-based supervision may be considered to be more effective for rehabilitation purposes, there is also supposed to be a significant focus on rehabilitating young offenders who are sentenced to full-time detention.

Juvenile justice agencies in states and territories may provide case management services that are intended to enhance rehabilitation by having a caseworker provide individual attention to an offender. The stated aim of these services is to involve the child in decisions about suitable educational, vocational and recreational programs tailored to the needs of the child.[2261] Offence-specific rehabilitation programs, including those that target sexual offending, may be provided in detention centres.[2262]

The conditions in detention facilities are also of relevance to the rehabilitation of young offenders. The Australian Law Reform Commission has stated:

> The well-being and rehabilitation of young people in detention depend to a large extent on the living conditions, services and programs provided for them. Living conditions encompass the physical standard of buildings and other facilities, levels of hygiene, food and clothing, classification of detainees, contact with family and friends and privacy.[2263]

The *National standards for juvenile custodial facilities* (AJJA Standards) were developed by the Australasian Juvenile Justice Administrators group in 1999. They contain 46 broad standards which deal with areas such as safety, respect, privacy, health, recreation and leisure, and family and community contacts. Each standard is backed by reference to relevant United Nations rules, as well as sample indicators which might indicate whether a standard is being met.

Table 15.2 sets out examples of some of the standards and sample indicators.

Table 15.2: Examples of national standards for juvenile custodial facilities and sample indicators

Standard	Sample indicators
Abuse-free environment: The centre provides an environment in which young people, staff and others feel safe, secure and not threatened by any form of abuse or harassment.	• Young people, staff and visitors report that they are satisfied that the environment of the centre is free of physical, psychological and emotional abuse or harassment. • During sleeping hours there is regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories.
Regard to age and gender: The centre provides age-appropriate and gender-appropriate services in recognition of the differing needs of young people at different stages of development and the specific needs of young females.	• The centre interprets policies, follows procedures, delivers programs, and generally provides services with due regard to the age and gender of the young people in its care. • There is an appropriate policy or established method of responding to the needs of pregnant young females and young mothers. • There is an appropriate policy or established method of responding to the needs of transgender and other young people who do not fit traditional gender categories.
Clothing and grooming: Young people are provided with a sufficient quantity and reasonable choice of clean clothing in good condition, and their choices in matters of personal grooming are maximised.	• Observation of variety, cleanliness and condition of clothing. • Young people report satisfaction with clothing and grooming choices available to them. • Young people have regular access to a hairdresser. • Level of complaints relating to clothing and grooming.
Food and nutrition: Young people are provided with a variety of foods of satisfactory quality in sufficient quantities; meals are nutritious and meet special dietary needs; and their choice and preparation is influenced by young people's preferences.	• Policy, procedure and practices in relation to food preparation and nutrition are consistent and reflect the standard. • Food services comply with applicable sanitation and health codes. • Young people report satisfaction with the centre's food services. • Culturally- and age-appropriate diets are provided, and religious requirements are observed.

The AJJA Standards do not have any regulatory force and the operational aspects of juvenile detention facilities are regulated by state and territory legislation and policy.

In some jurisdiction, the AJJA Standards may be considered by independent inspectors of juvenile detention facilities. For example, Inspectors of Custodial Services in New South Wales and Western Australia, or Official Visitors working on their behalf, may provide post-inspection reports to the relevant Minister about a facility's performance in accordance with the AJJA Standards.[2264]

Adult detention

Article 37(c) of CROC states that every child deprived of liberty 'shall be separated from adults unless it is considered in the child's best interest not to do so'.

Typically, juvenile offenders sentenced to a period of detention will be detained in separate facilities to adult offenders. However, juvenile offenders may be detained in adult prisons in certain situations.

Depending on the state or territory, the jurisdiction of the Children's Court may not extend to certain serious offences, requiring the matter to be tried in a higher court. For example, while Children's Courts in Australia have a broad jurisdiction over sexual offences, in New South Wales the most serious sexual offences, such as aggravated sexual assault, are outside the jurisdiction of the Children's Court and must be tried in a higher court. When that court determines a sentence in such a situation, they are required to deal with the person according to law – that is, as if the offender were an adult offender.[2265] In such cases any custodial sentence the court imposes will be served in an adult prison rather than a juvenile detention centre.

Similarly, legislation governing the jurisdiction of a Children's Court may specify that the Children's Court can refer proceedings for an indictable offence to be dealt with in a higher court where, on the prosecution evidence, the court is not satisfied that the charge can be disposed of appropriately within the Children's Court's jurisdiction.[2266] In determining a sentence in that situation, legislation may give the higher court the option of dealing with the offender according to law or using the sentencing options that are available to Children's Courts, having regard to factors such as the nature and seriousness of the offence, the age and maturity of the offender and the offender's criminal history.[2267]

In addition to situations where a court sentences a juvenile to serve a custodial sentence in an adult prison, in some jurisdictions the legislation may permit detainees under the age of 18 to be transferred to adult prisons in certain circumstances. For example, in Victoria the Youth Parole Board may transfer a detainee aged 16 or older to an adult prison where the person has engaged in conduct that threatens the good order and safe operation of the youth justice centre and cannot be properly controlled in a youth justice centre.[2268]

Finally, young offenders may be detained in adult prisons due to practical considerations. For example, while Western Australia has the single largest juvenile detention facility in Australia – Banksia Hill – it is also the only juvenile detention facility in Western Australia. If it is full, young offenders and young people on remand may be detained in adult prisons.

In some cases, there may be some practical benefits for the young offender if they are detained in an adult prison. Particularly in regional areas, if there is no juvenile detention facility, a juvenile offender may be able to maintain more family and community contact if they are detained in an adult prison closer to their family and community.[2269]

15.7 Risk management issues

Risk management issues may arise for child sexual offenders at the end of their sentence. As discussed in section 14.4, ongoing consequences of conviction for a child sexual abuse offender

include placement on a sex offender registry with corresponding reporting obligations and an inability to work in child-related employment.

15.7.1 Child sex offender registries

In some jurisdictions, the registration of a child sexual abuse offender involves the exercise of judicial discretion, especially when dealing with a juvenile offender. In other jurisdictions, registration for juveniles is mandatory upon conviction for a registrable offence, but there are provisions which exclude registration for offences involving a low level of criminality. Only one jurisdiction – Western Australia – has mandatory registration for juvenile offenders.

In Victoria, South Australia and the Northern Territory, the registration of a juvenile offender requires the exercise of judicial discretion. That is, a juvenile offender will only be registered if the court is satisfied that the registration is necessary.

For example, in Victoria, a person is not a registrable offender merely because they committed a registrable offence as a child.[2270] In order for a juvenile offender to be registered, the court must make a sex offender registration order upon being satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons in the community.[2271] Similar provisions exist in South Australia and the Northern Territory, although the courts in those jurisdictions need not be satisfied beyond reasonable doubt that registration is warranted.[2272]

In Tasmania, no exceptions are made for juvenile offenders. However, the court has the discretion in all matters not to make a registration order if satisfied that the person does not pose a risk of committing a reportable offence in the future.[2273]

In addition to judicial discretion, some jurisdictions have sentencing thresholds which apply before sex offender registration provisions are enlivened. In New South Wales, Queensland, the Australian Capital Territory and the Northern Territory, there is no mandatory registration where the offender is sentenced to certain non-conviction orders.[2274] In Queensland, South Australia and the Australian Capital Territory, there is also no mandatory registration where a person is sentenced for a single offence and the sentence does not include a term of imprisonment or supervision, although in South Australia and the Australian Capital Territory this exception only applies to certain offences.[2275]

New South Wales, Queensland, Western Australia and the Australian Capital Territory have some form of mandatory registration for juvenile offenders. However, each jurisdiction also has a limited exception to registration requirements for juveniles convicted of a single prescribed offence of a minor nature. In Western Australia the exception is limited to offences involving child pornography.[2276] In New South Wales, Queensland and the Australian Capital Territory, the exception applies to offences involving indecency as well as child pornography offences.[2277]

In 2012, the Law Reform Commission of Western Australia (WALRC) reviewed the *Community Protection (Offender Reporting) Act 2004* (WA). The review focused on the Act's application to juvenile offenders and to adult offenders who commit offences in exceptional circumstances, such as consensual sexual activity with the honest and reasonable belief that the person was over the age of consent at the time of the offence.

The WALRC recommended that the Act be amended to introduce judicial discretion of the kind that exists in Victoria, South Australia and the Northern Territory so that a juvenile offender would only be required to register if the court is satisfied that the offender poses a sexual safety risk to the community. The WALRC stated that the failure of the Western Australian legislation to differentiate between juvenile and adult offenders was of concern given that, in general, the criminal justice system treats juvenile offenders and adult offenders differently.[2278] The WALRC also stated that the stigma of being registered as a sex offender may undermine the rehabilitation of a juvenile offender.[2279]

15.7.2 Working with Children Check schemes

As discussed in sections 14.2.3 and 14.4.3, we made recommendations about WWCC schemes in our *Working with Children Checks report*.[2280]

In our *Working with Children Checks report*, we recommended that the complete and unabridged criminal history of applicants, including offences committed as juveniles, should be available for review by screening agencies.[2281] We noted that no state or territory laws exclude juvenile records from being checked, but these types of records are not expressly included in all jurisdictions' statutory definitions of criminal history.[2282]

In recommendation 17, we recommended as follows:

> State and territory governments should amend their WWCC laws to include a standard definition of criminal history, for WWCC purposes, comprised of:
>
> a. convictions, whether or not spent
>
> b. findings of guilt that did not result in a conviction being recorded
>
> c. charges, regardless of status or outcome, including:
>
> i. pending charges – that is, charges laid but not finalised
>
> ii. charges disposed of by a court, or otherwise, other than by way of conviction (for example, withdrawn, set aside or dismissed)
>
> iii. charges that led to acquittals or convictions that were quashed or otherwise over-turned on appeal
>
> for all offences, *irrespective of whether or not they concern the person's history as an adult or a child* and/or relate to offences outside Australia.[2283] [Emphasis added.]

Some jurisdictions require an automatic refusal of a WWCC clearance if the applicant has certain serious offences in their criminal history. Generally, convictions for these offences as a juvenile do not result in automatic refusal but are considered as part of a risk assessment process. We did not recommend changing this approach. However, we recommended that states and territories ensure that juvenile records for the automatic refusal categories are specified as relevant criminal records so that they will be considered in a risk assessment.[2284]

We welcome submissions that discuss the issues raised in Chapter 15.

We also welcome submissions that identify any additional issues in relation to juvenile child sexual abuse offenders – apart from the issue of treatment, which we are considering separately – that we should consider that are not raised in Chapter 15.

Appendix A: Glossary

Term	Definition
accused	a person charged with committing a criminal offence or offences in a higher court. Other words for accused are 'defendant' and 'alleged offender'
acquittal	when a magistrate, jury or appeal court find that a person is not guilty of an offence
adjournment	when a trial or legal proceedings are put off until a later time
admissible evidence	evidence that is allowed to be given in court and taken into account in the proceedings. Not all evidence is admissible
appeal	to take a case to a higher court to challenge a decision on the grounds that there has been an error. The person who appeals is the appellant. Not all decisions can be appealed
Appeals Study	a part of the Delayed Reporting Research which analyses grounds of appeal and appeal outcomes in child sexual abuse cases in the New South Wales Court of Criminal Appeal. The study is published on the Royal Commission's website
blind reporting	reporting to police information about an allegation of child sexual abuse without providing the alleged victim's name or other identifying details
brief of evidence	a collection of statements from witnesses and other evidence that is given to the Director of Public Prosecutions by the police or investigating agency after they have finished their investigation. The Director of Public Prosecutions uses the material contained within the brief of evidence to decide whether a prosecution should take place and, if so, to prosecute the accused
case management	monitoring of cases by the court to finalise matters efficiently and ensure court time is used to maximum effect
charge	the formal accusation by the Crown that a person has committed a specific crime. Charges are what are prosecuted at trial
charge negotiation	discussions between the defence and the prosecution about the appropriate charge in the circumstances. For example, an accused may agree to admit to a crime (sometimes lesser than the original charge)
child	human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier
child sexual abuse	any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other

	object, fondling of breasts, voyeurism, exhibitionism and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child
child sexual abuse in an institutional context	abuse that, for example: • happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution • is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased or in any way contributed to (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk • happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children
child sexual assault	physical assault of a sexual nature on a child. Most but not all child sexual abuse constitutes an offence. Sometimes child sexual assault is used for offences involving penetration, and indecent assault is used for offences involving assault but not penetration
coincidence evidence	evidence that relies on the improbability or implausibility of two or more events occurring coincidentally to prove that a person did a particular act or had a particular state of mind. This is discussed in section 10.2.1
committal hearing	a hearing of all the evidence supporting the charge in the lower court by a magistrate who then decides if there is enough evidence for the case to go to trial. In some cases witnesses may be required to give evidence at a committal hearing
common law	law developed by judges through decisions in individual cases
complainant	a person who alleges a crime has been committed against them. 'Complainant' is used in this consultation paper to describe a person who is a victim and gives evidence in proceedings in relation to particular charges relating to them
Complainants' Evidence Research	a research project by Professor Martine Powell, Dr Nina Westera and Professor Jane Goodman-Delahunty, commissioned by the Royal Commission, on how evidence is elicited from complainants of child sexual abuse. The study is published on the Royal Commission's website

conviction	when a person accused of committing a criminal offence is found guilty of that offence, and a record of their guilt is recorded on their criminal history
counsel	a barrister acting for the defence or the prosecution
County Court (Victoria)	a trial court of intermediate jurisdiction between the Magistrates' Court and the Supreme Court in Victoria. In some states and territories the equivalent court is the District Court
criminal history	a record of offences of which a person has been convicted
criminal justice system	we use this term to include the process from initial reporting to police to the investigation, charge, prosecution, sentencing, possible appeal, and administration of a sentence
criminal proceeding	this term includes any formal proceedings that relate to a criminal charge, including the laying of the charge, and any mentions or hearings at court to determine the outcome of the charge
criminogenic	likely to cause or produce criminal behaviour or may contribute to offending indirectly
cross-examination	when a witness for one party (for example, the prosecution) is asked questions in court by a lawyer for the other party (for example, the defence). Cross-examination follows the giving of evidence in chief
Crown prosecutor	for matters on indictment before judge and jury, the prosecutor is usually a Crown prosecutor or a person representing the Director of Public Prosecutions. 'The Crown' refers to representing the Queen in right of the Commonwealth
defence	the accused person's case and the lawyers, including defence counsel, who represent them
defendant	a person charged with a criminal offence. Another term for 'an accused'
Delayed Reporting Research	a research project by Professor Judy Cashmore, Dr Alan Taylor, Associate Professor Rita Shackel and Professor Patrick Parkinson AM, commissioned by the Royal Commission, on the impact of delayed reporting on the prosecution of child sexual abuse offences in New South Wales and South Australia. The study is published on the Royal Commission's website
deliberations	the process taken by a jury to decide whether the accused is guilty or not guilty
deterrence	discouraging people from committing a crime
Director of Public Prosecutions (DPP)	the executive officer with authority to prosecute criminal offences within each jurisdiction. The Director of Public Prosecutions' powers include commencing and terminating

	prosecutions, conducting trials and appealing against inadequate sentences
District Court	an intermediate court that operates in some jurisdictions. In hierarchy, it is below the Supreme Court but higher than Local Courts. In Victoria the equivalent court is the County Court
evidence	information provided to the court that is used to prove or disprove a fact in issue in court proceedings
evidence in chief (also referred to as examination in chief)	the questioning of a witness by the party who called that witness – for example, when the prosecution asks the complainant questions so that they can tell the court what happened. It also includes the playing of a prerecorded investigative interview, as discussed in sections 3.8 and 9.4.3
exhibits	evidence tendered during a public hearing
government	government of the Commonwealth or of a state or territory, including any non-government institution that undertakes, or has undertaken, activities on behalf of a government. Note that we use 'government' to refer to the Australian Government and state and territory governments in this consultation paper
grooming	the process of establishing or building a relationship with a child to facilitate sexual contact with that child. Grooming offences are discussed in section 5.4
guilty	to be legally responsible for a criminal offence. When a defendant enters a plea of guilty, he or she accepts responsibility for the offence
High Court	the highest court in the Australian judicial system
indictable offence	a serious criminal offence that is usually heard in a higher court before a judge and jury. Less serious indictable offences, known as summary offences, are usually heard in a Local Court
indictment	a formal written accusation charging a person with an offence that is to be tried in a higher court
institution	public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and: • includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families • does not include the family
intermediary	a specialist who assists in the communication between a victim or survivor (usually a child or person with disability) and police and/or legal professionals in court

Joint Investigation Response Team (JIRT)	a multidisciplinary response to child abuse, including child sexual abuse, in New South Wales. It brings together the NSW Police Force, Department of Family and Community Services and NSW Health
joint investigation specialist response	a unit where police and child protection officers are co-located to perform jointly the role of investigating sexual abuse or assault
joint trial	where two or more complainants who have allegedly been sexually abused by the same accused have the charges in relation to them heard at the same trial
judicial direction	a judge's instructions to the jury about relevant laws and other matters to guide their deliberations
judicial review	judges' review of administrative decisions. This is discussed in the context of Director of Public Prosecutions decisions in Chapter 7
jurisdiction	the Commonwealth, state and territory legal entities. Can also refer to the scope of the power of a court or administrative decision-maker or tribunal to examine and determine facts, interpret and apply the law, make orders and, in the case of a court, declare judgment
juror	a member of the jury. We use the term 'mock juror' when describing participants in the Jury Reasoning Research
jury	a group of people randomly selected from eligible citizens to decide whether an accused person in a criminal trial is either guilty or not guilty. A jury typically consists of 12 people in a criminal trial, although this number may be increased by court order. We use the term 'mock juries' when describing juries in the Jury Reasoning Research
Jury Reasoning Research	a research project by Professor Jane Goodman-Delahunty, Professor Annie Cossins and Ms Natalie Martschuk, commissioned by the Royal Commission, on how juries reason in joint and separate trials of institutional child sexual abuse. The study is published on the Royal Commission's website
juvenile	in this report we use this term to distinguish those who are accused of committing a child sexual abuse offence and who are under 18 years of age
Legal Aid Commission	government-funded organisations in each state which provide legal services to people who are socially or economically disadvantaged. It delivers legal services with the private legal profession through grants of legal aid
limitation period	imposes a maximum period from the date of the alleged offence during which a prosecution may be brought. After that time the offence lapses and it is too late to prosecute
Local Court	a lower court which deals with less serious (summary) matters and holds committal hearings for indictable matters. In other jurisdictions, the equivalent court is the Magistrates'

	Court. A magistrate sits on a Local Court / Magistrates Court without a jury
magistrate	a judicial officer appointed by the executive government to hear and determine civil and criminal matters arising in courts of summary jurisdiction
Magistrates' Court	a lower court which hears less serious matters. A magistrate sits on a lower court without a jury. See also Local Court
mention	where the case is heard in court for a brief time, usually to deal with a procedural matter, and is not the 'hearing' of the matter
multidisciplinary centre	Victorian units where police and at least one other agency are co-located to perform the primary role of providing a coordinated response to sexual abuse or assault. SOCITs provide the police component. The combination of agencies varies in each centre but may include child protection, counselling, medical and forensic, child interviewing, victim advocate and prosecution services
nolle prosequi (also known as 'no bill')	a decision by the Director of Public Prosecutions not to proceed with a charge or charges that have already been presented to the court on indictment. This may be due to reasons such as insufficient evidence. A prosecution is discontinued when the court is informed of this
not guilty	a plea made by an accused person to a criminal charge which then requires the prosecution to prove the person's guilt in court. A 'not guilty' verdict represents the jury's failure to be satisfied of the accused's guilt beyond reasonable doubt
Notice to Produce	requires a person to provide specified documents or items in their possession to the issuer of the notice
offender	a person who is found to have done something which is prohibited by law. Until this happens, a person may be called an alleged offender, defendant or accused or, by the police, a suspect or person of interest
Office of the Director of Public Prosecutions (ODPP) **also Office of Public Prosecutions (OPP)**	an independent prosecution service established by parliaments in each jurisdiction to prosecute alleged offences
official (of an institution)	includes: • any representative of the institution or a related entity • any member, officer, employee, associate, contractor or volunteer of the institution or a related entity • any person, or any member, officer, employee, associate, contractor or volunteer of a body or other entity who provides services to, or for, the institution or a related entity • any other person who you consider is, or should be treated as if the person were, an official of the institution

particulars	details of the alleged offence with which the alleged offender is charged, including dates, times and locations
perpetrator	a person who has sexually abused a child
plea bargaining/negotiation	see charge negotiation
police-only specialist unit	a unit where police officers are co-located to perform the primary role of investigating sexual abuse or assault
prerecorded interview	a recorded police investigative interview with a witness containing their evidence about an alleged child sexual abuse offence
prima facie case	a case which, on first appearance, contains sufficient evidence to prove the elements of the offence
private session	a confidential meeting where victims, survivors and their families can meet with a Commissioner from the Royal Commission to tell their story of institutional child sexual abuse
propensity evidence	common law name for tendency evidence. This is discussed in section 10.2.1
prosecution	the proceedings by which a person is brought to trial for a criminal offence. It may also refer to the person representing the Director of Public Prosecutions and conducting a criminal case before the court
prosecutor	the person who conducts criminal proceedings on behalf of the prosecution. For matters on indictment before judge and jury, the prosecutor is usually a Crown prosecutor or a person representing the Director of Public Prosecutions
public defender	appointed barristers who appear in serious criminal matters for clients who have been granted legal aid
reasonable prospects of conviction	a test applied by the Director of Public Prosecutions to determine whether a prosecution is justified. For example, if there is no reasonable prospect of a conviction even though there may be a prima facie case, the prosecution should not proceed. There is also a public interest test
recidivism	habitual or repeated offending after conviction
re-examination	further questioning of a witness by the party who first called the witness, after the witness has been cross-examined by the other party. The purpose of re-examination is to allow the witness to explain matters that arose in cross-examination to remove ambiguities that may otherwise distort the witness's account
repealed	legislation that is no longer in force
reportable conduct	a scheme that requires reporting of allegations of conduct to a government body for investigation. New South Wales has a reportable conduct scheme which requires designated government and non-government agencies to notify the Ombudsman of allegations of 'reportable conduct'. This includes sexual offences or sexual misconduct, with or in the

	presence of a child, against employees of the agency, including volunteers engaged by the agency to provide services to children. Other jurisdictions are introducing reportable conduct schemes
restorative justice	alternative approaches to address harm which generally involve an offender admitting that they caused the harm, engaging in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour
retrial	a new trial of the same charges – for example, following a successful conviction appeal or after a jury is hung or discharged
sentence	the penalty imposed by a court after a person has been found guilty of, or has pleaded guilty to, a criminal offence
Sentencing Data Study	a research project by Dr Karen Gelb, commissioned by the Royal Commission, which expands on the sentencing database created for the Sentencing Research and provides a more detailed analysis of the interactions of the factors collected in the database. The study is published on the Royal Commission's website
Sentencing Research	a research project by Emeritus Professor Arie Freiberg, Mr Hugh Donnelly and Dr Karen Gelb, commissioned by the Royal Commission, on a number of sentencing and post-sentencing issues with a focus on institutional child sexual abuse. The study is published on the Royal Commission's website
Sexual Offences and Child Abuse Investigation Teams (SOCITs)	Victoria's specialist police response organised around child abuse and child sexual abuse. In addition to responding to adult and child sexual offences, SOCITs also respond to other forms of child abuse. They provide the police component of multidisciplinary centres. They are further discussed in Chapter 3
similar fact evidence	common law name for coincidence evidence. This is discussed in section 10.2.1
summary offence	a less serious criminal offence that may be dealt with by a lower court
summons	order by a court requiring a person to appear at court or produce documents
Supreme Court	the court with highest authority in each Australian state and territory. It generally includes a Court of Appeal. It hears appeals from intermediate courts and the most serious offences at first instance
survivor	someone who has suffered child sexual abuse in an institutional context. In this consultation paper, we use both 'survivor' and 'victim'. We generally use 'survivor' to refer to those who are now adults who suffered child sexual abuse in an institutional context. We use 'victim' particularly where it

	is used in relevant legislation (victim impact statements) or Director of Public Prosecutions guidelines, or where a person makes a report of abuse relatively quickly, as a child. We acknowledge that some people prefer the term 'victim' to the term 'survivor' and others prefer 'survivor' to 'victim'
tendency evidence	evidence relating to a person's character, reputation, or conduct that is used to prove that someone has a tendency to act or think in a particular way. This is discussed in section 10.2.1
transcript	a written record of proceedings
trial	a procedure where an issue of fact or law is determined before a judge, either alone or with a jury, according to the applicable law
trial advocate	legal representative (usually a barrister) at trial. It is a specific position title in the New South Wales Office of the Director of Public Prosecutions, junior to a Crown prosecutor
Uniform Evidence Act	uniform evidence legislation based on an initial report by the Australian Law Reform Commission in 1987, and a further report by the Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission in 2006
Uniform Evidence Act jurisdictions	jurisdictions that have enacted the Uniform Evidence Act (sometimes with jurisdiction-specific additions or amendments). Currently, the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory are Uniform Evidence Act jurisdictions
victim	someone who has suffered child sexual abuse in an institutional context. See also the definition of 'survivor'
victim impact statement	a statement read or presented before the sentencing of an offender which informs the court about the harm suffered by the victim or survivor arising from the offence
voir dire	a separate hearing on evidence or a particular legal issue, often to determine preliminary issues before trial, which takes place in the absence of the jury
vulnerable or special witness	witnesses who require special protections when giving evidence at court regarding child sexual abuse. This is further discussed in Chapter 9
witness	a person who appears and gives evidence at a hearing
Witness Assistance Service (WAS)	a service available in states and territories to assist victims of crime and vulnerable prosecution witnesses
Working with Children Check (WWCC)	pre-employment screening for child-related work. These checks are available in each state and territory. They prevent people from working or volunteering with children if records indicate that they may pose an unacceptable level of risk to children

Appendix B: Victoria Police information

Reporting sexual assault to police

VICTORIA POLICE

Contents

Authorised and published by
Victoria Police Victoria Police Centre,
637 Flinders Street, Docklands, VIC, 3008
www.police.vic.gov.au
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Reporting sexual assault to police

Reporting sexual assault to police is a significant step. This document explains the investigation process and the options that are available to help you consider your decision.

We understand it can be difficult to report your experience to us. Making the decision to report sexual assault is an important personal choice. In reaching that decision, you may wish to seek advice and guidance from others.

Telling us about your experience does not mean that we will always commence an investigation. The decision as to whether or not to conduct a formal investigation will be discussed with you and the circumstances of your particular assault will always be taken into account. It may be that police conduct a formal investigation or we may take and record your information and take no further action.

Regardless of the investigation decision, **telling us about your sexual assault is important.** When considering your options we encourage you to read this document together with speaking to one of our specialist detectives from a Sexual Offences and Child Abuse Investigation Team (SOCIT) who will assist with any questions or concerns.

What is sexual assault?

Sexual assault happens when someone does not consent to a sexual act or acts. In some cases, such as offences against children, consent is not an issue. Sexual assault can refer to a broad range of sexual behaviours that make a victim feel uncomfortable, frightened or threatened. This includes rape, sexual touching and child sexual abuse.

It is important that you do not worry about whether the sexual assault you have experienced is a criminal offence or not. It is our job to work that out. If you are concerned about something that has happened to you, we encourage you to come and speak with us. You need not worry about your actions or choices, or that you will not be taken seriously. Our investigators are trained to understand these complicated stories. We will listen without judgment. Any form of sexual assault is serious and everyone is entitled to protection under the law.

What happens when I report sexual assault to police?

Your wellbeing and the safety of the community is our first priority. We will consider your immediate medical needs and take steps to ensure you are safe. We will offer you counselling and advocacy support from a Centre Against Sexual Assault (CASA) and if your sexual assault has occurred recently, accompany you to a Crisis Care Unit where you will be supported by a CASA counsellor.

After your immediate medical and safety needs have been addressed, we will carefully explain the information contained within this pamphlet about your reporting options and the investigation process and discuss any concerns you may have.

What if the assault happened a long time ago?

It is never too late to report sexual assault. Delays in reporting sexual assault to police are not uncommon. Our detectives often investigate assaults reported weeks, months and even years after an assault has occurred. You are encouraged to report it regardless of when the incident occurred.

Why is telling the police about my sexual assault important?

Even if a decision is made to not conduct an investigation, there are a number of reasons why telling us about your sexual assault is important.

The information you provide helps us to:

- Assess your safety and assist you to remain safe
- Assess and ensure the safety of others
- Help solve previous sexual assaults that have been reported or are later reported
- Identify serial sexual perpetrators
- Prevent future sexual assaults and protect victims
- Learn more about sexual assault in the community
- Refer and link you to victims of crime and support agencies that will provide you with specialist ongoing assistance.

What is the process if there is a police investigation?

The primary role of Victoria Police is to investigate offences and apprehend offenders. Sexual assault investigations are conducted by specialised detectives trained in the investigation of sexual assault. Your investigation will be handled by a primary investigator who will be your main point of contact.

During the investigation we will keep you informed of the progress and ensure your questions and concerns are answered promptly. You may request to receive progress reports in writing, by phone, email or in person.

The investigation process is made up of a number of stages. The initial stage involves the collection and examination of all the available evidence. Evidence includes anything that may assist in the investigation and may later be produced at court.

Medical examination

Depending on the circumstances of your report and the time frame, you may be asked to undergo a forensic medical examination. In addition to addressing any immediate medical needs, this may also be for the purpose of collecting evidence. Forensic medical examinations are conducted by a trained medical professional called a Forensic Medical Officer (FMO) or a Forensic Nurse Examiner (FNE). Where a forensic medical examination is appropriate, we will arrange the consultation with the FMO/FNE.

During the forensic medical examination the FMO/FNE will assess and treat any immediate medical needs or arrange your referral to a specialist medical service. The FMO/FNE may discuss concerns relating to sexually transmitted infections (STIs) and pregnancy and will collect evidence for use in the investigation.

You may wish to have a support person present during the examination. This support person can be a counsellor, family member or friend, unless they are a witness to the assault.

Even if you are unsure about proceeding with a report, we encourage you to undergo a forensic medical examination in case you decide to proceed at a later time. Whether to undergo a forensic medical examination is your choice, however be mindful that any evidence that could be obtained to assist with the investigation may be lost with time.

For more information about forensic medical examinations, please visit the Victorian Institute of Forensic Medicine website at www.vifm.org/forensics/clinical-forensic-medicine

Recording your statement

An important aspect of the investigation is for us to take your statement. This will usually be done very early in the investigation. Statements will be taken in a private setting. A statement is a written document that records what you can recall about the incident in detail. It is important that statements include everything that happened. Even small details that you might not think are important may help us to investigate the incident.

We know it may not be easy for you to reveal certain facts, but it is important to disclose everything. Remember, we will listen without judgment.

It is very important you are given the time you need to make your statement. Making statements may require several hours and sometimes may even require several appointments. It is important you have sufficient time and feel comfortable when giving your statement.

If your sexual assault happened a long time ago, the thought of recalling events can be overwhelming. Our detectives are trained to assist you in this process.

If you are under 18 years of age or have a cognitive impairment your statement may be electronically recorded. No one gets a copy of this recording and they are securely stored by police. We will explain this form of statement in greater detail and answer your questions should this apply to you.

Evidence collection

In certain circumstances we may need to take photographs of any injuries and collect clothing or other items that may provide evidence relating to your experience. We may attend the scene of the assault, examine video surveillance, mobile phones, social media and/or inquire into any other matter that may assist with establishing all the facts. If the incident occurred several years ago we may need to review old records and documents.

Any items taken as evidence will only be kept for as long as necessary. At the completion of the investigation and/or court proceeding, we will discuss with you which items you would like returned to you or disposed of.

We will also take statements from people who may assist with information about the incident. Any person who makes a statement, including you as a victim, is referred to as a witness. Others may include those who may have witnessed the incident and those who can provide information around your incident. Sometimes victims are reluctant to have investigators speak to family or close friends as it may cause embarrassment or concern. While we understand you may find this difficult, it is important we are thorough. **We respect your privacy and will not disclose any unnecessary information when speaking to witnesses. If you are concerned or worried about anyone we might speak to, let us know and we will discuss these concerns.**

Interviewing the offender

When the suspect is known or has been identified, we will interview the suspect. Depending on the circumstances, the suspect might be kept in custody. On other occasions, the suspect will be released pending some further investigation. Your safety will be the first priority at every stage of the investigation.

At the conclusion of the investigation, all the evidence collected will be examined by a person who is specifically trained in making decisions about matters that may proceed to court. The decision is made after careful consideration and is based on the available evidence and the rules of law.

The court process and witness support

There are a number of support services available to you should your matter proceed to court. The Office of Public Prosecution's (OPP) Witness Assistance Service and the Child Witness Service are examples of these services. They offer support to victims and families of victims of serious crime throughout the court process. We work closely with the OPP and can make referrals to specialist support services if required. You may also wish to have a friend or family member (who is not a witness), assist you.

For more information on Victim and Witness Support, please visit the Witness Assistance Service website at www.opp.vic.gov.au/witnesses-and-victims.

Each stage in the court process will be explained to you. There are a number of different stages in a court hearing process before witnesses will be required to attend and give evidence. There are special arrangements for sexual assault victims/survivors designed to minimise trauma to victims of this crime. One of the things that may be available to reduce trauma is the remote witness facility. This is an area where the victim gives evidence via camera, which is transmitted into the Court to prevent the accused person coming face to face with the victim.

For more information about going to court, please visit the Department of Justice and Regulation website at www.victimsofcrime.vic.gov.au

What if the matter does not proceed to court?

Not all investigations proceed to court. This does not mean we don't believe you. It simply means we do not have a sufficient amount of evidence to meet the required level for criminal prosecution. If this occurs, you will be advised and the reasons will be explained to you. The evidence collected during the investigation will be securely stored.

It is still very important that you share your story with police and that we fully investigate your report. In some instances, further evidence regarding your report may become available at a later date. If this occurs, we may be able to review the investigation and consider prosecution.

What if I no longer want to continue?

It is the role of Victoria Police to encourage and support you through an investigation regardless of the circumstances. However, we understand there may be reasons for you to decide a police investigation is not the best option for you at the time. You may also choose to defer formal reporting for a period of time or may decide to have no further involvement with us.

Deciding to not proceed does not prohibit you from proceeding at a later date. However a delay in the investigation may result in the loss of some evidence. Regardless of your decision, your safety and welfare will still be addressed and we will refer you to other agencies that can offer you support.

In some circumstances, where there is a risk to community safety, we may still need to proceed with an investigation. Your safety and welfare will remain our priority.

Support and welfare information

All victims/survivors of sexual assault can access sexual assault support services. We will provide you with information regarding the centres and services offered to you at no cost. The services provided varies on the support you would like, but can include:

- Follow-up short, medium and longer term counselling and support
- Information and support during the investigation and court process
- Medical assistance and follow-up medical treatment
- Emergency housing
- Victims of Crime Assistance Tribunal applications
- Information and counselling for friends and family members.

Your Sexual Offences and Child Abuse Investigation Team (SOCIT) detective or Centre Against Sexual Assault (CASA) counsellor can assist you in obtaining the support and help you need.

For information about the services provided by CASA, please visit their website at: www.casa.org.au

Who else can I speak to?

If you would like further information about the investigation process you may speak to a SOCIT detective. You may also seek further information from the following agencies:

Centres Against Sexual Assault

T: 1800 806 292
www.casa.org.au

Centres Against Sexual Assault provide free counselling and support to women, children and men who are victims/survivors of sexual assault. To access your nearest CASA during business hours, ph. 1800 806 292.

After Hours Sexual Assault Crisis Line

T: 1800 806 292

The after-hours Sexual Assault Crisis Line (SACL) provides a state-wide crisis counselling and support service to all victims of sexual assault at any time in their lives and coordinates after-hours crisis care responses with CASA for recent victims/survivors of sexual assault. SACL operates between 5pm weeknights through to 9am the next day and throughout weekends and public holidays.

National Sexual Assault, Domestic Family Violence Counselling Service

T: 1800 737 732 (1800RESPECT)
www.1800RESPECT.org.au

The National Sexual Assault, Domestic Family Violence Counselling Service is a 24 hours a day, 7 days a week nation-wide telephone and online counselling service for victims/survivors of both past and recent sexual assault and/or domestic family violence. They offer an interpreting and sign language (Auslan) service.

Department of Justice and Regulation
Victims of Crime

T: 1800 819 817
www.victimsofcrime.vic.gov.au

The Department of Justice and Regulation provides free information and support 7 days a week between 8am and 11pm. They provide information and advice on reporting a crime and information about your rights, the court process and other services that can help you. They can also help you in applying for compensation and financial assistance.

Safe Steps
Family Violence Response Centre

T: 1800 015 188
www.safesteps.org.au

Safe Steps (formerly Women's Domestic Violence Crisis Service) is a state-wide service for women and children experiencing violence and abuse from a partner or ex-partner, another family member or someone close to them. They provide a comprehensive range of support services to enable women and children to become – and stay – free from violence. Women experiencing family violence can call 24 hours a day 7 days a week and speak confidentially to another woman for information on family violence support services, legal rights and accommodation options.

Women's Legal Service Victoria

T: 03 8622 0600 (Metro)
or 1800 133 302 (Country)
www.womenslegal.org.au

Women's Legal Service Victoria assists women experiencing disadvantage who are facing legal issues due to a relationship breakdown and violence. They can assist with issues such as protection from family violence and personal safety intervention orders, child custody and access, division of property after separation, separation and divorce and victim's of crime applications. Financial advice is also available to women experiencing problems with debt, financial hardship or accessing financial entitlements following a relationship breakdown.

NORTH-WEST METROPOLITAN

Diamond Creek (03) 9438 8320
Epping (03) 9409 8174
Fawkner (03) 9355 6100
Footscray (03) 8398 9860
Brimbank (03) 9313 3460
Melbourne (03) 8690 4056

SOUTHERN METROPOLITAN

Dandenong (MDC)* (03) 8769 2200
Frankston (MDC)* (03) 8770 1000
Moorabbin (03) 9556 6128

WESTERN VICTORIA

Ballarat (03) 5336 6055
Central Victoria (Bendigo) (03) 5448 1420
Colac (03) 5230 0044
Geelong (MDC)* (03) 5223 7200
Horsham (03) 5382 9241
Ararat (03) 5355 1500
Mildura (MDC)* (03) 5023 5980
Swan Hill (03) 5036 1600
Warrnambool (03) 5560 1333

EASTERN VICTORIA

Bairnsdale (03) 5150 2677
Benalla (03) 5760 0200
Box Hill (03) 8892 3292
Knox (03) 9881 7939
Central Gippsland (Morwell) (03) 5131 7014
Wonthaggi (03) 5671 4100
Sale (03) 5142 2200
Seymour (03) 5735 0208
Shepparton (03) 5820 5878
Wangaratta (03) 5723 0848
Wodonga (02) 6049 2673

***Multi-disciplinary Centre**

Investigator:

Contact your local Sexual Offences and Child Abuse Investigation Team (SOCIT)

Our Sexual Offences and Child Abuse Investigation Team (SOCIT) locations and phone numbers across Victoria are listed on the following page. The locations are divided into regions to make it easier for you to find your nearest unit.

Remember, in an emergency dial Triple Zero (000).

Appendix C: NSW Police Force *Standard Operating Procedures for Employment related child abuse allegations*

SOPS for Employment related child abuse allegations

Purpose[1]

To give guidance about responding to employment-related criminal child abuse allegations against employees of certain agencies providing services to children and young people.

Procedures:

As an agency is unable to conduct its own investigation until police have either rejected the matter or completed their investigation, it is important that the agency is kept informed of the police investigation and any action that can be undertaken by the agency while police are conducting their own investigation.

The following procedures outline in more detail some of the key issues to be addressed in responding to employment related child abuse allegations[2].

- In cases where the LAC decides that the matter should be referred to JIRT, the JIRT procedures should be followed and the employing agency notified within **48 hours** of the transfer and the contact details of the JIRT.
- If the matter was not referred to the LAC by the employing agency and the LAC is aware that the subject of the allegations is engaged in child related employment, then the LAC should notify the employer of the criminal allegations as soon as is practicable so they can take appropriate risk management action.
- In cases where the Police referral is made by any source other than Community Services, then the LAC should as soon as practicable confirm with the employing agency or other reporter whether the matter has been reported to Community Services (and in the case of an agency referral, if not, why not).
- The LAC is to make a decision to accept or reject the investigation as soon as practical and preferably within two business days, and advise the agency.
- If the matter will be investigated by police, the agency should be provided with:
    - the contact details of the investigating officer,
    - expected timeframes for updates,
    - advice as to whether the employee can be advised of the nature of the allegations,
    - advice as to whether the employee can be informed of the police investigation, and
    - any known information relating to the safety, welfare or well being of a particular child or children or young person/s if the investigating officer believes that the provision of the information would assist the agency to manage any risk to such persons that might arise in the agency's capacity as employer of the suspect..

[1] Full details of the legislative scheme, including definitions are at Appendix 1

[2] It should be recalled that in all interactions with children and young people their safety, welfare and wellbeing is of paramount concern to police

Prior to providing such advice, Police will usually need to discuss these issues with the employing agency, to assist both parties to reach a shared understanding as to how best to protect the investigative process, while at the same time enabling the employer to fulfill its statutory and other common law responsibilities.

- If the LAC is unable to make a decision about whether to proceed with an investigation within two business days, the employing agency is to be contacted by a police officer from the LAC as soon as practicable after the expiry of the second business day for the purpose of informing the employing agency when it is likely to make such a decision.
- When an investigation is discontinued prior to the laying of charges, the investigating officer or his or her nominee is to inform the employing agency within **48 hours** of the making of the decision to discontinue the investigation. The investigating officer or his or her nominee is to provide information relating to the safety, welfare or well being of a particular child or young person (or class thereof) if he or she reasonably believes that the provision of the information would assist the agency:

  (a) to make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or young person or class thereof.

  (b) manage any risk to of the child or young person or class thereof such persons that might arise in the employing agency's capacity as an employer..
- For all matters the subject of ongoing investigation and/or prosecution, Police should provide the agency with regular updates on the progress of the investigation or prosecution. Police and the employing agency should reach an agreement as to the frequency of these updates.

Appendix:

The Legislative Scheme

Part 3A of the *Ombudsman Act 1974* (the Act) relates to the Ombudsman's workplace child protection jurisdiction. The Ombudsman oversights designated and non-designated employers' handling of reportable allegations against their employees. Reportable allegations constitute sexual offences, sexual misconduct, assault, ill-treatment, neglect and behavior that causes psychological harm to children.

Designated employers include both government and non government agencies who are required to notify the Ombudsman of allegations arising in the course of their employee's work and non-work life.

Non-designated employers include all other government agencies (such as NSW Police Force) who are only required to report to the Ombudsman reportable allegations made about their employees that arise in the course of their employment with their agency.

Relevant section of Ombudsman Act 1974 No 68

Part 3A Child protection

25A Definitions

(1) In this Part:

child means a person under the age of 18 years.

designated government agency means any of the following:

(a) the Department of Education and Training (including a government school), the Department of Community Services, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice or the Department of Corrective Services,

(b) an area health service within the meaning of the *Health Services Act 1997*,

(c) any other public authority prescribed by the regulations for the purposes of this definition.

designated non-government agency means any of the following:

(a) a non-government school within the meaning of the *Education Act 1990*,

(b) a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (not being a department referred to in paragraph (a) of the definition of designated government agency in this subsection) or a licensed children's service within the meaning of that Act,

(c) an agency providing substitute residential care for children,

(d) any other body prescribed by the regulations for the purposes of this definition.

employee of an agency includes:

(a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and

(b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

head of an agency means the chief executive officer or other principal officer of the agency. The regulations may specify the person who is to be regarded as the head of a particular agency for the purposes of this definition.

investigation of a matter includes any preliminary or other inquiry into, or examination of, the matter.

reportable allegation means an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

reportable conduct means:

(a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or

(b) any assault, ill-treatment or neglect of a child, or

(c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child. Reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or

(b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or

(c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

Note. Examples of conduct that would not constitute *reportable conduct* include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract

attention or to restore order in the classroom; and conduct that is established to be accidental.

reportable allegation means an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

reportable conviction means a conviction (including a finding of guilt without the court proceeding to a conviction), in this State or elsewhere, of an offence involving reportable conduct.

(2) A reference in this Part to a designated government or non-government agency is a reference to a designated government agency or a designated non-government agency.

(3) A reference in this Part to a reportable allegation or a reportable conviction extends to any such allegation or conviction in respect of a matter occurring before the commencement of this Part.

Information Provision

New laws that relate to the exchange of information about children and young people commenced on **30 October 2009. Chapter 16A** of the *Children and Young Persons (Care and Protection) Act 1998* prioritises the safety, welfare and wellbeing of a child or young person over an individual's right to privacy.

Chapter 16A allows government agencies – including NSW Police - and non-government organizations (NGOs) who are "prescribed bodies" to exchange information that relates to a child's or young person's safety, welfare or wellbeing, whether or not the child or young person is known to Community Services, and whether or not the child or young person consents to the information exchange. Up until now, information exchange has generally only been possible where the information was sent to or received from Community Services.

Appendix D: JIRT Local Contact Point Protocol

JIRT

Local Contact Point Protocol

2014

A system for dealing with parental and community concerns when there are reports of child sexual abuse under investigation in an institutionalised setting

This protocol has been developed by:
NSW Family and Community Services, NSW Police Force,
NSW Kids and Families, NSW Health

NSW GOVERNMENT Family & Community Services Community Services

NSW Police Force

NSW GOVERNMENT Health

Contents

1. Introduction

1.1 Background

In January 2013, the Governor-General of the Commonwealth of Australia, appointed a six-member Royal Commission to investigate Institutional Responses to Child Sexual Abuse. During the hearing, the Royal Commission identified a need, in cases involving institutional settings where a class of children is at risk, to address the concerns of parents of children who have and have not made a disclosure of sexual abuse.

NSW Police Commander for the Child Abuse Squad; provided evidence to the Royal Commission about a proposed future protocol for dealing with communication issues between child protection agencies and parents and community members.

As a result, this new JIRT Local Contact Point Protocol 2014 (*JIRT LCP Protocol)* has been developed in alignment with existing policy and procedures governing Family and Community Services, NSW Police, NSW Health and the Department of Education and Communities.
This *JIRT LCP Protocol* system will include informing Local Area Command Police (LAC), the Child Protection Helpline, Principals of schools, the Department of Education and Communities (in its capacity as regulator of early childhood education and care) and other relevant parties of the existence of a Local Contact Point for information and advice[1]. This document outlines the criteria to activate the Local Contact Point, establishment processes, and operational functions, within which an identified service is provided to families via a local telephone support line.

1.2 Objectives

The objectives of the *JIRT Local Contact Point Protocol (JIRT LCP Protocol)* are to provide clear operational guidelines for staff[2] on:-

- What matters warrant enactment of the *JIRT LCP Protocol*
- When and how to establish a Local Contact Point
- Outline the function and role of the *JIRT LCP Protocol* in the provision of information and support to:
  - parents and concerned community members
  - broader community groups and relevant stakeholders

[1] Rustja transcript 912 line 43

[2] JIRT staff, Local CS Community Services staff, Helpline, health staff and relevant stakeholders

1.3 Links with existing joint policies

Joint planning and information exchange regarding the safety, welfare and wellbeing of a child or young person is fundamental to the successful delivery of the JIRT intervention. The process by which JIRT practitioners maximise their capacity to protect children and young people, bring alleged perpetrators to justice and enhance the child/young person's recovery is articulated in *JIRT Local Planning and Response (LPR[3]) Procedures*.

For each referral accepted for a JIRT intervention, LPR procedures require field staff from the three (3) agencies to jointly plan the intervention. This involves sharing relevant information, planning the victim interview, identifying and facilitating access to immediate forensic medical and/or treatment needs, determining any mandatory notification requirements, allocating responsibilities and time frames while managing immediate risks to the child/young person and support needs of their protective carers. The agencies reconvene post the field response to determine subsequent action, time frames and responsibilities.

The *JIRT LCP Protocol* for responding to a report/s of child sexual abuse involving institutional settings should be considered during the LPR process.

[3] Reviewed 2013

2. JIRT Local Contact Point Protocol

2.1 Criteria

JIRT Agencies will consider the need to implement the *JIRT LCP Protocol* where:

1. A report of child sexual abuse has been accepted by the JIRT Referral Unit;

And;

2. Initial investigation and assessment obtains sufficient evidence to indicate further children at risk or broader community concern;

And;

3. The alleged offender is over the age of 18 years and is working in a paid or a voluntary capacity for an Institution[4] providing services to children and young people

Or;

4. Senior Officers determine that implementation of the *JIRT LCP Protocol* is warranted.

2.2 Assessment

- Where it becomes known that a report meets the *JIRT LCP Protocol* criteria, the JIRT local management team[5] will brief their JIRT agency line managers[6] and provide their recommendation in writing *[see Resource 1 – Activation Request/Approval]* on activating the *JIRT LCP Protocol.*
- Respective JIRT agency line managers will jointly assess the recommendation in consultation with the local JIRT management team and will:
  i. Approve the recommendation in writing *[see Resource 1 – Activation Request/Approval]* to activate the *JIRT LCP Protocol* and;
  ii. Approve the timing regarding the activation the *JIRT LCP Protocol* to ensure the integrity of the criminal investigation and the safety, welfare and well-being of the reported child/ren and young people[7] and;
  iii. Where required, assume responsibility for coordinating the establishment of a LCP.

[4] Any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), however described, and includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and does not include the family.

[5] Police Team Leader, CS JIRT Manager Casework and JIRT Senior Health Clinician

[6] CAS Inspector, CS JIRT Manager Client Services & JIRT Health Manager.

[7] The LCP Protocol will only be enacted once sufficient evidence has been obtained to indicate further children at risk or broader community concern.

2.3 Planning

Following the decision and approval to activate the *JIRT LCP Protocol* the coordination of a number of LCP activities will run parallel to the joint response provided to a victim child/children and their families.

The following actions may need to occur:

JIRT local management team[8]:-

i. Allocate responsibility to one JIRT agency representative[9] to liaise with the nominated representative[10] for the institution to brief them on the *JIRT LCP Protocol* [Note: it is preferred that both parties agree to enacting the *LCP Protocol,* this agreement and/or dissenting views in relation to enacting the *LCP Protocol* are to be recorded. Significant issues are to be raised with the line supervisors[11] *[see Resource 1 – Activation Request/Approval*].

ii. Jointly determine the most appropriate agency to undertake the role of the Local Contact Point (LCP), in most cases it is likely that the appropriate agency will be either CS or NSW Health;

iii. Consult with managers[12] from the selected agency to identify a staff member that has both the experience and capacity to undertake the LCP role,

iv. Brief the designated LCP and their supervisor on the role and responsibilities of the position[13]; provide a copy of this document and the *LCP Resource 2: Recording Template*.

v. Jointly determine what information will be provided to the designated LCP regarding the details of the matter/s under investigation prior to them undertaking the role;

vi. Local management team review and confirm information that is suitable for the institution to share to the broader community *[see LCP Resource 3: communication with parents/staff/stakeholders]*.

vii. Provide the institution with the approved *LCP Resource 3: communication with parents/staff/stakeholders*

viii. Promptly review drafted communication content provided by the institution to enable this to be sent to parents, staff and relevant stakeholders in a timely manner;

ix. Once the LCP has been activated the JIRT Health Senior Clinician to coordinate and liaise with local health services, as required, to advise of possible increases in demand;

x. Liaise, as frequently as is required, with the designated LCP and their supervisor to update them on the status of the investigation, or where there are changes to information;

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[8] Police Team Leader, CS JIRT Manager Casework and JIRT Senior Health Clinician or as required JIRT agency line managers

[9] Either the CS JIRT Manager Casework, JIRT Police Team Leader, JIRT Health Senior Clinician

[10] For example DEC School Principal, CEO of institution

[11] CAS Inspector, CS JIRT Manager Client Services & JIRT Health Manager

[12] Internal agency consultation re: allocation of staffing resources should occur between officers of similar delegation /authority ie: MCS to MCS etc

[13] Refer to page 9

xi. Contact the designated LCP weekly, or as required, to ensure that all relevant information held by either party is exchanged.

JIRT agency line management[14]:-

i. Review and approve requests to activate *JIRT LCP Protocol [see Resource 1 – Activation Request/Approval*].

ii. Provide internal agency communication and advice[15] regarding the activation of the *JIRT LCP Protocol* and the details of the Local Contact Point (i.e.: LACs, CP Helpline Director and Helpline staff, CSC[16] /JRU Staff, Child Wellbeing Unit, Child Protection Unit, Sexual Assault Services and other relevant Health staff)[17];

iii. If the institution subject to the investigation is an education and care service as defined under s.5 of the *Children (Education and Care Services) National Law (NSW) ("National Law")* and the *Children (Education and Care Services) Supplementary Provisions Regulation 2004 (Supplementary Provisions),* such as long day care, family day care, outside school hours care, home based, mobile or occasional education and care services then the Early Childhood Education and Care Directorate as the Regulatory Authority of NSW is to be notified of the activation of the *JIRT LCP Protocol.*

iv. Consult, as required, on the content of joint media releases[18];

v. Review and approve requests to deactivate the *JIRT LCP Protocol;*

vi. Where required participate in activities to evaluate the functionality of the *JIRT LCP Protocol.*

2.4 Engagement

- The allocated local JIRT agency representative will brief the nominated representative for the institution on the processes governing the *JIRT LCP Protocol.*
- It is preferred that the nominated representative for the institution together with the local JIRT agency representative agree to enact the *JIRT LCP Protocol.*[19]

[14] CAS Inspector, CS JIRT Manager Client Services & JIRT Health Manager

[15] For Community Services where available, communication and advice is to be sent to team/unit mailboxes as well as directly to relevant staff members

[16] To include advice to other local CSCs that may receive calls from the community about the matter under investigation

[17] It is essential that the Director of the CP Helpline communicates the activation of the *JIRT LCP Protocol* and the details of the Local Contact Point to Helpline staff in order to re-direct callers to this service, should it be required.

[18] Media being released broadly will identify key agency contact points i.e.: Crime Stoppers, Triple 000, CP Helpline

[19] agreement and/or dissenting views in relation to enacting the *LCP Protocol* are to be recorded and raised to line supervisors

2.5 Activation of the Local Contact Point (LCP)

Upon agreement between the local JIRT agency representative and the nominated representative for the institution to enact the *JIRT LCP Protocol, t*he local JIRT agency representative will provide the institution with the template paragraphs for communicating with parents; staff and relevant stakeholders *[see LCP Resource 3 - communication with parents/staff/stakeholders].* This template provides approved paragraphs for inclusion, advice and contact details for the LCP.

If the information subject to the investigation is related to an education and care service, then the Department of Education and Communities is to be notified of the activation of the *JIRT LCP Protocol.*

The local JIRT agency representative and the nominated representative for the institution must ensure that the LCP is operational before the letter/email or alternative communication message is sent out to parents, staff and relevant stakeholders.

The nominated representative for the institution will:-

i. Determine the best process to inform parents and staff of the institution concerned and any other relevant stakeholders about the existence of the LCP i.e. in the form of a letter/email and/or alternative communication message;
ii. If the institution is an early childhood education and care service, provide notification of the incident / complaint to the Department of Education and Communities within 24 hours;
iii. Consult with the local JIRT agency representative prior to forwarding ANY communication to parents, staff and relevant stakeholders about the details of the matter/s under investigation to ensure the information that is provided does not compromise the integrity of the criminal investigation and/or breach the confidentiality, safety, welfare and well-being of the victim children and families;
iv. Draft the communication to parents, staff and relevant stakeholders and forward this draft to the JIRT agency representative for review prior to sending;
v. Once the content of the information in the communication to parents, staff and relevant stakeholders has been agreed, send the communication to parents, staff and relevant stakeholders ensuring that the details of the designated Local Contact Point staff member are easily identified;
vi. Continue to liaise, as appropriate, with the local JIRT agency representative to ensure that all relevant information held by either party is exchanged.

Appendix E: NSW Police Force information on blind reporting

NSW POLICE
www.police.nsw.gov.au
ABN 43 408 613 180

STATE CRIME COMMAND

MEMORANDUM

To: **Region Operations Managers**
Local Area Commanders
Crime Managers

CC: Det Supt Linda Howlett
Manager Intelligence Nerys Evans
Det Insp Chris Goddard
Det Sgt Lauren Seretis

From: Det Insp Paul Jacob Manager Sex Crimes Squad SCC

Date: 9 July 2014.

Subject: **Reporting Processes NGO's to NSWPF**

Background;

For some years Non Government Organisations (NGOs), including the Catholic Church, Anglican Church, The Salvation Army and others have periodically sent reports of historical physical and sexual abuse allegations to NSW Police Force (NSWPF) via The Sex Crimes Squad. These have contained summaries of historical allegations of misconduct against church personnel that had been held in the records of the organisation.

Following the establishment of two major public enquiries in late 2012 the NGOs substantially increased the number of submissions to The Sex Crimes Squad. This identified a need to implement a formalised process by which the reports could be addressed and if necessary investigated in a timely manner. As a result the NGOs are now being advised to forward the reports to the relevant Local Area Commands.

These reports can be categorised as follows;

1. Reports where the identity of a victim of suspected crime is not known;
2. Reports where the identity of a victim of a suspected crime is known;
3. In circumstances where a victim of a suspected crime is known but that victim does not wish to speak with the Police, proceed as follows;

Sex Crimes Squad
NSW Police Headquarters Locked Bag 5102 Parramatta NSW 2124
Tel (02) 8835 8666 Fax (02) 8835 8688 TTY (02) 9211 3776 (Hearing/Speech impaired) Enet 28666 Efax 28688

Listed below are the minimum NSWPF response for each type of report/category of report.

1. Reports where the identity of a victim of suspected crime is not known;

In cases where a complaint is received by (The NGO) concerning a person being suspected of having committed a criminal offence but the victim is not known, (The NGO) will report the matter to the Police by way of a Form which will include, inter alia;

a) Sufficient description of the suspected offence(s)
b) Confirmation as to what steps (The NGO) has taken to assess any current or ongoing risks to children or adults arising from or similar to the circumstances of the suspected crime being reported; and
c) Confirmation as to what other notifications have been made by (The NGO) (for example, to the NSW Ombudsman, Office of the Children's Guardian and FaCS.

NSWPF will under these circumstances;

I. Acknowledge receipt of information.
II. Assess any immediate or ongoing risk to any persons including children and action/advise if necessary.
III. Record information on COPS in the form of Information Report or Event, as deemed appropriate and provide a COPS reference number to NGO, then disseminate to The SCC Sex Crimes Squad.

2. Reports where the identity of a victim of a suspected crime is known;

a) In cases where a complaint is received by a victim (The NGO) will encourage the victim to speak with the Police immediately; and
b) Will assist the victim to approach, the Local Area Command to speak with the Crime Manager and/or Detective on duty. (Sex Crimes Squad would be advised through internal disseminations).
c) Where a victim is willing to speak with the Police, then (The NGO) are not to conduct an investigation or to interview witnesses – the investigating police will do this.
d) (The NGO) will ensure that any evidence which we can access (video, telephone records, documents, diaries etc.) is preserved so that the Police can access it in the course of their investigation.

NSWPF will under these circumstances;

I. Acknowledge receipt of information.
II. Assess any immediate or ongoing risk to any persons including children and action/advise if necessary
III. Assist NGO in arranging a mutually convenient appointment for an investigator to meet with the victim and take over the management of the victim's welfare
IV. Commence an investigation
V. Establish a liaison with the NGO and receive any relevant evidence
VI. Record information on COPS in the form of Information Report or Event, as deemed appropriate and provide a COPS reference number to NGO and disseminate to the SCC Sex Crimes Squad.
VII. At the conclusion of the investigation advise the NGO of the outcome and disseminate to SCC Sex Crimes Squad.

3. In circumstances where a victim of a suspected crime is known but that victim does not wish to speak with the Police, proceed as follows;

The NGO will;

a) Advise the victim that they can change their mind and speak with the Police at any time in the future;
b) Where the victim is receiving counselling support, the counsellor may advise victim of the availability of reporting to the police through The Sexual Assault Reporting Option (SARO) process.
c) Preserve all available evidence in case the victim changes their mind and the evidence is required for a later Police investigation;
d) Conduct any necessary investigation to deal with any internal disciplinary matters, as required (for staff / volunteers etc.);
e) Confirm what steps have been taken to assess any current or ongoing risks arising from or similar to the circumstances of the suspected crime being reported
f) Send through to the relevant LAC a notification form in two stages - initially as a preliminary notification to confirm that an investigation will be undertaken and later, a more detailed report to be provided once concluded; and
g) The notification form should confirm that the victim has been advised of the continuing option of speaking with the Police and also of appropriate counselling services which might be able to assist them
h) Confirmation as to what other notifications have been made by (The NGO) (for example, to the NSW Ombudsman / Office of the Children's Guardian) and FaCS

NSWPF will under these circumstances;

I. Acknowledge receipt of information and provide a COPS reference number.
II. Action as appropriate any disclosure on a SARO form
III. Assess any immediate or ongoing risk to any person including children/action/advise if necessary
IV. Record information on COPS in the form of Information Report or Event, as deemed appropriate.

Attached to this memorandum are the following;

- Template of letter to be forwarded to Crime Managers
- Template of letter to be forwarded to all NGO's
- Flow chart outlining process to be followed reports from NGO's to the NSWPF
- A Form which will be used by NGO's to report matters to the NSWPF
- One page overview for the information of NGO's

The Sex Crimes Squad will operate a Help Desk to provide advice on any issues arising and will monitor this process.

Paul Jacob
Det Insp

Local Area Commander
Crime Managers
NSWPF

NSW Police Force
www.police.nsw.gov.au

10 July 2014

Process for managing historical physical and sexual abuse allegations referred from Non Government Organisations (NGOs) to the NSW Police Force.

For some years Non Government Organisations (NGOs), including the Catholic Church, Anglican Church, The Salvation Army and others have periodically sent reports of historical physical and sexual abuse allegations to NSW Police Force (NSWPF) via The Sex Crimes Squad. These have contained summaries of historical allegations of misconduct against church personnel that had been held in the records of the organisation.

Following the establishment of two major public enquiries in late 2012 the NGOs substantially increased the number of submissions to Sex Crimes Squad. This identified a need to implement a formalised process by which the reports could be addressed and if necessary investigated in a timely manner. As a result the NGOs are now being advised to forward the reports to the relevant Local Area Commands.

Based on our experience, along with our ongoing liaison with Victims Groups and Victims Support Services, as a general rule the NSWPF will not 'Cold Call' victims or potential victims of historical sexual abuse/assault, except in exceptional circumstances. This process ensures that those NGO's who are engaged with victims identify whether or not the victims wish to engage with police. This practice does not relate to children currently at risk where normal *'Child At Risk'* protocols apply.

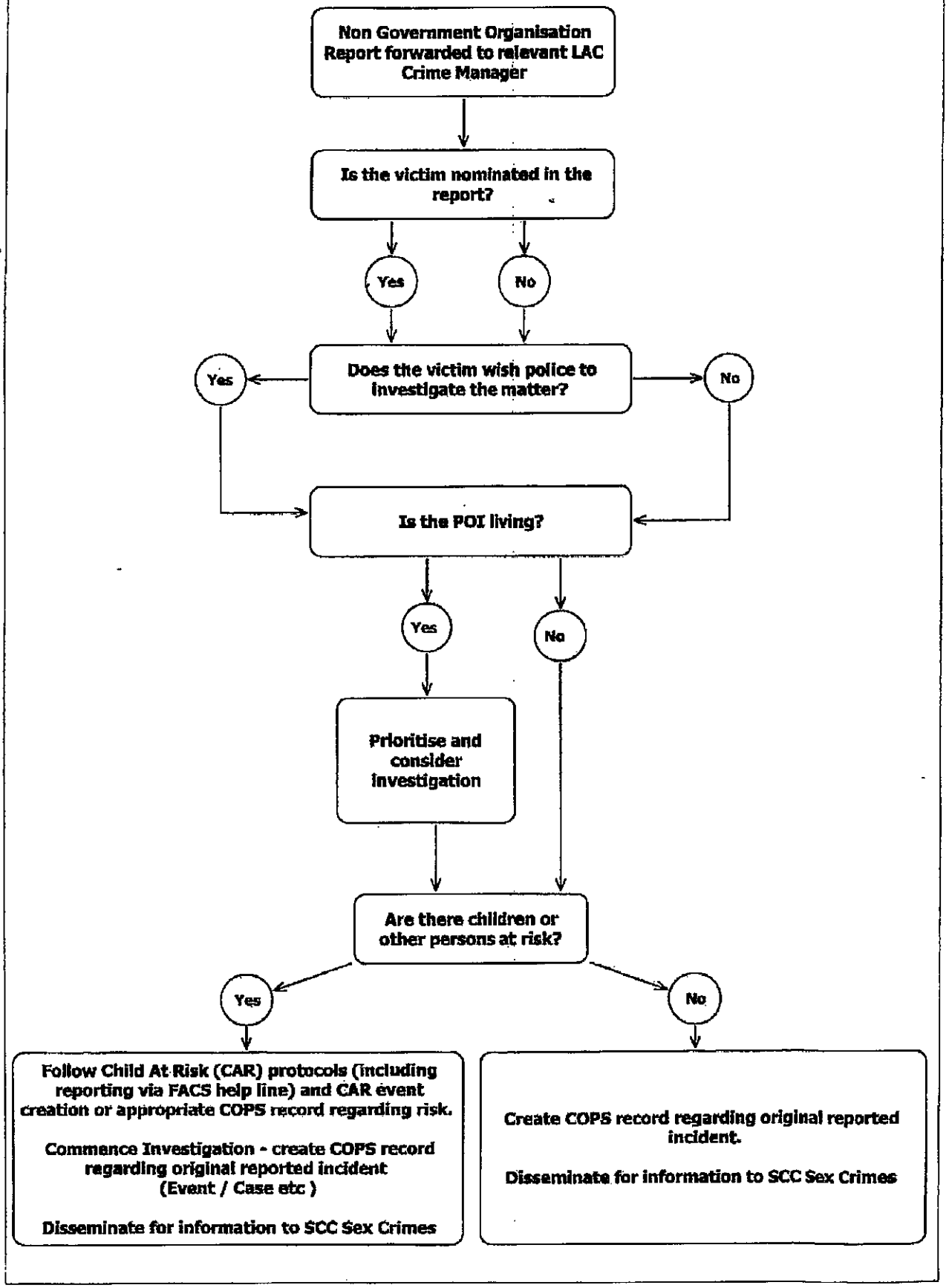
The attached flow chart (annexure A) provides a guide to processing the reports. Should you have any further enquiries, please contact State Crime Command, Sex Crimes Squad.

The attached Incident Report (annexure B) has been developed and forwarded to NGO's as a guide and will ensure a consistency and quality of the information that is provided by them.

L Howlett
Commander Sex Crimes Squad
State Crime Command

State Crime Command
Sex Crimes Squad
Level 6A, 1 Charles Street Parramatta, 2124
Telephone 02 8835 8724 Facsimile 02 8835 8688 ENet 28724 EFax 28688 TTY 9211 3776 (Hearing/Speech Impaired)
ABN 43 408 613 180

FLOW CHART - INCIDENT REPORTING



Incident Report to NSW Police Force by a Non Government Organisation (NGO)

(To be used in circumstances of suspected physical or sexual abuse AND where the victim details are unclear / unknown OR the victim does <u>not</u> want to report the incident to police)

This form is **not** to be completed if you have a current child victim – use existing mandatory reporting child at risk protocol.

NOTIFYING ORGANISATION DETAILS	
Organisation Name (ORG)	
Contact Name	
Contact Address	
Phone	
Mobile	
Email	
Date you were made aware of the incident or when it was reported to you.	
Has a report been made to Police? If so, where, when and to whom? Include NSWPF Reference No	
Have any other parties been notified? (E.g. FACS, Ombudsman, Children's Guardian, etc.) If so where, when and to whom?	
Is there any known urgency to have this matter reported to police?	
What steps have been taken by ORG to assess any current/ongoing risks	
What steps have been taken by the ORG to preserve all available evidence (ie notes, admissions, interviews, photos, etc) in case the victim changes their mind & the evidence is required for a police investigation ?	
Has the victim been advised of the continuing option of speaking with Police?	

Source of Information	
Surname	
Given Name/s	
Address	
Home Phone	
Work Phone	
Mobile	
Email	
Preferred contact	

Alleged Person of Interest (POI)	
Surname	
Given Name/s	
DOB or approx age	
Gender	
Address	
Home Phone	
Work Phone	
Mobile	
Email	
Preferred contact	

Alleged Incident	
Time	
Date	
Location	
How reported	
To whom reported	
Circumstances of the suspected offence	•

Alleged Victim Details	
Surname	
Given Name/s	
DOB or approx age	
Gender	
Address	
Home Phone	
Work Phone	
Mobile	
Email	
Preferred contact	
Age of victim at time of incident	
Has the victim been advised of the continuing option of speaking with Police?	

Head of Department
Professional Standards Office

NSW Police Force
www.police.nsw.gov.au

10 July 2014

Process for managing historical physical and sexual abuse allegations referred from Non Government Organisations (NGOs) to the NSW Police Force.

For some years Non Government Organisations (NGOs), including the Catholic Church, Anglican Church, The Salvation Army and others have periodically sent reports of historical physical and sexual abuse allegations to NSW Police Force (NSWPF) via The Sex Crimes Squad. These have contained summaries of historical allegations of misconduct against church personnel that had been held in the records of the organisation.

Since late 2012, The Sex Crimes Squad has received a substantial increase in the number of reports from organisations which has resulted in NSWPF reviewing the current process so that the reports can be managed in a timely manner.

As a result NSWPF requests that future reports are now forwarded to the Local Area Command, Crimes Manager where the offence occurred. The Local Area Command will now be responsible for processing the reports, conducting investigations and where necessary liaising with the relevant organisation.

Attached for your information is a Template Incident Report and the suggested protocol/process for managing these reports to the NSWPF. These documents will assist you in addressing key information required by the NSWPF for proper assessment of the report. You may incorporate the Template Incident Report into a specific form for your organisation, however you must address all of the key areas

The Sex Crimes Squad will remain a point of contact for your general enquiries and will continue providing assistance to your organisation as required.

L Howlett
Commander Sex Crimes Squad
State Crime Command

State Crime Command
Sex Crimes Squad
Level 6A, 1 Charles Street Parramatta, 2124
Telephone 02 8835 8724 Facsimile 02 8835 8688 ENet 28724 EFax 28688 TTY 9211 3776 (Hearing/Speech impaired)
ABN 43 408 613 180

SUGGESTED PROTOCOL/PROCESS FOR PROVIDING INFORMATION TO THE NSWPF

Sex Crimes Squad - Telephone – **8835 8533,** Facsimile – **8835 8688**

1. **Reports where the identity of a victim of suspected crime is not known;**

In cases where a complaint is received by your organisation concerning a person being suspected of having committed a criminal offence but the victim is not known, your organisation will report the matter to the Police by way of a Form which will include, inter alia;

a) Sufficient description of the suspected offence(s)
b) Confirmation as to what steps have been taken by your organisation to assess any current or ongoing risks to children or adults arising from or similar to the circumstances of the suspected crime being reported; and
c) Confirmation as to what other notifications have been made by your organisation (for example, to the NSW Ombudsman, Office of the Children's Guardian, FaCS.

2. **Reports where the identity of a victim of a suspected crime is known;**

a) In cases where a complaint is received by a victim (The NGO) will encourage the victim to speak with the Police immediately; and
b) Will assist the victim to approach the Local Area Command to speak with the Crime Manager and/or Detective's on duty. (Sex Crimes Squad would be advised through internal disseminations).
c) Where a victim is willing to speak with the Police, then (The NGO) are not to conduct an investigation or to interview witnesses – the investigating police will do this.
d) (The NGO) will ensure that any evidence which we can access (video, telephone records, documents, diaries etc.) is preserved so that the Police can access it in the course of their investigation.

3. **In circumstances where a victim of a suspected crime is known but that victim does not wish to speak with the Police, proceed as follows;**

a) Advise the victim that they can change their mind and speak with the Police at any time in the future;
b) Where the victim is receiving counselling support, the counsellor may advise victim of the availability of reporting to the police through the The Sexual Assault Reporting Option (SARO) process, www.police.nsw.au/community_issues/adult_sexual_assault
c) Preserve all available evidence in case the victim changes their mind and the evidence is required for a later Police investigation;
d) Conduct any necessary investigation to deal with any internal disciplinary matters, as required (for staff / volunteers etc.);
e) Confirm what steps (The NGO) has taken to assess any current or ongoing risks arising from or similar to the circumstances of the suspected crime being reported
f) Send through to the relevant LAC a notification form in two stages - initially as a preliminary notification to confirm that an investigation will be undertaken and later, a more detailed report to be provided once concluded; and
g) The notification form should confirm that the victim has been advised of the continuing option of speaking with the Police and also of appropriate counselling services which might be able to assist them
h) Confirmation as to what other notifications have been made by (The NGO) (for example, to the NSW Ombudsman / Office of the Children's Guardian), FaCS

Endnotes

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[282] Transcript of D Shoebridge, Criminal Justice Roundtable: Reporting Offences, 20 April 2016, T58:19-26.
[283] 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.
[284] 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.
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[286] Australian Institute of Criminology and H Boxall, M Tomison & S Hulme, *Historical review of sexual offence and child sexual abuse legislation in Australian 1788 – 2013*, Canberra, 2014, p 10.
[287] 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.
[288] See, for example, *Crimes Act 1900* (NSW) s 66EB, inserted in 2007, and s 66EB(2A), inserted in 2008.
[289] *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, Table.
[290] See *Crimes Act 1900* (NSW) s 66A.
[291] *Criminal Procedure Act 2009* (Vic) Schedule 1, cl 4A.
[292] *Crimes Act 1958* (Vic) s 49B.
[293] *Crimes Act 1958* (Vic) s 327.
[294] *Crimes Act 1958* (Vic) s 49C.
[295] *Criminal Code Act 1899* (Qld) sch 1 (*Criminal Code* (Qld)) s 218B.
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[299] *R v Johnson* [2015] SASCFC 170, [1].
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[304] Transcript of D Boyle, Case Study 26, 22 April 2015, TC8080:39 - TC8082:31.
[305] Transcript of A Kimber, Case Study 33, 14 October 2015, T11758:20 - T11759:9.
[306] 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.
[307] *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 489 (Dixon J).
[308] See, for example, transcript of H Baker, Case Study 38, 23 March 2016, T18084:32-T18085:26.
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[310] This is a common law requirement that has also been reproduced in statute. See, for example, *Criminal Code* (Qld) s 567.
[311] *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 497.
[312] See, for example, *Criminal Procedure Act 1986* (NSW) s 50; *Criminal Procedure Act 2009* (Vic) s 6(3), s 159(3); *Criminal Code* (Qld) s 564, s 573.
[313] See, for example, *Veysey v R* [2011] VSCA 309; (2011) 33 VR 277.
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[315] *Kirk v IRC* [2010] HCA 1 [26], (2010) 239 CLR 531, 557.
[316] *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 486.
[317] *WGC v The Queen* [2007] HCA 58 [127]; (2007) 233 CLR 66, 103 (Hayne and Heydon JJ).
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[319] *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266, 274.
[320] *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).
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[326] *Crimes Act 1900* (NSW) s 66EA; *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) s 3, Sch 1, [2].
[327] *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A.
[328] *Criminal Code* (WA) s 321A.
[329] *Criminal Code* (Qld) s 229B; *Criminal Code* (Tas) s 125A; *Crimes Act 1900* (ACT) s 56; *Criminal Code* (NT) s 131A.
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[331] Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children, Report No 55, Part 1*, 2000, p 99.
[332] [1997] HCA 54; (1997) 191 CLR 417.

[333] *KBT v R* [1997] HCA 54]; (1997) 191 CLR 417, 418, 421.
[334] *KBT v R* [1997] HCA 54; (1997) 191 CLR 417, 422-423, 431.
[335] *KRM v R* [2001] HCA 11 [92]; (2001) 206 CLR 221, 252.
[336] Criminal Law Review, *Review of Sexual Offences*, Department of Justice, Victoria, 2013 [11.4.3].
[337] *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18; *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 7.
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[341] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence - A National Legal Response*, ALRC Report 114, NSWLRC Report 128, 2010, [25.66].
[342] *Criminal Law Consolidation Act 1935* (SA) s 50(6).
[343] *Criminal Code* (Tas) s 125A(1), amended by the *Criminal Code Amendment Act 2001* (Tas) s 4.
[344] *Criminal Code* (WA) s 321A(11), inserted by the *Criminal Law and Evidence Amendment Act 2008* (WA) s 10.
[345] *R v LAF* [2015] QCA 130 [4] (McMurdo P).
[346] *R v DAT* [2009] QCA 181 [17] (Holmes JA, Muir JA agreeing).
[347] *R v CAZ* [2011] QCA 231 [43]; [2012] 1 Qd R 440, 456 (Fraser JA, Chesterman and White JJA agreeing).
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[372] Data provided by the Queensland Director of Public Prosecutions to the Royal Commission into Institutional Responses to Child Sexual Abuse by letter dated 18 February 2016.
[373] Transcript of A Kimber, Case Study 33, 14 October 2015, T11758:20-T11759:9.
[374] Material obtained by the Royal Commission from the Office of Crime Statistics and Research (SA) under notice to produce C-NP-1725.
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[376] *R v M, BJ* [2011] SASCFC 50 [70]; (2011) 110 SASR 1, 28-29 (Vanstone J, Sulan and White JJ agreeing). Also see *R v C, G* [2013] SASCFC 83; (2013) 117 SASR 162; *R v Little* [2015] SASCFC 118; (2015) 123 SASR 414.
[377] *R v Johnson* [2015] SASCFC 170.
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[381] Sentencing Advisory Council, *Sex Offence Sentencing*, Hobart, 2015, p 16, Figure 2.
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[386] *Criminal Procedure Act 2009* (Vic) Sch 1, cl 4A.
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[388] Explanatory Memorandum, Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 (Vic), p 25.
[389] *Walker v R* [2012] NZCA 520, [47]-[53].
[390] *Criminal Procedure Act 2009* (Vic) Sch 1, cl 4A(2).
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[409] [2016] VSCA 164, [10] and [11].
[410] *R v Johnson* [2015] SASCFC 170, [2].
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[426] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 6: The response of a primary school and the Toowoomba Catholic Education Office to the conduct of Gerard Byrnes*, January, 2015, p 13.
[427] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 12: The response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009,* June, 2015, pp 24-25, 43.

[428] Transcript of R Llewellyn-Jones, Case Study 32, 1 September 2015, TC10018:14-TC10020:6.
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[430] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in an Institutional Context*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp x, 21.
[431] E Munro and S Fish, *Hear no Evil, See no Evil: Understanding failure to identify and report child sexual abuse in institutional contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 12.
[432] Victorian Law Reform Commission, *Sexual Offences: Interim Report*, 2003, p 387, [8.83].
[433] *Criminal Code* (WA) s 204B.
[434] *Crimes Act 1900* (ACT) s 66.
[435] *Criminal Code* (Qld) ss 218A, 218B.
[436] *Crimes Act 1958* (Vic) s 58; *Criminal Code* (NT) ss 131, 132(2).
[437] *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code* (Cth)) Pt 10, Div 474, Subdiv F, ss 474.25A-474.29.
[438] Attorney General's Department, *Proposed Reforms to Commonwealth Child Sex Related Offences* (2009), Commonwealth, p 10, [39].
[439] *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004 (Cth).*
[440] Attorney General (Cth), Criminal Justice Division, *Proposed Reforms to Commonwealth Child Sex Related Offences*, Commonwealth, 2009, p 47. The case of *Meehan* is described at p10, [40] as: '*R v Meehan*, unreported, Victorian County Court – 21 July 2006: In Meehan, the defendant used mobile telephone text messages, email and Internet 'chat' services to form a relationship with a girl who was under 16 years of age (the girl was 14 years old at the time the offences were first committed). The girl had contacted the defendant by accidentally sending a text message to him while trying to contact another person. The defendant responded, and the two subsequently exchanged personal details via text message, which included information about the age of the girl (14 years old) and the defendant (53 years old). The defendant continued to communicate with the girl through email and Internet chat services. Initially, the contact was platonic but became sexual in nature, and the defendant told the girl he was her boyfriend. The defendant sent the girl hundreds of text and Internet messages with the intention of grooming her to engage in sexual activity. Two months from the initial text message the defendant met with the girl, touched her inappropriately and asked her to kiss him. The defendant pleaded guilty to, and was convicted of, using a carriage service to procure a child for sexual activity. This is because the behaviour had progressed from grooming. The defendant was sentenced to two years imprisonment for offences contrary to section 474.26 of the Criminal Code.'
[441] *Criminal Code* (Cth) s 474.28(8).
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[443] Victoria, Legislative Assembly, 16 November 2005, *Debates*, 2184 (R Hulls, Attorney General).
[444] *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) 2003.
[445] *Criminal Code* (Qld) s 218A.
[446] *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld) s 18.
[447] Crime and Corruption Commission Queensland, *Child Sexual Victimisation in Queensland*, 2015, p 7.
[448]*Criminal Code Amendment (Cyber Predators) Act 2006* (WA) s 4, inserting s 204B into the *Criminal Code* (WA).
[449] Western Australia, Legislative Assembly, 20 October 2005, *Debates*, 6725b-6726a (JA McGinty, Attorney General).
[450] *Crimes Act 1900* (ACT) s 66. Originally *Crimes Amendment Act 2001* (No 2) (ACT) s 92NC.
[451] *Crimes Act 1900* (NSW) s 66EB(2).
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[456] Victorian Parliament, Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, 2013, [22.2.3].
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[458] *Crimes Act 1958* (Vic) s 49B.
[459] *Criminal Code* (Qld) s 218B.
[460] *Criminal Law Consolidation Act 1935* (SA) s 63B(3).
[461] *Criminal Code* (Tas) s 125D.
[462] See, for example, remarks on sentencing *DPP v DM* [2012] VCC 840 [31].
[463] See, for example, remarks on sentencing *DPP v Kelly* [2012] VCC 2054; *DPP v Finnin* [2013] VCC 1313; *R v Trevor Ted* [2014] VCC 1794.
[464] This was also proposed in Department of Justice, *Review of Sexual Offences*, 2013, [8.1], to implement a recommendation of The Hon P Cummins, D Scott and B Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, vol 1, 2012, p lvii, recommendation 51.
[465] Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, Victoria, 2013, [22.1.2].
[466] *Crimes Amendment (Grooming) Act 2014* (Vic) s 3.
[467] *Crimes Act 1958* (Vic) s 49B(3).
[468] *Crimes Act 1958* (Vic) s 49B(1).
[469] Victoria, Legislative Assembly, 12 December 2013, *Debates*, p 4668 (R Clark, Attorney General).
[470] Victoria, Legislative Council, 20 February 2014, *Debates*, p 445 (S Pennicuik, Member of Legislative Council).
[471] *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld), pts 1, 3.
[472] Queensland, Legislative Assembly, 29 November 2012, *Debates*, 2969.
[473] *Criminal Code* (Qld) s 218B(5)(c).
[474] *Criminal Law Consolidation Act 1935* (SA) s 63B(3)(b).
[475] *Criminal Code Amendment (Child Exploitation) Act 2005* (Tas) s 4, inserting s 125D into the *Criminal Code* (Tas).
[476] Tasmania, Legislative Council, 22 June 2005, *Debates*, 58.
[477] Judicial Information Research System (JIRS), *Penalty type for the principal offence; Crimes Act 1900 (NSW) s 66EB(3), NSW Higher Courts and NSW Local Courts.*
[478] Data provided by the Queensland Director of Public Prosecutions to the Royal Commission into Institutional Responses to Child Sexual Abuse by letter dated 18 February 2016.
[479] NSW Ombudsman, *Child Protection Practice Update 2013: Defining Reportable Conduct*, 2013, 2.
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[482] H Boxall and G Fuller, *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update*, Table 1, pp 3-6.
[483] 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, pp 30-31.

[484] 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 82.
[485] 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 90.
[486] 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 58.
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[488] 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, pp 39.
[489] 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 49.
[490] 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 69.
[491] New South Wales, Legislative Assembly, 25 February 1992, *Debates*, p 68.
[492] *Criminal Legislation (Amendment) Act 1992* (NSW) Sch 1 cl 5.
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[773] In Western Australia for example, the second dot point also includes consideration of whether the State case may be fraught with difficulty, and the public interest will be satisfied with an acknowledgment of guilt to certain criminal conduct. In Queensland, the fourth consideration is limited to victims, and must be weighed against the likely outcome of the trial: *Statement of prosecution policy and guidelines* (WA), p 23.
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[1295] D Heydon, 'Is the Weight of Evidence Material to Its Admissibility?', *Current Issues in Criminal Justice*, vol 26, 2014, pp 219, 234.
[1296] [2016] VSCA 160, [53], quoting *IMM v The Queen* [2016] HCA 14 [50] (emphasis added by Victorian Court of Appeal).
[1297] *Bayley v The Queen* [2016] VSCA 160 [55].
[1298] *Bayley v The Queen* [2016] VSCA 160 [54] quoting D Heydon, 'Is the Weight of Evidence Material to Its Admissibility?', *Current Issues in Criminal Justice*, vol 26, 2014, pp 219, 234.
[1299] *Bayley v The Queen* [2016] VSCA 160 [55]-[56].
[1300] The High Court also considered the issue of the admissibility of complaint evidence. That is not discussed further here.
[1301] *IMM v The Queen* [2016] HCA 14 [1].
[1302] *IMM v The Queen* [2016] HCA 14 [1].
[1303] *IMM v The Queen* [2016] HCA 14 [2].

[1304] *IMM v The Queen* [2016] HCA 14 [62].
[1305] *IMM v The Queen* [2016] HCA 14 [62].
[1306] *IMM v The Queen* [2016] HCA 14 [63].
[1307] *IMM v The Queen* [2016] HCA 14 [104].
[1308] *IMM v The Queen* [2016] HCA 14 [106].
[1309] *IMM v The Queen* [2016] HCA 14 [106].
[1310] *IMM v The Queen* [2016] HCA 14 [107].
[1311] [2008] HCA 16 [280]; (2008) 235 CLR 334, 427.
[1312] *IMM v The Queen* [2016] HCA 14 [176].
[1313] *IMM v The Queen* [2016] HCA 14 [177].
[1314] *IMM v The Queen* [2016] HCA 14 [178].
[1315] [1995] HCA 7 [40] (McHugh J); (1995) 182 CLR 461, 529.
[1316] Transcript of CDR, Case Study 38, 15 March 2016, T17387:16-20.
[1317] Transcript of CDR, Case Study 38, 15 March 2016, T17388:43-45.
[1318] Transcript of CDR, Case Study 38, 15 March 2016, T17390:38-40.
[1319] Transcript of CDR, Case Study 38, 15 March 2016, T17391:35-T17392:1.
[1320] Transcript of N Williams, Case Study 38, 15 March 2016, T17419:14-24.
[1321] Transcript of N Williams, Case Study 38, 15 March 2016, T17424:15-T17425:5.
[1322] Transcript of N Williams, Case Study 38, 15 March 2016, T17420:32-36.
[1323] Transcript of N Williams, Case Study 38, 15 March 2016, T17425:15-25.
[1324] Transcript of N Williams, Case Study 38, 15 March 2016, T17421:6-T17422:41.
[1325] Transcript of N Williams, Case Study 38, 15 March 2016, T17404:20-28.
[1326] Transcript of H Baker, Case Study 38, 15 March 2016, T17432:35-45.
[1327] *Velkoski v The Queen* [2014] VSCA 121 [152]; (2014) 45 VR 680, 715.
[1328] Transcript of M Lawrence, Case Study 38, 15 March 2016, T17439:6-9.
[1329] Exhibit 38-0007, Statement of K J Whitley, Case Study 38, STAT.0914.001.0001_R at [39].
[1330] Transcript of S Herbert, Case Study 38, 15 March 2016, T17461:43-T17462:2.
[1331] Transcript of S Herbert, Case Study 38, 15 March 2016, T17463:6-15.
[1332] Transcript of S Herbert, Case Study 38, 15 March 2016, T17462:4-16.
[1333] Transcript of S Herbert, Case Study 38, 15 March 2016, T17464:3-13.
[1334] Transcript of P A Henry, Case Study 38, 16 March 2016, T17476:41-43.
[1335] Transcript of P A Henry, Case Study 38, 16 March 2016, T17480:11-16.
[1336] Transcript of J Dunn, Case Study 38, 16 March 2016, T17485:22-24.
[1337] Transcript of J Dunn, Case Study 38, 16 March 2016, T17487:44-46.
[1338] Transcript of J Dunn, Case Study 38, 16 March 2016, T17488:4-25.
[1339] Transcript of R Herps, Case Study 38, 16 March 2016, T17493:28-39.
[1340] Transcript of R Herps, Case Study 38, 16 March 2016, T17494:4-34.
[1341] Transcript of R Herps, Case Study 38, 16 March 2016, T17496:32-40.
[1342] Transcript of R Herps, Case Study 38, 16 March 2016, T17499:25-46.
[1343] [2010] VCSA 88; (2010) 27 VR 146.
[1344] Transcript of CDT, Case Study 38, 16 March 2016, T17508:20-23.
[1345] Transcript of CDT, Case Study 38, 16 March 2016, T17508:33-39.
[1346] Transcript of CDT, Case Study 38, 16 March 2016, T17511:39-T17512:12.
[1347] Transcript of CDT, Case Study 38, 16 March 2016, T17512:27-32.
[1348] *PNJ v DPP* [2010] VCSA 88 [19]-[20]; (2010) 27 VR 146, 151.
[1349] *PNJ v DPP* [2010] VCSA 88 [21]; (2010) 27 VR 146, 151.
[1350] *PNJ v DPP* [2010] VCSA 88 [22]; (2010) 27 VR 146, 151-152.
[1351] Transcript of J R Champion, Case Study 38, 16 March 2016, T17577:44-T17578:1.
[1352] J Kirk and D Barrow, *Opinion of Counsel Assisting the Royal Commission regarding Week 1 of Case Study 38*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, [139].

[1353] Transcript of J R Champion, Case Study 38, 16 March 2016, T17538:1-40.
[1354] Transcript of J R Champion, Case Study 38, 16 March 2016, T17563:32-46.
[1355] [2014] VSCA 216.
[1356] J Kirk and D Barrow, *Opinion of Counsel Assisting the Royal Commission regarding Week 1 of Case Study 38*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, at [153] and [154].
[1357] Transcript of D J Dodt, Case Study 38, 17 March 2016, T17632:33-37.
[1358] Transcript of D J Dodt, Case Study 38, 17 March 2016, T17633:12-14.
[1359] Transcript of D J Dodt, Case Study 38, 17 March 2016, T17634:25-28.
[1360] Transcript of D J Dodt, Case Study 38, 17 March 2016, T17635:5-7.
[1361] Transcript of M R Byrne, Case Study 38, 17 March 2016, T17645:29-46.
[1362] Transcript of M R Byrne, Case Study 38, 17 March 2016, T17647:43-44.
[1363] Transcript of M R Byrne, Case Study 38, 17 March 2016, T17648:3-11.
[1364] Transcript of WQ, Case Study 12, 19 May 2014, TWA2349:39-TWA2398:29, and 20 May 2014, TWA2404:10-TWA2417:12.
[1365] Transcript of CDW, Case Study 38, 17 March 2016, T17676:39-T17677:3.
[1366] Transcript of J C Whalley, Case Study 38, 17 March 2016, T17680:47-T17681:9.
[1367] Transcript of J C Whalley, Case Study 38, 17 March 2016, T17684:27-35.
[1368] J Kirk and D Barrow, *Opinion of Counsel Assisting the Royal Commission regarding Week 1 of Case Study 38*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, [214].
[1369] J Kirk and D Barrow, *Opinion of Counsel Assisting the Royal Commission regarding Week 1 of Case Study 38*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, [215].
[1370] J Kirk and D Barrow, *Opinion of Counsel Assisting the Royal Commission regarding Week 1 of Case Study 38*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, [218].
[1371] Transcript of J C Whalley, Case Study 38, 17 March 2016, T17689:26-38.
[1372] [1894] AC 57.
[1373] *Pfennig v The Queen* [1995] HCA 7 [41] (Mason CJ, Deane and Dawson JJ); (1995) 182 CLR 461, 475. For a review of the historical case law see A Cossins, 'The Legacy of the Makin Case 120 Years on: Legal Fictions, Circular Reasoning and Some Solutions', *Sydney Law Review,* vol 35, 2013, p 731.
[1374] [1975] AC.
[1375] *Boardman v DPP* [1975] AC 421, 456.
[1376] *IMM v The Queen* [2016] HCA 14 [160].
[1377] *IMM v The Queen* [2016] HCA 14 [169].
[1378] *IMM v The Queen* [2016] HCA 14 [158]–[161] (Nettle and Gordon JJ).
[1379] *Pfennig v The Queen* [1995] HCA 7 [7] (McHugh J); (1995) 182 CLR 461, 512.
[1380] *Pfennig v The Queen* [1995] HCA 7 [7] (McHugh J); (1995) 182 CLR 461, 512.
[1381] *Pfennig v The Queen* [1995] HCA 7 [7] (McHugh J); (1995) 182 CLR 461, 512, citing *Perry* (1982) 150 CLR 580, 594 (Murphy J).
[1382] *Pfennig v The Queen* [1995] HCA 7 [7] (McHugh J); (1995) 182 CLR 461, 512-513.
[1383] *Pfennig v The Queen* [1995] HCA 7 [7] (McHugh J); (1995) 182 CLR 461, 513.
[1384] *Noor Mohamed v King* [1949] AC 182.
[1385] *R v Oddy* (1851) 169 ER 499.
[1386] *Makin v Attorney General for NSW* [1894] AC 57.
[1387] *Makin v Attorney General for NSW* [1894] AC 57.
[1388] Australian Law Reform Commission, *Evidence Volume 1*, Report No. 26 (Interim), 1985, [957].
[1389] [2012] VSCA 328; (2012) 40 VR 182.
[1390] *Dupas v The Queen* [2012] VSCA 328, [175]; (2012) 40 VR 182, 227.
[1391] Australian Law Reform Commission, *Evidence Volume 1*, Report No. 26 (Interim), 1985, [644].
[1392] *Papakosmas v The Queen* [1999] HCA 37, [91]; (1999) 196 CLR 297, 325; *R v BD* (1997) 94 A Crim R 131, 139; *R v Lockyer* (1996) 89 A Crim R 457, 460.

[1393] See, for example, Kirby J in *KRM v The Queen* [2001] HCA 11 [97]; (2001) 206 CLR 221, 254.
[1394] [2001] HCA 11; (2001) 206 CLR 221.
[1395] [2001] HCA 11 [97]; (2001) 206 CLR 221, 254.
[1396] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 45-48.
[1397] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 47.
[1398] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 52.
[1399] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 62.
[1400] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 50-63.
[1401] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 84–88.
[1402] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 36-37.
[1403] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 35.
[1404] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 249.
[1405] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016, p 32.
[1406] This figure combines the information in relation to the moderately strong case in Table 5 on p 110 of the Jury Reasoning Research and Table 6 on p 111 of the Jury Reasoning Research. It is found in the researchers' presentation for the Jury Reasoning Research launch, available on the Royal Commission website: J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study presentation*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 13.
[1407] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 248.
[1408] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 248.
[1409] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 249.

[1410] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 249, 259.
[1411] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 28.
[1412] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 250.
[1413] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 35.
[1414] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 27.
[1415] J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, Table 21, p 245.
[1416] *Criminal Justice Act 2003* (UK) s 101(1)(c).
[1417] *Criminal Justice Act 2003* (UK) s 101(1)(d).
[1418] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 12.
[1419] See D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 13 for a further discussion of 'disposition towards misconduct', which may include activities such as grooming, or admitting sexual attraction towards a child.
[1420] *Criminal Justice Act 2003* (UK) s 98.
[1421] As defined in the *Criminal Justice Act 2003* (UK) s 103(1)(a).
[1422] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 14.
[1423] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 14.
[1424] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 15-16.
[1425] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 17.
[1426] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 19-20.
[1427] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 20.

[1428] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 20.
[1429] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 21.
[1430] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 21-22.
[1431] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 22-23.
[1432] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 24.
[1433] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 24.
[1434] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 27.
[1435] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 27.
[1436] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 27. For further discussion on joint trials in England and Wales, see pp 27-29.
[1437] Transcript of J Spencer, Case Study 38, 16 March 2016, T17596:28-37.
[1438] Transcript of J Spencer, Case Study 38, 16 March 2016, T17597:14-24.
[1439] Professor Spencer noted that typical circumstances supporting exclusion of the evidence would be where the rest of the evidence is insubstantial, or where the admission of the evidence would lead to extensive dispute about issues not directly relevant to the charges under consideration - Transcript of J Spencer, Case Study 38, 16 March 2016, T17617:22-28.
[1440] Transcript of J Spencer, Case Study 38, 16 March 2016, T17614:25-39.
[1441] Transcript of J Spencer, Case Study 38, 16 March 2016, T17615:6-37.
[1442] Transcript of J Spencer, Case Study 38, 16 March 2016, T17616:18-25.
[1443] Transcript of J Spencer, Case Study 38, 16 March 2016, T17620:35-T17621:7.
[1444] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 37.
[1445] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 37–8.
[1446] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 39.
[1447] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 40.

[1448] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 40.
[1449] [2002] 2 SCR 908 [72].
[1450] *Handy* [2002] 2 SCR 908 [31]. Quoted in D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 40.
[1451] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 42.
[1452] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 43.
[1453] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 43.
[1454] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 45.
[1455] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 46.
[1456] [2002] 3 SCR 33
[1457] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 47.
[1458] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 49.
[1459] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 50.
[1460] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 50.
[1461] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 51–52.
[1462] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 52.
[1463] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 52.
[1464] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 55.
[1465] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 55.

[1466] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 55-56.
[1467] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 56-57.
[1468] [2012] NZCA 99.
[1469] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 57.
[1470] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 58-59.
[1471] [2011] 3 NZLR 52.
[1472] (2007) 23 CRNZ 923.
[1473] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 59.
[1474] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 59-61.
[1475] [2013] NZCA 612.
[1476] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 61.
[1477] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 63.
[1478] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 65.
[1479] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 65.
[1480] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 62.
[1481] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 65.
[1482] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 66.
[1483] [2011] NZCA 665.
[1484] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 66.
[1485] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 67.

[1486] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 67-68.
[1487] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 72.
[1488] [1984] AC 57.
[1489] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 73.
[1490] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 73-74.
[1491] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 74.
[1492] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 74-75.
[1493] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 75, quoting C Mueller and L Kirkpatrick, *Federal Evidence*, Westlaw database, updated June 2015, section 4.35.
[1494] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 75-76.
[1495] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 76-77.
[1496] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 77.
[1497] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 78.
[1498] D Hamer, *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 79.
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[1803] See, for example, *Penalties and Sentences Act 1992* (Qld) s 9(4) in relation to mandatory sentencing, and *Sentencing Act* (NT) s 55 and *Sentencing Act 1991* (Vic) s 11A in relation to mandatory non-parole periods, and A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 189-191.
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[1808] 'Form 1' is a procedure in New South Wales where during sentencing proceedings, the prosecutor may file a document with the court listing other offences with which the offender has been charged, but not convicted, and for which the offender wishes to plead guilty: *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3 Division 3. The term 'Form 1' comes from the now superseded *Crimes (Sentencing Procedure) Regulation 2000* (NSW). The legislation now requires that the document be in the approved form.
[1809] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 122-124, 126.
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[1823] K Gelb*, A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 19, 20, 25, 53, 54.
[1824] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 26-32. While not an impact on whether a custodial sentence would be issued, it was found that the less time between an offender's last known offence and the most recent sentence, the longer the total effective sentence.
[1825] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 40.
[1826] *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(c).
[1827] A 'serious sexual offender' is defined to mean an offender, other than a young offender, (a) who has been convicted of two or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ab) who has been convicted of an offence to which clause 1(a)(viii) of Schedule 1 applies [relating to *Crimes Act 1958* (Vic) s 47A(1) persistent sexual abuse of a child under 16] for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ac) who has been convicted of committing the incidents of a sexual offence included in a course of conduct charge (within the meaning of clause 4A of Schedule 1 to the *Criminal Procedure Act 2009* (Vic)) for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (b) who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre - *Sentencing Act 1991* (Vic) s 6B(3)(c) and s 6B(2).
[1828] A 'relevant offence' is defined as a sexual offence or a violent offence in the case of a serious sexual offender - *Sentencing Act 1991* (Vic) s 6B(3)(c).
[1829] *Sentencing Act 1991* (Vic) s 6D(a)-(b).
[1830] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g) and *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g). Most sentencing acts require the court to take into account the harm caused to the victim or the community as a factor in sentencing. See, for example, *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i).
[1831] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act* (NT) s 5(1).
[1832] The Law Reform Commission of Western Australia recommended the addition of a statutory statement of the purposes of sentencing to the *Sentencing Act 1995* (WA) in Law Reform Commission WA, *Court Intervention Programs: Final Report*, Project No. 96, 2009, recommendation 11, p 43.
[1833] *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(a)-(e).
[1834] *Sentencing Act 1997* (Tas) s 3.
[1835] See, for example, *Sentencing Act 1991* (Vic) s 48A(a).
[1836] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 37.
[1837] *Criminal Law (Sentencing) Act 1988* (SA) s 20BA(1)(a).
[1838] *Green v The Queen*; *Quinn v The Queen* [2011] HCA 49 [28]; (2011) 244 CLR 462, 472-473, (French CJ, Crennan and Kiefel JJ).
[1839] See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, p 48.
[1840] See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, p 48.
[1841] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW*)* s 5(1); *Sentencing Act 1991* (Vic) s 5 (4); *Penalties and Sentences Act 1992* (Qld) s 9 (2)(a); *Sentencing Act 1995* (WA) s 6(4).

[1842] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
[1843] *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 28(2).
[1844] *Penalties and Sentencing Act 1992* (Qld) s 9(4).
[1845] *R v De Simoni* [1981] HCA 31 [8]; (1981) 147 CLR 383, 389, (Gibbs CJ, Mason and Murphy JJ agreeing).
[1846] See, for example, *Sentencing Act 1991* (Vic) s 5(3).
[1847] *Blundell v R* [2008] NSWCCA 63 [46-47]; (2008) 70 NSWLR 660, 666-667 (Simpson J, Grove and Hulme JJ agreeing); *Leach v The Queen* [2008] NSWCCA 73 [8]-[9]; (2008) 183 A Crim R 1, 4, 5, (Basten JA).
[1848] *Blundell v R* [2008] NSWCCA 63 [47]; (2008) 70 NSWLR 660, 667 (Simpson J, Grove and Hulme JJ agreeing [47]); *Kelly v The Queen* [2007] NSWCCA 357 (18 December 2007) [30] (Basten JA, Barr and Adams JJ agreeing).
[1849] See, for example, *Sentencing Act 1991* (Vic) s 5(1)(f); *Penalties and Sentences Act 1992* (Qld) s 9(1)(f); *Sentencing Act* (NT) s 5(1)(f).
[1850] *Crimes (Sentencing) Act 2005* (ACT) s 7(2): 'To remove any doubt, nothing about the order in which the purposes appear in subsection (1) implies that any purpose must be given greater weight than any other purpose.'
[1851] *Muldrock v The Queen* [2011] HCA 39 [20]; (2011) 244 CLR 120, 129.
[1852] See, for example, A Freiberg, H Donnelly and K Gelb, in *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 54-56, which sets out child sexual assault offences at July 2015 and their associated statutory maximums.
[1853] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 7.
[1854] Sexual intercourse with a child under 10 years (*Crimes Act 1900* (NSW) s 66A(2)); carnal knowledge of a child under 12 with an impairment of the mind (*Criminal Code* (Qld) s 215(4A)); sexual intercourse with a child under 14 years (*Criminal Law Consolidation Act 1935* (SA) s 49(1)).
[1855] Judicial Commission of NSW, *Sentencing Bench Book*, [5-030].
[1856] *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Child Sex Offenders Registration Act 2006* (SA*); Community Protection (Offender Reporting) Act 2005* (Tas); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration) Act* (NT).
[1857] See, for example, *Sex Offenders Registration Act 2004* (Vic) s 11.
[1858] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
[1859] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(b)–(cb), 21A(2)(e)–(ib), 21A(2)(m)–(p).
[1860] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(d), 21A(2)(j).
[1861] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(a), 21A(2)(h), 21A(2)(l).
[1862] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(3)(c)–(d), 21A(3)(j).
[1863] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f)–(i).
[1864] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(a).
[1865] See, for example, *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Crimes (Sentencing) Act 2005* (ACT) ss 33-36.
[1866] See, for example, *Sentencing Act 1995* (WA) ss 6(2), 6(3), 7, 8.
[1867] *Anderson v The Queen* [1993] HCA 59 [15], [19]; 177 CLR 520, 536, 539-540; (Deane, Toohey and Gaudron JJ); *R v Olbrich* [1999] HCA 54 [27]; (1999) CLR 270, 281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ).
[1868] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).
[1869] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 52.

[1870] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 57.
[1871] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 52.
[1872] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 56.
[1873] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 53.
[1874] A Hoel and K Gelb, *Sentencing Matters: Mandatory Sentencing*, Sentencing Advisory Council (Vic), 2008, p 1.
[1875] *Corrective Services Act 2006* (Qld) s 181A.
[1876] *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) s 3.
[1877] *Penalties and Sentences Act 1992* (Qld) s 161E(2).
[1878] *Penalties and Sentences Act 1992* (Qld) s 161E(3).
[1879] New South Wales Law Reform Commission, *Interim Report on Standard Minimum Non Parole Periods: Report 134*, 2012, p 3.
[1880] *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4, Table to Division 1A.
[1881] Sentencing Advisory Council (Victoria), *Baseline sentencing,* https://www.sentencingcouncil.vic.gov.au/about-sentencing/baseline-sentencing (viewed 29 August 2016).
[1882] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 61.
[1883] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(u); A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 64.
[1884] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 108.
[1885] *Muldrock v The Queen* [2011] HCA 39 [54]; (2011) 244 CLR 120, 139; A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 58-59.
[1886] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).
[1887] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 60, 78.
[1888] Sentencing Council (NSW), *Sentencing for child sexual assault*, 2015, p 27.
[1889] *Crimes (Sentencing Procedure Act) 1999* (NSW) s 24A.
[1890] *Sentencing Act 1991* (Vic) s 5(2BC).
[1891] *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(b).
[1892] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 76.
[1893] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).
[1894] *Veen v The Queen (No 2)* [1998] HCA 14 [14]; (1988) 164 CLR 465, 477-478 (Mason CJ, Brennan, Dawson, Toohey JJ); A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 77.
[1895] See, for example, *Penalties and Sentences Act 1992* (Qld) ss 9(10), 9(11).
[1896] *Ryan v R* [2001] HCA 21 [29]; (2001) 206 CLR 267, 276 (McHugh J); A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 79.

[1897] See, for example, *Crimes Act 1914* (Cth) s 16A(2)(m); *Sentencing Act 1991* (Vic) ss 5(2)(f), 6(b), 6(c); *Penalties and Sentences Act 199*2 (Qld) s 9(2)(f); *Crimes (Sentencing Act) 2005* (ACT) s 33(1)(m); *Sentencing Act* (NT) s 5(2)(e).
[1898] Sentencing Council (NSW), *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1*, 2008, p 120.
[1899] *Ryan v R* [2001] HCA 21 [23]-[25]; (2001) 206 CLR 267, 275 (McHugh J).
[1900] Sentencing Council (NSW), *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1*, 2008, p 127.
[1901] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).
[1902] Sentencing Council (NSW), *Sentencing for child sexual assault*, 2015, p 21.
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[1904] See *Penalties and Sentences Act* (Qld) s 9(3)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(d); *Crimes Sentencing Act* (ACT) s 33(1)(d).
[1905] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 69.
[1906] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 67-69.
[1907] *Crimes Act 1914* (Cth) s 16A(2)(ea); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28; *Sentencing Act 1991* (Vic) s 8K; *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i) and *Victims of Crime Assistance Act 2009* (Qld) s 15; *Sentencing Act 1995* (WA) s 24; *Criminal Law (Sentencing) Act 1988* (SA) s7A; *Sentencing Act 1997* (Tas) s 81A; *Crimes (Sentencing) Act 2005* (ACT) s 49; and *Sentencing Act 1995* (NT) s 106B.
[1908] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1); *Sentencing Act 1991* (Vic) s 8K(1).
[1909] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.
[1910] *The Queen v De Simoni* [1981] HCA 31 [8]; (1981) 147 CLR 383, 389 (Gibbs CJ, Mason and Murphy JJ agreeing).
[1911] *R v H* [2005] NSWCCA 282.
[1912] *R v H* [2005] NSWCCA 282 (16 September 2005) [56]-[58]; Judicial Commission of NSW, *Sentencing Bench Book*, [12-836].
[1913] See, for example, *Report of Case Study No 15: Response of Swimming Institutions, the Queensland and NSW Offices of the DPP and the Queensland Commission for Children and Young People and Child Guardian to Allegations of Child Sexual Abuse by Swimming Coaches*, 2015, p 159.
[1914] *Crimes (Sentencing) Act 2005* (ACT) s 53(3); *Sentencing Act* (NT) s 106B(9).
[1915] See, for example, *Sentencing Act 1991 (Vic)* s 8K(2); *Sentencing Act 1995* (WA) s 25(1); *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3)(a); *Sentencing Act 1997* (Tas) s 81A(2).
[1916] See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30(2), 30A(1); *Sentencing Act 1991* (Vic) ss 8K(3)(a)-(b), 8Q (1)(a)(i)-(ii); *Sentencing Act 1995* (WA) s 24(2); *Sentencing Act* (NT) ss 106B(1)(b), 106B(2)(aa), 106B(3).
[1917] E Wren and L Bartels, 'Guilty your honour': Recent legislative developments on the guilty plea discount and an Australian Capital Territory case study on its operation*, Adelaide Law Review*, vol 35, 2014, pp 361 – 384, p 361.
[1918] *R v Thomson; R v Houlton* [2000] NSWCCA 309 [160]-[162]; (2000) 49 NSWLR 383, 419 (Spigelman CJ, Wood CJ at CL, Foster AJA and Grove and James JJ agreeing).
[1919] New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, p 123.
[1920] South Australia: *Criminal Law (Sentencing) Act 1988* (SA) ss 10B, 10C.
[1921] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23; in Victoria, the *Sentencing Act 1991* (Vic) ss 5(2AB), (2AC) recognises the availability of a discount for future assistance; *Penalties and Sentences Act 1992* (Qld) ss 13A, 13B.

[1922] See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013, pp 128-129.
[1923] See New South Wales Law Reform Commission, *Sentencing: Report 139*, 2013 p 132; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A.
[1924] New South Wales Law Reform Commission, *Encouraging appropriate guilty pleas: Report 141*, 2014, p 225.
[1925] Sentencing Council (NSW), *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1*, 2008, pp 123-125.
[1926] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 80.
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[1928] *Ryan v R* [2001] HCA 21; (2001) 206 CLR 267.
[1929] *Ryan v R* [2001] HCA 21 [20]; (2001) 206 CLR 267, 274 (McHugh J).
[1930] Reproduced in *Ryan v R* [2001] HCA 21 [19]; (2001) 206 CLR 267, 274 (McHugh J).
[1931] See *Ryan v R* [2001] HCA 21[21]-[22]; (2001) 206 CLR 267, 274-275 (McHugh J).
[1932] *Ryan v R* [2001] HCA 21 [34]-[35]; (2001) 206 CLR 267, 278 (McHugh J).
[1933] *Crimes (Sentencing Procedure Act) 1999* (NSW) Sch 2 Pt 19 cl 59.
[1934] *R v Stoupe* [2015] NSWCCA 175 (3 July 2015) [56], [87] (Johnson J, Hoeben CJ at CL agreeing).
[1935] *R v Stoupe* [2015] NSWCCA 175 (3 July 2015) [85], [86] (Johnson J, Hoeben CJ at CL agreeing).
[1936] *AH v R* [2015] NSWCCA 51 [20]-[25].
[1937] *Criminal Law (Sentencing) (Character Evidence) Amendment Act 2014* (SA).
[1938] A class 1 or class 2 offence within the meaning of the *Child Sex Offenders Registration Act 2006* (SA) see *Criminal Law (Sentencing) (Character Evidence) Amendment Act 2014* s 4.
[1939] *Criminal Law (Sentencing) (Character Evidence) Amendment Act 2014* s 4.
[1940] *R v Maynard* [2014] SASCFC 128 [17], [54]; (2014) 121 SASR 188, 191, 196, 197 (Bampton J): The offender was an Aboriginal Education officer at a Department for Education and Child Development School and the child was a student of that school.
[1941] Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline*, 2013, Annex B (Approach to sentencing historic sexual offences), p 155.
[1942] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 81.
[1943] See, for example, *R v Bradley Ian Weir* [2015] ACTSC 394 [15] (Robinson AJ); Sentencing Advisory Council (Vic), *Sentencing of Offenders: Sexual Penetration with a Child under 12*, 2016, p 52.
[1944] See, for example, *R v Liddy* (No 2) [2002] SASC 306 [23] (Mullighan J).
[1945] Sentencing Advisory Council (Vic), *Sentencing of Offenders: Sexual Penetration with a Child under 12*, 2016, p 54.
[1946] Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Final Report* 2012, p 9, Recommendation 2.
[1947] Sentencing Advisory Council (Tas), *Sex Offence Sentencing: Final Report*, 2015, p 104, Recommendation 12.
[1948] N Stevens and S Wendt, 'The "good" child sex offender: Constructions of defendants in child sexual abuse sentencing', *Journal of Judicial Administration*, vol 24, 2014, pp 95-107, pp 101, 102.
[1949] N Stevens and S Wendt, 'The "good" child sex offender: Constructions of defendants in child sexual abuse sentencing', *Journal of Judicial Administration*, vol 24, 2014, pp 95-107, p 107.
[1950] The term 'cumulative' is used in the sentencing legislation of most states and territories. However, the term 'consecutive' is used instead of 'cumulative' in the sentencing legislation of New South Wales and the Australian Capital Territory: See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55; *Crimes (Sentencing) Act 2005* (ACT) Part 5.3.

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[1952] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 100.
[1953] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 100.
[1954] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 98; Sentencing Council (NSW), *Sentencing for child sexual assault*, 2015, Table 7.1, pp 45-46; Sentencing Advisory Council (Vic), *Sentencing of Offenders: Sexual Penetration with a Child under 12*, 2016, pp xii, 14.
[1955] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, Table 5 pp 25-26.
[1956] Transcript of M Lawrence, Case Study 38, 15 March 2016, T17441:20-28.
[1957] Transcript of M Lawrence, Case Study 38, 15 March 2016, T17443:32-36.
[1958] Exhibit 38-0007, Statement of K J Whitley, Case Study 38, STAT.0914.001.0001_R at [34].
[1959] Exhibit 38-0007, Statement of K J Whitley, Case Study 38, STAT.0914.001.0001_R at [43].
[1960] Australian Law Reform Commission, *Same Crime, Same time: Sentencing of Federal Offenders*, 2006, p 338. In relation to Victoria, see *Sentencing Act 1991* (Vic) s 6E, as discussed in A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 99.
[1961] See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(1); *Sentencing Act 1991* (Vic) ss 16(1), 16(1A); *Penalties and Sentences Act 1992* (Qld) ss 155, 156; *Sentencing Act 1995* (WA) s 88*; Sentencing Act 1997* (Tas) s 15*; Crimes (Sentencing) Act 2005* (ACT) ss 71-73; *Sentencing Act* (NT) ss 50-52.
[1962] New South Wales Law Reform Commission, *Sentencing: Report 79,* 1996, p 182, in recommending 'There should be a general legislative presumption in favour of concurrent sentences (recommendation 43, p 181).
[1963] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 56, 57.
[1964] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(2).
[1965] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53(1).
[1966] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2)(b); New South Wales Law Reform Commission, *Sentencing: Report 139*, 2014, p 138.
[1967] *Sentencing Act 1991* (Vic) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 18A; *Sentencing Act 1997* (Tas) s 11; *Sentencing Act 1995* (NT) s 52.
[1968] *Franklin v R* [2013] NSWCCA 122 [44]-[45] (Hoeben CJ at CL, Hall and Davies JJ agreeing). Also see: Judicial Commission of NSW, *Sentencing Bench Book*, [8-230].
[1969] *Magnuson v R* [2013] NSWCCA 50 [142] (Button J, McClellan CJ at CL and Bellew J agreeing).
[1970] See, for example, *R v Smith* [2006] NSWCCA 353 [23] (Bell J, Hidden J agreeing).
[1971] *Sentencing Act 1991* (Vic) s 16(1).
[1972] *Sentencing Act 1991* (Vic) s 6A.
[1973] *Sentencing Act 1991* (Vic) s 6E.
[1974] *Sentencing Act 1991* (Vic) s 6C.
[1975] *Sentencing Act 1991* (Vic) s 6B(2).
[1976] *Sentencing Act 1991* (Vic) s 6D.
[1977] *DPP v Bales* [2015] VSCA 261.
[1978] *DPP v Bales* [2015] VSCA 261 [45] (Osborn, Kaye and McLeish JJA).
[1979] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016, p ix.
[1980] See, for example, P Poletti, P Mizzi and H Donnelly, 'Sentencing for the offence of sexual intercourse with a child under 10', *Sentencing Trends and Issues*, Judicial Commission of NSW,

Number 44, 2015, p 27, which observed that the shortest sentences were imposed where delay was more than 20 years.
[1981] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 95.
[1982] See, for example, *Magnuson* [2013] NSWCCA 50 [143]-[145] (Button J, McClellan CJ at CL and Bellew J agreeing).
[1983] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 97.
[1984] *Radenkovic v R* [1990] HCA 54 [17]; (1990) 170 CLR 623, 632 (Mason CJ and McHugh J, Toohey and Gaudron JJ accepting without deciding, Dawson J dissenting).
[1985] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 92.
[1986] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 93.
[1987] *Sentencing Act 1991* (Vic) ss 5(2)(a), 5(2)(b).
[1988] *Stalio v R* [2012] VSCA 120 [18]; (2012) 46 VR 426, 434-435 (Neave and Osborn JJA and King AJA).
[1989] *Curypko v R* [2014] VSCA 19 (29 August 2014) [72] (Ashley JA, Neave JA agreeing); *Stalio v R* [2012] VSCA 120 [78]; (2012) 46 VR 426, 445 (Neave and Osborn JJA and King AJA).
[1990] *Stalio v R* [2012] VSCA 120 [78]; (2012) 46 VR 426, 445 (Neave and Osborn JJA and King AJA).
[1991] *R v D* (1997) 69 SASR 413.
[1992] *Criminal Law (Sentencing) Act 1998* (SA), s 29D.
[1993] *R v D* (1997) 69 SASR 413, BC9704318 at pp 12-14 (Doyle CJ, Bleby J agreeing).
[1994] *R v Kench* [2005] SASC 85 [26]; (2005) 152 A Crim R 294, 298 (Doyle CJ, Besanko J and Vanstone J agreeing); *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA); South Australia, House of Assembly, 11 April 2005, *Parliamentary Debates*, 2275-2276 (M Atkinson, Attorney General).
[1995] [2011] SASCFC 116.
[1996] *R v Marien* [2011] SASCFC 116 [26]-[27] (Gray, Sulan and Blue JJ).
[1997] *R v Marien* [2011] SASCFC 116 [28], [33]. See also *R v Cashion* [2014] SASCFC 138 [20] (Kourakis CJ).
[1998] Particularly *R v Millberry and Others* [2002] EWCA Crim 2891, [2003] 1 WLR 546.
[1999] *Sexual Assault Act 2003*, discussed in: Sentencing Council for England and Wales, *Sexual Offences Guideline: Consultation*, 2012, p 6.
[2000] *R v H and Others* [2011] EWCA Crim 2753; [2012] 2 Cr App R (s) 21.
[2001] *R v H and Others* [2011] EWCA Crim 2753, [10], [11]; [2012] 2 Cr App R (S) 21, [10], [11] (Lord Chief Justice of England and Wales).
[2002] *R v H and Others* [2011] EWCA Crim 2753, [16]; [2012] 2 Cr App R (S) 21, [16] (Lord Chief Justice of England and Wales).
[2003] *R v H and Others* [2011] EWCA Crim 2753, [17], [18]; [2012] 2 Cr App R (S) 21, [17], [18] (Lord Chief Justice of England and Wales); *R v Secretary of State for the Home Department (Appellant) ex parte Uttley (Respondent)* [2004] UKHL 38; [2004] 1 WLR 2278.
[2004] *R v Secretary of State for the Home Department (Appellant) ex parte Uttley (Respondent)* [2004] UKHL 38; [2004] 1 WLR 2278, 2285, [21] (Lord Phillips of Worth Matravers, Lord Steyn and Lord Rodger of Earlsferry agreeing).
[2005] *R v H and Others* [2011] EWCA Crim 2753 [47]; [2012] 2 Cr App R (S) 21 [47] (Lord Chief Justice of England and Wales).
[2006] Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline*, 2013, Annex B (Approach to sentencing historic sexual offences), p 155.
[2007] Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline*, 2013, Annex B (Approach to sentencing historic sexual offences), p 155, [note 1].

[2008] Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline*, 2013, Annex B (Approach to sentencing historic sexual offences), p 155, [1].
[2009] Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline*, 2013, Annex B (Approach to sentencing historic sexual offences), p 155, [4].
[2010] Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline*, 2013, Annex B (Approach to sentencing historic sexual offences), p 155, [2].
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[2012] Sentencing Council for England and Wales, *New proposals give greater focus to impact of sex offences on victims*, media release, 12 December 2013.
[2013] J Cashmore, A Taylor, R Shackel and P Parkinson, *Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 191.
[2014] Sentencing Council (NSW), *Sentencing for child sexual assault*, 2015, p 38.
[2015] K Gelb, *A Statistical Analysis of Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 24.
[2016] Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Final Report*, 2012, pp 35-36.
[2017] *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld), see Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Final Report*, 2012, pp 35.
[2018] Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Final Report*, 2012, p 36.
[2019] Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Final Report*, 2012, p 36.
[2020] Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Final Report*, 2012, p 35.
[2021] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, p 1.
[2022] The Rt Hon Lord Justice Auld, *Review of the criminal courts of England and Wales*, 2001, p 611.
[2023] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, p 2.
[2024] Office of the Director of Public Prosecutions for New South Wales, *Prosecution and Policy Guidelines*, Guideline 29.
[2025] See, for example, *Crimes (Appeals and Review) Act 2001* (NSW) Part 8.
[2026] Transcript of M P Lawrence, Case Study 38, 15 March 2016, T17441:42-46.
[2027] Transcript of M P Lawrence, Case Study 38, 15 March 2016, T17442:11-14.
[2028] Transcript of J C Brandt, Case Study 38, 16 March 2016, T17516:44-T17517:7.
[2029] Transcript of CDW, Case Study 38, 17 March 2016, T17674:46-T17675:5.
[2030] H Donnelly, R Johns and P Poletti, *Conviction appeals in New South Wales: Monograph 35*, Judicial Commission of NSW, 2011.
[2031] H Donnelly, R Johns and P Poletti, *Conviction appeals in New South Wales: Monograph 35*, Judicial Commission of NSW, 2011, p 239.
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[2038] J Cashmore, A Taylor, R Shackel and P Parkinson, *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 270-271.
[2039] J Cashmore, A Taylor, R Shackel and P Parkinson, *Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 131.
[2040] J Cashmore, A Taylor, R Shackel and P Parkinson, *Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 283.
[2041] J Cashmore, A Taylor, R Shackel and P Parkinson, *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 282-283.
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[2043] J Cashmore, A Taylor, R Shackel and P Parkinson, *Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 294.
[2044] *R v PWD* [2010] NSWCCA 209.
[2045] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, p 27. The relevant provisions are *Criminal Appeal Act 1912* (NSW) s 5F; *Criminal Procedure Act 2009* (Vic) s 295; *Supreme Court Act 1933* (ACT) s 37E(4); *Federal Court of Australia Act 1976* (Cth) s 30AA(4).
[2046] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, p 27-28. The relevant provisions are *Criminal Law Consolidation Act 1935* (SA) s 352(1)(b), (c); *Criminal Appeals Act 2004* (WA) s24(2), s26(1), (3); *Criminal Code* (Qld) s 668A.
[2047] *Criminal Appeal Act 1912* (NSW) s 5F (3A).
[2048] *Criminal Code* (Qld) s 668A(1).
[2049] *Criminal Appeals Act 2004* (WA) s26.
[2050] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, p 214 [11.26]-[11.27].
[2051] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, pp 214-215, Recommendation 11.2.
[2052] New South Wales Law Reform Commission*, Criminal Appeals*, Report 140, 2014, pp 214-215, [11.28].
[2053] [2002] HCA 53; (2002) 213 CLR 606.
[2054] (1996) 190 CLR 348.
[2055] (1997) 191 CLR 439.
[2056] (1996) 190 CLR 348, 366.
[2057] (1996) 190 CLR 348, 366.
[2058] (1996) 190 CLR 348, 366.
[2059] (1996) 190 CLR 348, 367.

[2060] *Mackenzie v The Queen* (1996) 190 CLR 348, 367-368 quoting King CJ in *R v Kirkman* (1987) 44 SASR 591, 593: 'Juries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at a verdict of guilty.'
[2061] (1996) 190 CLR 348, 368.
[2062] (1996) 190 CLR 348, 368.
[2063] (1996) 190 CLR 348, 369–70.
[2064] (1997) 191 CLR 439.
[2065] (1997) 191 CLR 439, 446 (Brennan J), 453 (Gaudron, McHugh and Gummow JJ).
[2066] (1997) 191 CLR 439, 453.
[2067] (1997) 191 CLR 339, 455.
[2068] *MFA v The Queen* [2002] HCA 53 [97]; (2002) 213 CLR 606, 634.
[2069] [1994] HCA 63; (1994) 181 CLR 487. The test is: 'Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty' (Mason CJ, Deane, Dawson and Toohey JJ).
[2070] *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, 614 [25], 618 [36] (Gleeson CJ, Hayne and Callinan JJ); 624 [60]-[61] (McHugh, Gummow and Kirby JJ).
[2071] *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, 616-618 [33]-[35] (Gleeson CJ, Hayne and Callinan JJ); 630 – 631 [85]-[87] (McHugh, Gummow and Kirby JJ).
[2072] *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, 618 [35] (Gleeson CJ, Hayne and Callinan JJ); 632 [89] (McHugh, Gummow and Kirby JJ).
[2073] *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, 618 [35].
[2074] *R v RAT* [2000] NSWCCA 77; (2000) 111 A Crim R 360 [46] (Dunford J, Arr J agreeing, Hulme J dissenting).
[2075] [2001] NSWCCA 290; (2001) 52 NSWLR 82.
[2076] [2001] NSWCCA 290; (2001) 52 NSWLR 82, 98, [65].
[2077] [2001] NSWCCA 290; (2001) 52 NSWLR 82. Grove J [271], 136 and Carruthers AJ [344], 149 agreed with Spigelman CJ; Wood CJ at CL found to similar effect [212], 125; Simpson J agreed with Spigelman CJ, Wood CJ at CL and Grove J in relation to the law and analysis of *Jones* [324], 145.
[2078] [2001] NSWCCA 290, [65].
[2079] [2001] NSWCCA 290, [65].
[2080] [2007] NSWCCA 235.
[2081] [2007] NSWCCA 235 [49], [53].
[2082] {2007] NSWCCA 235 [53].
[2083] [2007] NSWCCA 235 [244].
[2084] [2007] NSWCCA 235 [247].
[2085] [2007] NSWCCA 235 [248].

[2086] [2007] NSWCCA 235 [259].
[2087] [2007] NSWCCA 235 [260].
[2088] [2007] NSWCCA 235 [8].
[2089] [2007] NSWCCA 235 [16], [22].
[2090] [2007] NSWCCA 235 [22].
[2091] *Criminal Procedure Act 1986* (NSW) s 306B, *Criminal Procedure Act 2009* (Vic) s 374(2), s 379, *Evidence Act 1977* (Qld) s 21A(6), s 21AM(1)(b), *Evidence Act 1906* (WA) s 106T, *Evidence Act 1929* (SA) s 13D, *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7B(1), *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 40V(2), 40S, *Evidence Act* (NT) s 21E(4).
[2092] Transcript of CDW, Case Study 38, 17 March 2016 T17673:47-T17674:3 and T17675:12-22.
[2093] *Criminal Procedure Act 1986* (NSW) s 306C, s 306D, s 306J, s 306K.
[2094] *Criminal Procedure Act 1986* (NSW) s 306E.
[2095] *Criminal Procedure Act* (Vic) s 379.
[2096] [2016] VSCA 96.
[2097] [2016] VSCA 96 [68].
[2098] [2016] VSCA 96 [70]–[74].
[2099] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015.
[2100] Transcript of M Braden, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T17:21-32, T17:38-T18:06.
[2101] Transcript of S Smallbone, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T37:44-46.
[2102] Transcript of S Wong, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T52:20-38.
[2103] P Keyzer and B McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice', *University of New South Wales Law Journal,* vol 38, no 2, p 810.
[2104] Transcript of S Wong, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T52:20-T53:15; Transcript of H Pharo, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T56:26-44.
[2105] Transcript of A Phelan, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T19:20-27; transcript, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T65:12-29.
[2106] Transcript of H Pharo, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T56:30-44.
[2107] Transcript of J Prately, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T46:37-T47:1.
[2108] Transcript of M Donaldson, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T47:9-35.
[2109] L Bakker, S Hudson, D Wales and D Riley, *And there was light … Evaluating the Kia Marama Treatment Programme for New Zealand Sex Offenders Against Children*, 1998, pp 19-20.
[2110] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, p 11, recommendation 20(b).
[2111] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, p 11, recommendation 20c.
[2112] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, p 12, recommendation 23.
[2113] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, p 95.

[2114] *National Framework: Creating Safe Environments for Children – Organisations, Employees and Volunteers, Schedule: An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*, Community and Disability Services Ministers' conference, 2005.
[2115] *National Framework: Creating Safe Environments for Children – Organisations, Employees and Volunteers, Schedule: An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*, Community and Disability Services Ministers' conference, 2005, p 4.
[2116] Transcript of L Coe, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T58:46-T59:6.
[2117] Transcript of L Coe, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T59:8-17.
[2118] Transcript of L Coe, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T59:25-29.
[2119] Transcript of L Coe, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T59:31-41.
[2120] Transcript of S Wong, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T61:38-T62:8.
[2121] Transcript of A Phelan, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016: T62:26-38.
[2122] Transcript of Justice McClellan and M Donaldson, Criminal Justice Roundtable: Adult Sex Offender Treatment Programs, 21 April 2016, T65:12-21.
[2123] *Crimes (High Risk Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Criminal Law (High Risk Offenders) Act 2015* (SA); *Serious Sex Offenders Act* (NT).
[2124] B McSherry, P Keyzer and A Freiberg, *Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development: Report to the Criminology Research Council*, Monash University, 2006, p 9.
[2125] New South Wales and South Australia expand the scope of these provisions outside of the serious sex offender category (*Crimes (High Risk Offenders) Act 2006* (NSW) s 3 and *Criminal Law (High Risk Offenders) Act 2015* (SA) s 3). Other jurisdictions, including Victoria, Queensland, Western Australia and the Northern Territory have indefinite detention schemes that encompass violent offenders, which are discussed below at [14.3.3]. In addition, at the Council of Australian Governments on 1 April 2016, First Ministers supported the development of a nationally consistent post sentence preventative detention scheme in relation to high risk terrorist offences (Council of Australian Governments, *COAG Meeting Communiqué, 1 April 2016*, 2016, pp 3-4.
[2126] *Crimes (High Risk Offenders) Act 2006* (NSW) s 3; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 1(1), 1(2); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 3; *Dangerous Sexual Offenders Act 2006* (WA) s 4. Note that the objects clause of the *Criminal Law (High Risk Offenders) Act 2015* (SA) does not include rehabilitation as an object (s 3).
[2127] *Crimes (High Risk Offenders) Act 2006* (NSW) s 5H-5J, s 6(2), s 9, s 13A-13C, s 17, s 24A, noting that no Regulation has been made under the Act to authorise another person to act on behalf of the State; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 7; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5, s 13(5)(a)-(b); *Dangerous Sexual Offenders Act 2006* (WA) s 6 (which also allows the Director of Public Prosecutions to make an application), s 17; *Criminal Law (High Risk Offenders) Act 2015* (SA) ss 7(1)-(2) (an order can be made within 12 months of the expiry date); Northern Territory legislation permits an application within 12 months of finalisation of sentence: *Serious Sex Offenders Act 2013* (NT) s 23.

[2128] New South Wales legislation defines custody as full-time detention, intensive correction order, home detention and release on parole: *Crimes (High Risk Offenders) Act 2006* (NSW) s 5I(3); Victorian legislation states that an offender on parole is still serving a custodial sentence for the purpose of the Act: *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 5; Other jurisdictions do not so define: For example, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5(2)(c); *Dangerous Sexual Offenders Act 2006* (WA) s 8 (3).
[2129] See, for example *Crimes (High Risk Offenders) Act 2006* (NSW), where the Supreme Court must be satisfied 'to a high degree of probability' that the offender poses an unacceptable risk of committing a serious sex offence to be considered a 'high risk sex offender' (s 5B). See also s 9(2) of the *Serious Sex Offenders* (*Detention and Supervision) Act 2009* (Vic). See also P Keyzer and B McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' (2013) 2 *International Journal of Criminology and Sociology* 296, Chapter II(C).
[2130] *Crimes (High Risk Offenders) Act 2006* (NSW) s 9(3); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 9(3); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4); *Dangerous Sexual Offenders Act 2006* (WA) s 7(3); *Criminal Law (High Risk Offenders) Act 2015* (SA), ss 7(3) and 7(6); *Serious Sex Offenders Act 2013* (NT) s 14.
[2131] *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 11; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 16, s17; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 16; *Dangerous Sexual Offenders Act 2006* (WA) s 18; *Criminal Law (High Risk Offenders) Act 2015* (SA) ss 10, 11; *Serious Sex Offenders Act 2013* (NT) ss 18, 19.
[2132] *Crimes (High Risk Offenders) Act 2006* (NSW) s 12; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 160; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 43AA; *Dangerous Sexual Offenders Act 2006* (WA) s 40A; *Serious Sex Offenders Act 2013* (NT) s 46.
[2133] *Kable v DPP (NSW)* (1996) 189 CLR 51; *Fardon v Attorney-General (Qld)* (2204) 223 CLR 575.
[2134] See: *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW), which expanded the scope of the legislation to violent offenders as well as sexual offenders (Schedule 1), and the *Crimes (High Risk Offenders) Amendment Act 2014* (NSW), which introduced the High Risk Offenders Assessment Committee, comprising senior representatives from various NSW Government agencies, the functions of which include reviewing risk assessments of sex offenders and violent offenders and making recommendations to the Commissioner of Corrective Services NSW for the taking of action by the State under the Act (Part 4A, *Crimes (High Risk Offenders) Act 2006* (NSW)).
[2135] See, for example, B McSherry, P Keyzer and A Freiberg, *Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development*: *Report to the Criminology Research Council*, Monash University, 2006, pp 75-85; P Keyzer, 'The United Nations Human Rights Committee's views about the legitimate parameters of the preventive detention of serious sex offenders' *Criminal Law Journal*, vol 34, no 5, 2010, pp 285-288; P Keyzer, B McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' *International Journal of Criminology and Sociology,* 2013, 2, p 299.
[2136] B McSherry, P Keyzer, and A Freiberg, *Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development: Report to the Criminology Research Council*, Monash University, 2006, p 80. The reference to 'Fardon' is a reference to the High Court's decision in *Fardon v Attorney-General (Qld)* (2204) 223 CLR 575.
[2137] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 182, 183.
[2138] Information drawn from A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 180-185.
[2139] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 171-180.

[2140] *Sentencing Act 1991* (Vic) s 18A; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1995* (WA) s 98(1); *Sentencing Act* (NT) s 65.
[2141] *Sentencing Act 1991* (Vic) s 18B(1); *Penalties and Sentences Act 1992* (Qld) s 163(3); *Sentencing Act 1995* (WA) s 98; *Sentencing Act* (NT) s 65(8).
[2142] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 175, citing *McGarry* [2001] HCA 62 [61]; (2001) 207 CLR 121 (Kirby J).
[2143] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp 179, 180, citing NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences*, 2008, Vol 3, pp 12-16. In referring to the work of the NSW Sentencing Council, the Sentencing Research noted that the Council did not necessarily agree with all of the criticisms listed, nor did the Council consider that the objections raised justify the abandonment or repeal of preventive detention legislation.
[2144] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 181.
[2145] Information drawn from A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015 pp 175-178.
[2146] In Queensland, the *Criminal Law Amendment Act 1945* (Qld) refers to persons convicted of an 'offence of a sexual nature' s 2A; the relevant offences in South Australia are set out in the *Criminal Law (Sentencing) Act 1988* (SA) s 23(1), definition of 'relevant offence'.
[2147] *Criminal Law Amendment Act 1945* (Qld) ss 18(3), 18(14); *Criminal Law (Sentencing) Act 1988* (SA) s 23(1).
[2148] *Criminal Law (Sentencing) Act 1988* (SA) s 23(9).
[2149] *Criminal Law Amendment Act 1945* (Qld) ss 18(8), 18(8A).
[2150] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 172.
[2151] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 173.
[2152] *Sentencing Act 1997* (Tas) s 19.
[2153] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, (2015, p 174.
[2154] *Sentencing Act 1997* (Tas) s 19(1).
[2155] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 174.
[2156] *Child Protection (Offenders Registration) Act 2000* (NSW) Division 9; *Child Protection (Offender Reporting) Act 2004* (Qld) Part 5.
[2157] *Sex Offenders Registration Act 2004* (Vic) Part 4.
[2158] *Community Protection (Offender Reporting) Act 2004* (WA) Part 4; *Community Protection (Offender Reporting) Act 2005* (Tas) Part 4.
[2159] *Child Sex Offenders Registration Act 2006* (SA) Part 4.
[2160] *Crimes (Child Sex Offenders) Act 2005* (ACT) Chapter 4.
[2161] *Child Protection (Offender Reporting and Registration) Act 2004* (NT).
[2162] A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p 211.
[2163] See, for example, *Child Protection (Offenders Registration) Act 2000* (NSW) s 3, definitions of 'Class 1 offence' and 'Class 2 offence'. In Victoria, there are four classes of offence, which include offences of a sexual nature against an adult by a person who is for the purposes of the *Sex Offenders Registration Act 2004* (Vic), a serious sexual offender (s 8). In Queensland, there is no class-based approach to offences (*Child Protection (Offender Reporting) Act 2004*, s 9, Schedule 1).

[2164] *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A; *Sex Offenders Registration Act 2004* (Vic) s 34; *Community Protection (Offender Reporting) Act 2004 (*WA) s 46; *Child Sex Offenders Registration Act 2006* (SA) s 34; *Community Protection (Offender Reporting) Act 2005* (Tas) s 24; *Crimes (Child Sex Offenders) Act 2005* (ACT) Part 3.5; *Child Protection (Offender Reporting and Registration) Act* (NT) s 37; Note that in Queensland the reporting period is slightly varied: *Child Protection (Offender Reporting) Act 2004* (Qld) s 36: five years, 10 years or life.
[2165] See, for example, *Child Protection (Offenders Registration) Act 2000* (NSW) s 9; *Sex Offenders Registration Act 2004* (Vic) s 14.
[2166] See, for example, *Child Protection (Offenders Registration) Act 2000* (NSW) s 16C; *Sex Offenders Registration Act 2004* (Vic) s 66V, if the court considered that it is necessary to monitor the registrable offender's compliance with any conditions it can impose in relation to s 66Q of that Act.
[2167] *Child Protection (Offenders Registration) Act 2000* (NSW) s 9A; *Sex Offenders Registration Act 2004* (Vic) s 12; *Child Protection (Offender Reporting) Act 2004* (Qld) s 14; *Community Protection (Offender Reporting) Act 2004 (*WA) s 24; *Child Sex Offenders Registration Act 2006* (SA) s 11; *Community Protection (Offender Reporting) Act 2005* (Tas) s 16; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 23; *Child Protection (Offender Reporting and Registration) Act* (NT) s 14.
[2168] *Child Protection (Offenders Registration) Act 2000* (NSW) s 10; *Sex Offenders Registration Act 2004* (Vic) s 16; *Community Protection (Offender Reporting) Act 2004 (*WA) s 28; *Child Sex Offenders Registration Act 2006* (SA) s 15; *Community Protection (Offender Reporting) Act 2005* (Tas) s 18; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 37; *Child Protection (Offender Reporting and Registration) Act* (NT) s 18. Queensland requires quarterly reporting, having previously required annual reporting: see *Child Protection (Offender Reporting) Act 2004* (Qld) ss 19 and 86 and Schedule 5.
[2169] See, for example, *Child Protection (Offenders Registration) Act 2000* (NSW) s 11(1); *Sex Offenders Registration Act 2004* (Vic) s 17.
[2170] *Child Protection (Offenders Registration) Act 2000* (NSW) s 17; *Sex Offenders Registration Act 2004* (Vic) s 46; *Child Protection (Offender Reporting) Act 2004* (Qld) s 50; *Community Protection (Offender Reporting) Act 2004 (*WA) s 63; *Child Sex Offenders Registration Act 2006* (SA) s 44; *Community Protection (Offender Reporting) Act 2005* (Tas) s 33; *Crimes (Child Sex Offenders) Act 2005* (ACT) s116A; *Child Protection (Offender Reporting and Registration) Act* (NT) s 48.
[2171] *Child Protection (Offenders Registration) Act 2000* (NSW) ss 2A(b), (c); *Sex Offenders Registration Act 2004* (Vic) s 1(a); *Child Sex Offenders Registration Act 2006* (SA) s 3(a); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 6(1)(a).
[2172] *Sex Offenders Registration Act 2004* (Vic) s 1(b); *Child Sex Offenders Registration Act 2006* (SA) s 3(b); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 6(b).
[2173] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report,* 2015, pp 6-15
[2174] Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim report: Volume 1*, 2014, p 122.
[2175] Exhibit 30-0002, Statement of J Marijancevic, Case Study 30, STAT.0610.001.0001_R at [22]-[29]; Exhibit 30-0003, Case Study 30, Statement of BDB, STAT.0609.001.0001_R at [30], [44]-[45].
[2176] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 49.
[2177] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 34.
[2178] Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2014-15 Table 2 Defendants finalised, Summary characteristics by court level, States and territories,* http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02014-15?OpenDocument (viewed 29 August 2016).

[2179] Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2014-15 Table 1 Defendants finalised, Summary characteristics by court level, 2010-11 to 2014-15,* http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02014-15?OpenDocument (viewed 29 August 2016).
[2180] Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2014-15 Table 3 Defendants finalised, Sex and principal offence by method of finalisation,* http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02014-15?OpenDocument (viewed 29 August 2016).
[2181] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 98.
[2182] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 104.
[2183] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pp 107-109.
[2184] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 171.
[2185] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 171.
[2186] Australian Bureau of Statistics, *4519.0 - Recorded Crime – Offenders, 2014-15 Table 3 Offender Rate, Principal offence by age-2008-09 to 2014-15* http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02014-15?OpenDocument (viewed 29 August 2016).
[2187] Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders, 2014-15 Table 20 Youth Offenders, Principal offence by age and sex-2014-15,* http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02014-15?OpenDocument (viewed 29 August 2016).
[2188] *Treffiletti & Ors v Robinson & Anor* (Unreported, Supreme Court of New South Wales, Woodward J, 9 February 1981); *DK v Rooney*, (Unreported, Supreme Court of New South Wales, McInerney J, 3 July 1996); *R v CRH* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996); *R v LMW* [1999] NSWSC 1343.
[2189] *R v ALH* [2003] VSCA 129; (2003) 6 VR 276.
[2190] *The Queen v M* (1977) 16 SASR 589.
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[2196] *C v DPP* [1996] 1 AC 1, 38 (Lord Lowry), quoted by Newman J in *R v CRH* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996) 8.
[2197] *R v CRH* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996) 12.

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[2199] *C (A Minor) v Director of Public Prosecutions* (1996) 1 AC 1, 39 (Lord Lowry)*; Graham v DPP* [1997] EWHC Admin 869.
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[2204] Transcript of A/D Supt Watts, Criminal Justice Roundtable: Multi-disciplinary and specialist policing responses, T84:38-42.
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[2212] *Children (Criminal Proceedings) Act 1987* (NSW) s 17.
[2213] *Young Offenders Act 1997* (NSW) s 8.
[2214] *Children, Youth and Families Act 2005* (Vic) s 516.
[2215] *Children, Youth and Families Act 2005* (Vic) s 356(3)(b).
[2216] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 60.
[2217] *Youth Justice Act 1992* (Qld) s 99, Schedule 4 definition of 'supreme court offence'; *District Court of Queensland Act 1967* (Qld) s 61.
[2218] *Children's Court of Western Australia Act 1988* (WA) s 19.
[2219] *Young Offenders Act 1993* (SA) ss 4 definition of 'youth', 17.
[2220] *Young Offenders Act 1993* (SA) ss 17(3)(b), 17(3)(c).
[2221] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, pp 60-61.
[2222] *Youth Justice Act 1997* (Tas) ss 3 definition of 'youth', 161(1).
[2223] *Youth Justice Act 1997* (Tas) ss 3 definitions of 'offence' and 'prescribed offence', 161.
[2224] *Magistrates Court Act 1930* (ACT) ss 288(1)(a)-(b).
[2225] *Youth Justice Act* (NT) s 52(1)(a).
[2226] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 61.
[2227] A Hemming, *Halsbury's Laws of Australia*, LexisNexis, Chapter 130 – Criminal Law, VII Criminal Practice and Procedure, (11) Criminal proceedings against children and young persons (viewed 29 August 2016).

[2228] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 58.
[2229] *Youth Justice Act 1992* (Qld) Schedule 1, cl 5.
[2230] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 58.
[2231] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 58. Warner and Bartels observe that Victoria operates differently when cautioning young offenders because cautions are governed by operational instructions rather than legislation. Victorian Police will only consider a caution for sexual or related offences in exceptional circumstances and will obtain advice as to suitability from the Manager of the Sexual Crimes Squad.
[2232] K Warner and L Bartels, 'Juvenile sex offending: its prevalence and the criminal justice response', *UNSW Law Journal*, Vol 38(1), 2015, p 59.
[2233] Courts Administration Authority of South Australia 'Family Conferences' webpage: http://www.courts.sa.gov.au/OurCourts/YouthCourt/Pages/Family-Conferences.aspx (viewed 29 August 2016).
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[2237] *Children (Criminal Proceedings) Act* 1987 (NSW) s 6(f).
[2238] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process,* ALRC Report 84, 1997, [20.1].
[2239] *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2), *Children, Youth and Families Act 2005* (Vic) s 410(1)(c), *Youth Justice Act 1992* (Qld) s 150(2)(e), *Young Offenders Act 1994* (WA) s 120, *Young Offenders Act 1993* (SA) s 23(4), *Youth Justice Act 1997* (Tas) ss 5(1)(g) and 80, *Children and Young People Act 2008* (ACT) s 94(1)(f), *Youth Justice Act 1992* (NT) s 81(6).
[2240] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.
[2241] *Children (Community Service Orders) Act 1987* (NSW) s 13.
[2242] See, for example, *Children (Criminal Proceedings) Act 1987* (NSW) s 33; *Children, Youth and Families Act 2005* (Vic) s 373.
[2243] See, for example, *Youth Justice Act 1992* (Qld) s 190.
[2244] *Youth Justice Act 1997* (Tas) s 37.
[2245] *Youth Justice Act 1997* (Tas) ss 19, 40, 41, 42, 47.
[2246] Australian Bureau of Statistics, *Criminal Courts, Australia, 2011-12*, *Children's Courts, Table 8*, http://abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02011-12?OpenDocument (viewed 29 August 2016).
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[2248] *Children, Youth and Families Act 2005* (Vic) s 389(1).
[2249] *Children, Youth and Families Act 2005* (Vic) s 393.
[2250] *Children, Youth and Families Act 2005* (Vic) ss 397, 398.
[2251] *Children, Youth and Families Act 2005* (Vic) s 405.
[2252] *Children, Youth and Families Act 2005* (Vic) ss 399, 402.
[2253] *Children, Youth and Families Act 2005* (Vic) s 408.
[2254] *Young Offenders Act 1994* (WA) ss 73, 78, 88, 89, 91.
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[2259] *Children (Criminal Proceedings) Act 1987* (NSW) s 19.
[2260] *Children, Youth and Families Act 2005* (Vic) ss 411, 412.
[2261] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process,* ALRC Report 84, 1997, [20.43].
[2262] Australian Institute of Health and Welfare, *Youth justice supervision in the states and territories* http://www.aihw.gov.au/youth-justice/states-territories (viewed 29 August 2016): Male Adolescent Program for Positive Sexuality (Victoria) and the Griffith Youth Forensic Service (Queensland).
[2263] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process,* ALRC Report 84, 1997, [20.34].
[2264] See, for example, *Report of an announced inspection of Banksia Hill Juvenile Detention Centre, Report No 58, Office of the Inspector of Custodial Services,* December 2008 (WA), p 5, [1.8], *http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3810538a5d3e5e7b681c087548257791001255bc/$file/tp+538.pdf* (viewed 29 August 2016).
[2265] *Children (Criminal Proceedings) Act 1987* (NSW) s 17.
[2266] See, for example, *Children (Criminal Proceedings) Act 1987* (NSW) s 31(3).
[2267] *Children (Criminal Proceedings) Act 1987* (NSW) s 18.
[2268] *Children, Youth and Families Act 2005* (Vic) s 467.
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[2270] *Sex Offender Registration Act 2004* (Vic) s 6(3).
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