CRIMINAL JUSTICE REPORT

Royal Commission
into Institutional Responses
to Child Sexual Abuse

EXECUTIVE SUMMARY AND PARTS I - II

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Executive Summary and Parts I - II

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Preface

The Royal Commission

The Letters Patent provided to the Royal Commission require that it 'inquire into institutional responses to allegations and incidents of child sexual abuse and related matters' (see Appendix A). In carrying out this task, the Royal Commission is directed to focus on systemic issues, be informed by an understanding of individual cases, and must make findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse on children when it occurs. The Royal Commission does this by conducting public hearings, private sessions and a policy and research program.

Public hearings

A Royal Commission commonly does its work through public hearings. We are aware that sexual abuse of children has occurred in many institutions, all of which could be investigated in a public hearing. However, if the Royal Commission were to attempt that task, a great many resources would need to be applied over an indeterminate, but lengthy, period of time. For this reason the Commissioners have accepted criteria by which Senior Counsel Assisting will identify appropriate matters for a public hearing and bring them forward as individual '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 some cases the relevance of the lessons to be learned will be confined to the institution the subject of the hearing. In other cases they will have relevance to many similar institutions in different parts of Australia.

Public hearings are also held to assist in understanding the extent of abuse that may have occurred in particular institutions or types of institutions. This enables the Royal Commission to understand the way in which various institutions were managed and how they responded to allegations of child sexual abuse. Where our investigations identify a significant concentration of abuse in one institution, the matter may be brought forward to a public hearing.

Public hearings are also held to tell the story of some individuals, which assists in a public understanding of the nature of sexual abuse, the circumstances in which it may occur and, most importantly, the devastating impact that it can have on some people's lives.

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 result, the Commonwealth Parliament amended the *Royal Commissions Act 1902* (Cth) 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. Many accounts from these sessions are recounted in a de-identified form in our reports.

Policy and research

The Royal Commission has an extensive policy and research program that draws upon the findings made in public hearings, survivor private sessions and written accounts, as well as generating new research evidence.

Issues papers, roundtables and consultation papers are used by the Royal Commission to consult with government and nongovernment representatives, survivors, institutions, regulators, policy and other experts, academics and survivor advocacy and support groups. The broader community has an opportunity to contribute to our consideration of systemic issues and our responses through our public consultation processes.

The Royal Commission considers and draws upon the significant body of information identified through our activities. This enables us to develop recommendations in response to our Terms of Reference.

This report

As set out by the Letters Patent, any report published prior to our final report, which is required to be submitted to the Governor-General by 15 December 2017, will be considered an interim report.

However, this report contains the Royal Commission's final recommendations on criminal justice. It is based on laws, policies and information current as at 15 May 2017. On 14 June 2017, as this report was being finalised for printing, the High Court gave judgment in *Hughes v The Queen* [2017] HCA 20. This case is significant for the issues we discuss in Part VI of this report in relation to tendency and coincidence evidence. We have added a discussion of the High Court's reasons at the end of Chapter 28.

This report addresses part of paragraph (d) of the Letters Patent, which requires the Royal Commission 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.

It also addresses paragraphs (a) to (c) of the Letters Patent, which 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;

This report contains recommendations in relation to the criminal justice system's response to child sexual abuse, including institutional child sexual abuse. The recommendations are directed to reform of the criminal justice system to ensure that the following objectives are met:

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

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
QC	Queen's Counsel
QLRC	Queensland Law Reform Commission

RASSO	Rape and Serious Sex Offence in England and Wales
SAPOL	South Australia Police
SARO	Sexual Assault Reporting Options
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
WALRC	Law Reform Commission of Western Australia
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.

The Royal Commission has now formed concluded views on the appropriate recommendations in relation to criminal justice.

Our concluded views have been informed by the significant input we have obtained in relation to criminal justice issues from a broader range of sources, including private sessions, public hearings, an issues paper, public and private roundtables, and information obtained under summons. We have also commissioned a number of research projects to inform our criminal justice work.

On 5 September 2016, the Royal Commission published the *Consultation paper: Criminal justice* (the Consultation Paper). We received a wide range of submissions in response to the Consultation Paper. In November and December 2016, all six Commissioners sat for the public hearing in relation to issues raised in the Consultation Paper.

Responses to the Consultation Paper and the public hearing have helped to inform our final recommendations on criminal justice, which are contained in this report.

As recognised in the Letters Patent, while we have not specifically examined the issue of child sexual abuse and related matters outside institutional contexts, the recommendations we make in this report are likely to improve the response to all forms of child sexual abuse in all contexts.

Our approach

The role of criminal justice

In Chapter 2, we discuss the importance of an effective criminal justice response to child sexual abuse in an institutional context for both victims and the community.

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.

An effective criminal justice response must punish the convicted offender, protect children from the offender and restate the community's abhorrence of such crimes. A criminal justice response can help to bring the occurrence of institutional child sexual abuse into the public domain and ensure that the community is aware of the nature and extent of that abuse and the institutional contexts in which it has occurred.

Criminal justice for victims

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.

We also acknowledge the breadth of survivors' concepts of 'justice' in criminal justice responses. We recognise that, for many survivors, whether they feel they can obtain 'justice' from a criminal justice response is likely to include considerations of:

- how they will be treated by the various participants in the criminal justice system
- whether they will be given the information they need to make decisions
- whether their decisions will be listened to and respected
- what support they will be given, both immediately within the criminal justice system and alongside it.

These considerations are likely to apply in addition to what are more typically measured as the outcomes of the criminal justice system – charges, convictions and sentences. For many survivors, these considerations may be more important than some of these outcomes. It is also

clear that many survivors will draw strength from the fact that their participation in the criminal justice system may help to protect other children and give a voice to other survivors who are not able to come forward themselves.

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. We have taken account of the many experiences of the criminal justice system we have heard about during our work relating to earlier periods of time.

Our recommendations in this report focus on those aspects of the contemporary responses of the criminal justice system that we believe require further reform.

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.

Data for New South Wales courts shows that, in prosecutions for child sexual assault offences finalised between July 2012 and June 2016, the defendant was not convicted of any child sexual assault offence in 40 per cent of prosecutions.

Child sexual assault offences, New South Wales courts, 2012–2016 – all matters (see Table 2.1)

Total number of matters	2,604
Convicted of all relevant offences (%)	33
Convicted of at least one but not all relevant offences (%)	27
Convicted of no relevant offences (%)	40

The data shows that the defendant was not convicted of any child sexual assault charge in more than 50 per cent of the prosecutions that were finalised at a defended hearing or trial.

Child sexual assault offences, New South Wales courts, 2012–2016 – matters finalised at a defended hearing or at trial (see Table 2.2)

Total number of matters	725
Convicted of all relevant offences (%)	32
Convicted of at least one but not all relevant offences (%)	16
Convicted of no relevant offences (%)	52

The data also shows that total conviction rates for child sexual assault offences are lower than most other offence categories. These conviction rates include matters finalised by a guilty plea.

Comparative table – total matters and conviction rates for child sexual assault (CSA) offences and other offence categories, New South Wales courts, 2012–2016 (see Table 2.4)

Crime category	Conviction rate (%)
All offences	89
Sexual assault other than child sexual assault	50
Child sexual assault	60
Assault	70
Robbery	73
Illicit drugs	94

Sexual assault offences other than child sexual assault – effectively adult sexual assault – had a lower conviction rate than child sexual assault offences. One possible reason for this lower rate is that in addition to the fact that these cases are, like child sexual assault cases, commonly 'word against word' cases, consent will often be an issue.

There are 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. These 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. We heard of one complainant who described the system as 'not an adversarial system but a conspiratorial system', because he felt that, along with the jury, he was the only person in the courtroom who did not understand what was happening in court.

We recognise 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.

We consider that our recommendations in this report, if implemented, will make a significant positive difference to the experience of many survivors in the criminal justice system and will reduce the extent to which they might feel marginalised, vulnerable, attacked or traumatised.

We also consider that our recommendations, if implemented, will not in any way undermine the fairness of the trial for an accused. Rather, they will promote the conduct of trials with fairness to all interested parties – the accused, the complainant and the public – and the determination of the issues on the basis of the best relevant evidence.

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.

However, based on current evidence, we are not satisfied that formal restorative justice approaches should be included as part of the criminal justice response to institutional child sexual abuse, at least in relation to adult offenders.

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 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.

In relation to juvenile offenders, we note that youth conferencing provisions may allow for some elements of restorative justice. We discuss youth conferencing in Chapter 37.

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 *Redress and civil litigation report* (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:

- the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
- 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.

Recommendation

1. In relation to child sexual abuse, including institutional child sexual abuse, the criminal justice system should be reformed to ensure that the following objectives are met:
    a. the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
    b. criminal justice responses are available for victims and survivors
    c. victims and survivors are supported in seeking criminal justice responses.

In this report, we recommend the reforms that we consider are necessary to achieve these objectives.

The role of victims

In Chapter 3, we discuss the role of victims in the criminal justice system. 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. 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. In November 2016, the Victorian Law Reform Commission published the final report of its review of the role of victims of crime in the criminal trial process in Victoria.

A number of submissions in response to the Consultation Paper commented on the role of the victim in the criminal justice system. Some submissions suggested reforms to adopt alternative approaches, particularly drawing on models used in jurisdictions outside Australia.

We acknowledge the experience and sincerity of those who have advocated that we should recommend inquisitorial models or legal representation for victims. However, we are not satisfied that we should do so. We consider that a number of the benefits of other models are achieved, wholly or in part, in at least some Australian states and territories.

We do not wish to see child sexual abuse cases pursued through a different system that is outside of the main criminal justice system.

We remain of the view that we should recommend reforms to the existing – and adversarial – criminal justice system that are intended to make it as effective as possible for responding to child sexual abuse cases. We appreciate that some interested parties would prefer us to recommend a replacement of, or at least encroachments on, the adversarial system. However, we are satisfied that our recommendations, if implemented, will significantly improve the criminal justice system's response to victims and survivors of child sexual abuse.

Child sexual abuse, memory and criminal justice

In Chapter 4 we discuss the research report *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Memory Research).

In preparing the Consultation Paper, it became apparent that there was no clear, readily available guidance material summarising the contemporary psychological understanding of memory relevant to our work in relation to criminal justice issues.

We briefly outline the existing guidance then discuss the Memory Research in some detail. The Memory Research provides a detailed survey of the current psychological literature relevant to memory issues in relation to child sexual abuse reports and prosecutions. It also provides a succinct stand-alone summary of guidance on memory in cases of child sexual abuse, which presents the main findings derived from the detailed report.

Drawing on the Memory Research and our public roundtable on complainants' memory of child sexual abuse and the law, we outline:

- misconceptions about memory identified in the Memory Research which can lead to wrong 'common sense' beliefs about memory
- the nature of human memory generally, including the processes of encoding, retaining or consolidating and retrieving memory
- children's memories and memories for childhood events
- autobiographical memory and event memory
- memory for repeated or recurring events
- the effect of trauma at the time of the abuse
- the effect of mental disorders – such as post-traumatic stress disorder – on memory
- how circumstances at the time of retrieving a memory can affect what can be retrieved.

The Memory Research is particularly relevant for a number of issues we examine in this report, including:

- how police can interview complainants of child sexual abuse to assist them to provide more accurate and complete accounts of the abuse
- how persistent child sexual abuse offences can be framed to take account of how repeated or recurring events are remembered
- questioning techniques that can assist complainants to retrieve reliable memories and questioning techniques that impair memory retrieval, including in cross-examination
- how judges, juries and the legal profession can be assisted to understand issues in relation to memory that affect child sexual abuse prosecutions.

The Memory Research is intended to contribute to the development of guidance for judges, juries and the legal profession, whether through bench books, judicial directions, expert evidence or legal education.

Police responses since the 1950s

In Chapter 6 we discuss police responses to institutional child sexual abuse in the past, particularly from the 1950s onwards. We provide an overview of what we have heard in public hearings, private sessions and submissions and more detailed examples from our case studies.

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 charges are laid and whether matters are referred to the prosecution agency for possible prosecution.

It is clear that some survivors have had positive experiences with police, 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.

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.

We outline what we have heard about police responses in each decade since the 1950s through to police responses since 2000.

Current police responses

Police Data Report

We obtained under notice from each state and territory government data in relation to all reports of child sexual abuse to police between 1 January 2010 and 31 December 2014. We commissioned an analysis of this data in a report, *Police responses to child sexual abuse 2010–2014: An analysis of administrative data for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Police Data Report).

The detailed data that we obtained for the Police Data Report is not generally reported by police and is not available on a regular basis. We consider that it would be useful to explore whether police data on child sexual abuse reports could be obtained and reported on an

ongoing basis. While it may not be possible to report data to the level of detail that we have obtained, we consider that some ongoing reporting of police data on child sexual abuse reports would be useful.

The Report on Government Services is an annual publication of data managed by a Steering Committee coordinated by the Productivity Commission and comprising representatives of all Australian governments. It already reports data for sexual assault, but this is not disaggregated to identify child sexual abuse offences separately from adult sexual assault.

Recommendation

2. Australian governments should refer to the Steering Committee for the Report on Government Services for review the issues of:

    a. how the reporting framework for police services in the Report on Government Services could be extended to include reporting on child sexual abuse offences

    b. whether any outcome measures that would be appropriate for police investigations of child sexual abuse offences could be developed and reported on.

We outline the analyses in the Police Data Report of:

- the number and nature of reported child sexual abuse cases received by police
- the characteristics of the victim within the reported cases, including gender and age both at the time of incident and at the time of report
- the types of offences reported, including classification of offences, the relationship between the victim and the offender and cases that could be classified as involving institutional child sexual abuse using various proxy measures
- the characteristics of the offender, including gender and age both at the time of incident and at the time of report.

The Police Data Report sought to identify how police are responding to the reported cases of child sexual abuse that they receive. We outline the analyses in the Police Data Report of:

- the proportion of reported cases of child sexual abuse that were finalised by police
- the methods police used to finalise reported cases of child sexual abuse
- the time that police took to finalise reported cases of child sexual abuse, analysing cases finalised within 180 days and cases finalised after 180 days
- finalisation of cases with the following particular aspects:
    - cases that could be classified as involving institutional child sexual abuse
    - cases of child-to-child sexual abuse
    - cases that were finalised on the basis that the victim was unwilling to proceed

- cases of 'historical' offences – which were identified as offences reported more than 12 months after they were alleged to have been committed – and cases where the victim was aged 20 or older at the time of report.

We discuss the Police Data Report's analyses of the factors associated with:

- whether a report of child sexual abuse will be finalised by police within 180 days of the report being received
- whether a report of child sexual abuse will be finalised by police by the initiation of court proceedings.

Features of current police responses

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.

We discuss the literature review we commissioned on the use and effectiveness of specialist police investigative units and multidisciplinary approaches, and we outline how states and territories and the Commonwealth currently structure their police responses to child sexual abuse.

Issues in police responses

In Chapter 8 we examine issues in police responses that we have identified as being 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.

Principles for initial police responses

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 are satisfied that a victim or survivor's initial contact with the police is likely to be highly influential in determining how they view the criminal justice system as a whole and whether they are prepared to continue to seek a criminal justice response.

We received strong support for the possible principles we suggested in the Consultation Paper to guide initial police responses to victims and survivors.

Particularly for survivors who report to police as adults, the police response is more likely to come from general duties police than from specialist police who have received additional specialist training. Even where victims and survivors receive a specialist police response, their initial contact with police may be with general duties police at the local police station.

Recommendation

3. Each Australian government should ensure that its policing agency:
    a. recognises that a victim or survivor's initial contact with police will be 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
    b. ensures that all police who may come into contact with victims or survivors of institutional child sexual abuse are trained to:
        i. 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)
        ii. treat anyone who approaches the police to report child sexual abuse with consideration and respect, taking account of any relevant cultural safety issues
    c. establishes arrangements to ensure that, on initial contact from a victim or survivor, police refer victims and survivors to appropriate support services.

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.

We are satisfied that police should pursue the possible approaches to encourage reporting that we suggested in the Consultation Paper, including to encourage increased reporting from groups that are harder to reach, including Aboriginal and Torres Strait Islanders victims and survivors, survivors who are in prison and survivors who have criminal records.

We are also satisfied that there is likely to be benefit in making explicit reference to the role of survivor advocacy and support groups, support services and other support people in encouraging and supporting victims and survivors to report to police. We consider that there is value in police taking statements from victims and survivors even where the alleged perpetrator is dead or is otherwise unlikely to be able to be tried.

Recommendations

4. To encourage reporting of allegations of child sexual abuse, including institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. takes steps to communicate to victims (and their families or support people where the victims are children or are particularly vulnerable) that their decision whether to participate in a police investigation will be respected – 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

    b. provides 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 groups and support services to provide it to victims and survivors

    c. makes available a range of channels to encourage reporting, including specialist telephone numbers and online reporting forms, and provides information about what to expect from each channel of reporting

    d. works with survivor advocacy and support groups and support services, including those working with people from culturally and linguistically diverse backgrounds and people with disability, to facilitate reporting by victims and survivors

    e. allows victims and survivors to benefit from the presence of a support person of their choice if they so wish throughout their dealings with police, provided that this will not interfere with the police investigation or risk contaminating evidence

    f. is willing to take statements from victims and survivors in circumstances where the alleged perpetrator is dead or is otherwise unlikely to be able to be tried.

5. To encourage reporting of allegations of child sexual abuse, including institutional child sexual abuse, among Aboriginal and Torres Strait Islander victims and survivors, each Australian government should ensure that its policing agency:

    a. takes the lead in developing good relationships with Aboriginal and Torres Strait Islander communities

    b. provides channels for reporting outside of the community (such as telephone numbers and online reporting forms).

6. To encourage prisoners and former prisoners to report allegations of child sexual abuse, including institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. provides channels for reporting that can be used from prison and that allow reports to be made confidentially

    b. does not require former prisoners to report at a police station.

Police investigations

We received strong support for the possible principles we suggested in the Consultation Paper which focus on general aspects of police investigations that are of particular importance or concern to victims and survivors.

We are satisfied that continuity of staffing in the police response – and effective handovers where continuity is not possible – and regular and appropriate communication are likely to be critical aspects of the police response for many victims and survivors.

We are also satisfied that police being non-judgmental and focusing on the credibility of the complaint rather than focusing only on the credibility of the survivor is important for building and maintaining trust. This approach is likely to encourage more survivors to report to police and will be important in ensuring that survivors – particularly prisoners, former prisoners and Aboriginal and Torres Strait Islander survivors – are not denied the opportunity to pursue a criminal justice response.

We also indicate our support for the reforms recommended by the Australian Law Reform Commission and the New South Wales Law Reform Commission in relation to the protections against disclosing the identity of mandatory reporters.

Recommendations

7. Each Australian government should ensure that its policing agency conducts investigations of reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

    a. 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 steps to facilitate, to the extent possible, continuity in police staffing on an investigation of a complaint.

    b. 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.

    c. 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:

        i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record

        ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

8. State and territory governments should introduce legislation to implement Recommendation 20-1 of the report of the Australian Law Reform Commission and the New South Wales Law Reform Commission *Family violence: A national legal response* in relation to disclosing or revealing the identity of a mandatory reporter to a law enforcement agency.

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 30.

We have heard detailed evidence about the effectiveness of investigative interviewing provided that it is conducted by investigators who have been trained with the appropriate skills in and understanding of child sexual abuse issues to obtain the best evidence possible.

We have also heard of the benefits which the prerecording of investigative interviews can have, not just in relation to child witnesses but also, as we have been told in submissions to the Consultation Paper and in evidence in the public hearing, their potential benefits to other vulnerable witnesses, including witnesses with disability.

We have heard detailed evidence about the importance of effective training in investigative interviewing and the benefits in that training being ongoing and based on the actual interviews being undertaken by police. We consider that training in this area should be ongoing.

We appreciate the work that jurisdictions have commenced to ensure that the technical standard of prerecorded interviews continues to improve. We also recognise the importance of these improvements to ensure the best available evidence is led in criminal trials and the likelihood of any unnecessary and unexpected delays is reduced.

We support the ongoing engagement of interpreters and intermediaries to assist in the collection of the best evidence available. We discuss this issue further in Chapter 30.

Recommendation

9. Each Australian government should ensure that its policing agency conducts investigative interviewing in relation to reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

    a. 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.

    b. 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.

    c. 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.

    d. Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:

        i. a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses

        ii. skill development in planning and conducting interviews, including use of appropriate questioning techniques.

    e. 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.

    f. 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.

    g. 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 should not authorise the use of video recorded interviews for general training in a manner that would raise privacy concerns.

    h. Police should continue to work towards improving the technical quality of video recorded interviews so that they are technically as effective as possible in presenting the complainant's and other witnesses' evidence in chief.

    i. Police should recognise the importance of interpreters, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses.

    j. 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 possible principles we suggested in the Consultation Paper in relation to police charging decisions, including in relation to corroboration, were well supported in submissions, and we are satisfied that we should recommend them.

The issue of the risk of costs being awarded against police is more difficult. On balance, we consider that it is generally preferable that costs only be able to be awarded against the prosecution – whether police or the DPP – where there has been some failure or wrongdoing on the part of the prosecution.

We note that, apart from section 401 of the *Criminal Procedure Act 2009* (Vic), other legislation in Victoria and in other jurisdictions generally appears to allow the awarding of costs against the prosecution only in limited circumstances involving some form of failure or wrongdoing by police or the prosecution.

Recommendations

10. Each Australian government should ensure that its policing agency makes decisions in relation to whether to lay charges for child sexual abuse offences in accordance with the following principles:

    a. Recognising that 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.

    b. In making decisions about whether to charge, police should not:

        i. expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available

        ii. 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.

11. The Victorian Government should review the operation of section 401 of the *Criminal Procedure Act 2009* (Vic) and consider amending the provision to restrict the awarding of costs against police if it appears that the risk of costs awards might be affecting police decisions to prosecute. The government of any other state or territory that has similar provisions should conduct a similar review and should consider similar amendments.

Police responses to reports of historical child sexual abuse

One of the areas in which police responses may differ is in responses to child sexual abuse that is reported when the victim is a child and to child sexual abuse reported by an adult complainant. Apart from Victoria, states and territories generally focus their specialist response on children who report child sexual abuse. Adult reports of historical child sexual abuse are more often dealt with through general police responses.

Some submissions in response to the Consultation Paper and evidence in Case Study 46 suggested that some adults who report historical child sexual abuse may be less satisfied with the police response than children who have access to specialist responses.

It is clear to us that many adult survivors of child sexual abuse in an institutional context have particular needs for information, reassurance and support in relation to police responses. It seems likely that many adult survivors of child sexual abuse in other contexts may share some or all of these needs.

A document specifically addressed to victims and survivors reporting historical allegations of child sexual abuse can help to encourage and support those victims and survivors to make decisions about whether to report to police and whether to remain in the criminal justice process. Importantly, it can also serve as a reminder to the police officers who are involved in providing the police response about the particular needs of these victims and survivors. While such a reminder may not be needed in specialist responses, we are satisfied from what we have been told that it is likely to be of assistance when a police response is not provided by specialist police.

Recommendation

12. Each Australian government should ensure that, if its policing agency does not provide a specialist response to victims and survivors reporting historical child sexual abuse, its policing agency develops and implements a document in the nature of a 'guarantee of service' which sets out for the benefit of victims and survivors – and as a reminder to the police involved – what victims and survivors are entitled to expect in the police response to their report of child sexual abuse. The document should include information to the effect that victims and survivors are entitled to:

    a. be treated by police with consideration and respect, taking account of any relevant cultural safety issues

    b. have their views about whether they wish to participate in the police investigation respected

    c. be referred to appropriate support services

    d. contact police through a support person or organisation rather than contacting police directly if they prefer

    e. have the assistance of a support person of their choice throughout their dealings with police unless this will interfere with the police investigation or risk contaminating evidence

    f. have their statement taken by police even if the alleged perpetrator is dead

    g. be provided with the details of a nominated person within the police service for them to contact

    h. be kept informed of the status of their report and any investigation unless they do not wish to be kept informed

    i. have the police focus on the credibility of the complaint or allegations rather than focusing only on the credibility of the complainant, recognising 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.

Police responses to reports of child sexual abuse made by people with disability

People with Disability Australia (PWDA) submitted that children and adults with disability have substantial problems in seeking to report to police and that these must be addressed. PWDA identified the issues as including:

- police not taking a report, which may be because police doubt the ability of the person with disability to tell the truth or that their report will lead to a conviction
- a lack of adequate and appropriate emotional and disability support to make a report
- police taking the word of disability service providers above the word of a victim with disability
- police not prioritising investigation of allegations that people with disability make
- police not proceeding with charges where people with disability are victims and witnesses, perhaps due to an assumption that a conviction is unlikely.

Children with disability may face a higher risk of sexual abuse in institutional contexts, and children and adults with disability face particular barriers as complainants of child sexual abuse in the criminal justice system. Given these factors, we are satisfied that we should make a further recommendation in relation to the police response to victims and survivors with disability.

Recommendation

13. Each Australian government should ensure that its policing agency responds to victims and survivors with disability, or their representatives, who report or seek to report child sexual abuse, including institutional child sexual abuse, to police in accordance with the following principles:

    a. Police who have initial contact with the victim or survivor should be non-judgmental and should not make any adverse assessment of the victim or survivor's credibility, reliability or ability to make a report or participate in a police investigation or prosecution because of their disability.

    b. Police who assess or provide an investigative response to allegations made by victims and survivors with disability should focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant, and they should not make any adverse assessment of the victim or survivor's credibility or reliability because of their disability.

    c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to ensure that the victim or survivor is able to give their best evidence in the investigative interview.

    d. Decisions in relation to whether to lay charges for child sexual abuse offences should take full account of the ability of any available intermediary scheme, and communication supports, to assist the victim or survivor to give their best evidence when required in the prosecution process.

Police responses and institutions

The issues discussed in Chapter 8 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.

In Chapter 9 we discuss 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 Jonathan Lord is a particularly relevant example. We discuss the issues of what assistance institutions, victims, families and the broader community require from police and what assistance police can provide. We also discuss potential limitations that privacy and defamation laws and legislation protecting the identity of the accused may place on what institutions and police can disclose.

We 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 are satisfied that the following general elements should inform police responses and responses by institutions:

- The police response should take priority. The institution should not take any steps in response, including in relation to the alleged perpetrator, without consulting police and attempting to agree with police on the appropriate approach. If institutions have immediate risk management concerns, they should discuss with police how these can best be addressed without interfering with the police investigation.
- Police should provide reasonable assistance to the institution, including in relation to identifying an appropriate contact officer and discussing with the institution what steps it should or should not take in responding to an allegation while the police are investigating. The institution should provide all appropriate assistance to the police as requested by the police. Subject to the needs of the police investigation, cooperation between the police and the institution should be ongoing as required throughout the police response.
- Police and institutions should recognise that staff and volunteers involved in the institution, children, parents and the broader community are likely to seek information about current allegations. Police and the institution should cooperate to ensure that communication with these groups is appropriate, giving priority to the needs of the police in conducting the investigation but also recognising the legitimate needs of these groups to know what is happening and to consider taking protective action in relation to other children.
- If the institution has legitimate concerns about its ability to communicate relevant information – for example, because of privacy or defamation concerns – the police (or the child protection agency if it is involved) should consider communicating the information if the communication is reasonably required for law enforcement or child protection purposes or is otherwise appropriate.
- Any communication, whether by police, child protection or the institution, should be done in compliance with any applicable laws, including any restrictions in relation to the disclosure of the identity of an alleged victim or offender.
- Once the police response is concluded, particularly if it does not result in the laying of charges, the institution may need to pursue its own investigatin of the allegations. In these circumstances, police should identify and discuss with the institution whether they are able to provide the institution with any information obtained in the police investigation that would assist the institution in pursuing its investigation. The ability of the police to share information with the institution may be affected by any information-sharing legislation in the relevant state or territory. We will make recommendations in relation to information sharing in our final report. Police and the institution should try to avoid the need for the institution to duplicate steps already taken by the police, particularly in relation to interviewing victims and other affected parties.

We are also satisfied that police agencies should develop procedures and protocols to address these general elements in detail and as appropriate for the particular state or territory. Experience in New South Wales demonstrates that procedures and protocols should be kept under review and should be updated, as experience demonstrates that they can be improved.

Recommendations

14. In order to assist in the investigation of current allegations of institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. develops and keeps under review procedures and protocols to guide police and institutions about the information and assistance police can provide to institutions where a current allegation of institutional child sexual abuse is made

    b. develops and keeps under review procedures and protocols to guide the police, other agencies, institutions and the broader community on the information and assistance police can provide to children and parents and the broader community where a current allegation of institutional child sexual abuse is made.

15. The New South Wales Standard Operating Procedures for Employment Related Child Abuse Allegations and the Joint Investigation Response Team Local Contact Point Protocol should serve as useful precedents for other Australian governments to consider.

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 and survivor advocacy and support groups 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 alleged perpetrators 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.

The issue of blind reporting is very closely linked to the issue of reporting offences, which we discuss in Chapter 16.

In Chapter 16, we recommend the introduction of a failure to report offence targeted at institutions. If the failure to report offence we recommend is implemented, there were still be circumstances in which institutions and survivor advocacy and support groups receive allegations of institutional child sexual abuse that they are not obliged by law to report to police. Therefore, the issue of blind reporting remains relevant.

We consider that it is necessary to recognise the competing concerns that inform the different views that interested parties express on blind reporting. Making a blind report can enable an institution or survivor advocacy and support group to provide police with information while respecting the wishes of survivors and not discouraging them from coming forward to seek support. However, making a blind report can also leave institutions in particular open to criticism that they have discouraged survivors from consenting to police reports and that they have been motivated by a desire to protect the institution rather than to respect the wishes of survivors.

We do not want to see institutions or survivor advocacy and support groups adopting an approach that might discourage or prevent some survivors from coming forward to seek support. There is a risk that an absolute policy against blind reporting might do this. However, we also recognise that the conflict of interest and power imbalance between an institution and survivor may make institutions reluctant to continue to make blind reports, preferring instead to report everything to the police so that they cannot face accusations of hiding abuse or discouraging reports by survivors.

Regardless of their views on blind reporting, we consider that institutions and survivor advocacy and support groups should:

- be clear that, where the law requires reporting to police, child protection or another agency, the institution or group or its relevant staff member or official will report as required

- develop and adopt clear guidelines for what the institution or group will do in relation to allegations, reports or disclosures it receives that it is not required by law to report to police, child protection or another agency.

If the relevant institution or survivor advocacy and support group adopts a policy that does not require full reporting to police, we consider that blind reporting is preferable to not reporting at all. We also consider that police should ensure that they review any blind reports they receive and that they are available as intelligence in relation to any current or subsequent police investigations.

We are encouraged by the experiences recounted by many interested parties that most if not all survivors have become willing over time and with support to have a full report made to police even if the report is made on the basis that the survivor does not wish to be contacted by police. We are also encouraged by accounts of survivors being willing to speak to police if police inform their counsellor or other support worker that police are investigating the same alleged perpetrator or institution.

Recommendations

16. In relation to blind reporting, institutions and survivor advocacy and support groups should:

    a. be clear that, where the law requires reporting to police, child protection or another agency, the institution or group or its relevant staff member or official will report as required

    b. develop and adopt clear guidelines to inform staff and volunteers, victims and their families and survivors, and police, child protection and other agencies as to the approach the institution or group will take in relation to allegations, reports or disclosures it receives that it is not required by law to report to police, child protection or another agency.

17. If a relevant institution or survivor advocacy and support group adopts a policy of reporting survivors' details to police without survivors' consent – that is, if it will not make blind reports – it should seek to provide information about alternative avenues for a survivor to seek support if this aspect of the institution or group's guidelines is not acceptable to the survivor.

18. Institutions and survivor advocacy and support groups that adopt a policy that they will not report the survivor's details without the survivor's consent should make a blind report to police in preference to making no report at all.

19. Regardless of an institution or survivor advocacy and support group's policy in relation to blind reporting, the institution or group should provide survivors with:

    a. information to inform them about options for reporting to police

    b. support to report to police if the survivor is willing to do so.

20. Police should ensure that they review any blind reports they receive and that they are available as intelligence in relation to any current or subsequent police investigations. If it appears that talking to the survivor might assist with a police investigation, police should contact the relevant institution or survivor advocacy and support group, and police and the institution or group should cooperate to try to find a way in which the survivor will be sufficiently supported so that they are willing to speak to police.

Child sexual abuse offences

In Chapter 10, we outline some key developments in child sexual abuse offences since the 1980s and recent amendments to child sexual abuse offences during the life of the Royal Commission. We also discuss some current reform processes and general issues relating to offences that were raised in submissions in response to the Consultation Paper.

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 oneunlawful 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.

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

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.

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

Following another recent decision of the South Australian Court of Criminal Appeal, it might be thought that the South Australian offence is essentially as effective as the Queensland offence. However, we do not consider that it is likely to be as effective as the Queensland offence because of its requirement for extended jury unanimity. The Queensland offence expressly removes the requirement for the jury to agree on the same occasions of abuse – in Queensland, the jury is required only to agree that the accused maintained the unlawful sexual relationship.

We consider that the Queensland offence can be improved upon by giving it retrospective operation. The retrospective operation would allow the offence to apply only to conduct that was unlawful at the time it was committed, and the only change would be to the way in which it can be charged. This is likely to be important given what we know about delays in reporting child sexual abuse, including institutional child sexual abuse.

Where the new offence is charged retrospectively, we consider that, on sentencing, regard should be had to the maximum penalty for the earlier individual offences or any earlier persistent child sexual abuse offence that might have applied.

In relation to the Victorian course of conduct charge, the Victorian Government suggested that it might be most effective to have both the Queensland offence and the Victorian course of conduct charge so that the prosecution could choose which one to use on a case-by-case basis and having regard to the evidence that was available in the case. We see no difficulty with this approach. Equally, we see no difficulty with the two or more unlawful sexual acts each being particularised as courses of conduct for the purposes of the Queensland offence.

We obtained the assistance of the New South Wales Parliamentary Counsel's Office to draft an offence provision based on the Queensland offence but incorporating the changes we recommend. The draft provision is discussed in Chapter 11 and set out in full in Appendix H.

Recommendations

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

Grooming offences

We discuss grooming offences in Chapter 12. '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. South Australia and Tasmania also have broad grooming offences, although they cover communication rather than explicitly referring to any conduct.

In 2014, Victoria introduced a broad 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 or 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.

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.

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

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

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

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

We do not consider it necessary to recommend any particular form of grooming offence. However, we consider that other jurisdictions could usefully draw on the Victorian approach generally, and particularly in relation to including the grooming of persons other than the child, and on the Queensland approach.

Recommendations

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

26. Each state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child.

Position of authority offences

We discuss position of authority offences in Chapter 13. 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 discuss a number of cases that illustrate differences between jurisdictions in their position of authority offences and some of the difficulties that can arise. These cases cause us some concern.

Position of authority offences are designed to protect young people, often from themselves. We have no hesitation in saying that a schoolteacher should not engage in any sexual conduct with his or her 16- or 17-year-old students. We do not see what evidence of 'abuse' – in the sense of misuse – or 'exercise' of authority should be needed beyond the existence of the relationship of authority.

We discuss the different definitions of relationships of 'special care' or authority and defences adopted in New South Wales and Victoria.

We are satisfied that jurisdictions should review their position of authority offences to ensure that they are effective in protecting young people.

Recommendations

27. State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim. If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.

28. State and territory governments should review any provisions allowing consent to be negatived in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim. If the provisions require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), state and territory governments should introduce legislation to amend the provisions so that the existence of the relationship is sufficient.

29. If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.

Limitation periods and immunities

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.

Although we understand that there are very few limitation periods that still apply to child sexual abuse offences, we remain of the view that any remaining limitation periods for charging child sexual abuse offences should be removed and the removal should have retrospective effect. However, this removal should not revive any sexual offences that are no longer in keeping with community standards – for example, offences that targeted homosexuality, which has been decriminalised.

Limitation periods and immunities are arbitrary barriers to prosecutions, particularly given the lengthy periods of delay associated with the reporting of child sexual abuse. They can only work injustice against survivors.

Removing limitation periods and immunities does not operate unfairly against alleged perpetrators, as they retain the right to seek the court's assistance, particularly through staying proceedings, to protect against any abuse of process or in circumstances where they cannot receive a fair trial.

Recommendations

30. State and territory governments should introduce legislation to remove any remaining limitation periods, or any remaining immunities, that apply to child sexual abuse offences, including historical child sexual abuse offences, in a manner that does not revive any sexual offences that are no longer in keeping with community standards.

31. Without limiting recommendation 30, the New South Wales Government should introduce legislation to give the repeal of the limitation period in section 78 of the *Crimes Act 1900* (NSW) retrospective effect.

Third-party offences

In Chapter 15, we introduce issues in relation to 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 are good reasons for the criminal law to impose positive obligations on third parties to act in relation to child sexual abuse. For example:

- It is often very difficult for the victim to disclose or report the abuse at the time or even reasonably soon after it occurred. We know that many victims and survivors do not report the abuse until years, and even decades, later and some never disclose or report. If persons other than the victim do not report, the abuse – and the perpetrator – may go undetected for years.

- Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of adults.
- Perhaps more so than with other serious criminal offences, those who commit child sexual abuse offences may have multiple victims and may offend against particular victims over lengthy periods of time. A failure to report abuse or to protect the child may leave the particular child exposed to repeated abuse over time and may expose other children to abuse. The impact of child sexual abuse on individual victims may be lifelong, and the impact on their families and the broader community may continue into subsequent generations.
- The most effective deterrent through the criminal law may be the risk of detection. Promoting the earliest possible reporting should increase the likelihood of detection, regardless of whether a successful prosecution follows. If would-be perpetrators perceive that there is a real risk of being caught, they may be deterred from offending.

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 and in some cases raise broader cultural issues.

Failure to report

In Chapter 16 we discuss reporting offences, which have received recent attention in relation to institutional child sexual abuse. Our particular interest 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. Reporting offences also raise the issue of whether there should be any exemption from a requirement to report information received in religious confessions. We address this issue in Chapter 16.

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 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 outline the privileges that may currently apply to religious confessions.

Before discussing a criminal offence, we consider it important to make clear that persons who know or suspect that a child is being or has been sexually abused in an institutional context *should* report this to police – not necessarily as a legal obligation enforced by a criminal offence but because it is moral and ethical to do so. Child sexual abuse is a crime and it should be reported to police. There should be no doubt that police are the correct agency to which child sexual abuse should be reported.

Recommendation

32. Any person associated with an institution who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police (and, if relevant, in accordance with any guidelines the institution adopts in relation to blind reporting under recommendation 16).

Turning to the issue of a criminal offence, we are satisfied that there are good reasons for the criminal law to impose obligations on third parties to report to police in relation to child sexual abuse.

These reasons recognise the great harm that child sexual abuse can cause to victims. The impact of child sexual abuse on individual victims may be lifelong, and the impact on their families and the broader community may continue into subsequent generations. These reasons also recognise that, unlike other categories of crime, child sexual abuse is often not reported and stopped at the time of the abuse because the child victims face such difficulties in disclosing or reporting the abuse. When a perpetrator is not discovered and stopped from abusing a child, they may continue to abuse that child and other children.

We have concluded that we should recommend a failure to report offence targeted at institutions.

Our main concern in reaching this conclusion has been to identify a sufficiently lower standard of knowledge or belief to ensure that the sorts of allegations that a number of our case studies have revealed, and which were not reported to police, would be required to be reported to police in order to avoid committing the offence.

A significant difficulty with relying on the approaches adopted in section 316(1) of the *Crimes Act 1900* (NSW) or section 327 of the *Crimes Act 1958* (Vic) is that it must be proved that the accused had actual knowledge or in fact believed that the abuse occurred. If the accused did not witness the abuse and denies belief of any report or allegation made about it, it will be very difficult to prove the offence.

Drawing on the offence recommended by the Cummins Inquiry, we consider that the offence should apply if a relevant person at the institution:

- knows or suspects that a child is being or has been sexually abused or
- *should have suspected* that a child is being or has been sexually abused (on the basis that a reasonable person in their circumstances would have suspected),

by a person associated with the institution.

The standard of '*should have* suspected' requires a person to report where a reasonable person in the same circumstances as the person would have suspected. It allows for consideration of what the person knew – both inculpatory and exculpatory – and asks whether, with that knowledge and in those circumstances, a reasonable person would have suspected. In line with the standard of criminal negligence, the offence would be committed on the basis that a suspicion *should have* been formed only where there is a great falling short of what would be expected of a reasonable person.

We appreciate that this would impose criminal liability for failure to report a suspicion that the person did not form.

However, we are satisfied that this is a necessary step to take, particularly in light of the evidence we have heard from a number of senior representatives of institutions effectively denying that they had any knowledge or had formed any belief or suspicion of abuse being committed in circumstances where their denials are very difficult to accept.

We consider that creating an offence of failing to report where the person *should have* suspected abuse will also assist to overcome any conflict between the institutional representative's duty to report and their interest in seeking to protect the reputation of the institution.

We discuss in detail how we think the various aspects of the offence should be framed, including in relation to how it should apply to knowledge that has been gained or suspicions that have already been formed before the failure to report offence commences.

Recommendation

33. Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context as follows:

    a. The failure to report offence should apply to any adult person who:

        i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions

        ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution

        but it should not apply to individual foster carers or kinship carers.

    b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child.

    c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster and kinship care services should be included (but not individual foster carers or kinship carers). Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included.

d. If the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:

   i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years).

   ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:

      - still associated with the institution
      - known or believed to be associated with another relevant institution.

   iii. The knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years.

e. If the knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:

   i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution).

   ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:

      - still associated with the institution
      - known or believed to be associated with another relevant institution.

The offence we recommend has some overlap with mandatory reporting and reportable conduct requirements.

As the offence is intended to require 'criminal' reporting rather than 'welfare' reporting, we consider that the offence should require reporting to the police. However, states and territories should consider how the offence should interact with their other reporting requirements, including mandatory reporting and reportable conduct.

Our intention is not to require institutional staff and volunteers to make multiple reports to child protection, police and oversight bodies. However, we are satisfied that suspicions of abuse covered by the reporting offence we recommend must come to the attention of the police.

Recommendation

34. State and territory governments should:

    a. ensure that they have systems in place in relation to their mandatory reporting scheme and any reportable conduct scheme to ensure that any reports made under those schemes that may involve child sexual abuse offences are brought to the attention of police

    b. include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct schemes.

We have considered whether clergy should be exempt from reporting information about child sexual abuse received through religious confession.

A 'religious confession' is a confession that a person makes to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination involved.

We are satisfied that, where the elements of the reporting obligation are met, there should be no exemption, excuse, protection or privilege from the offence granted to clergy for failing to report information disclosed in or in connection with a religious confession.

We understand the significance of religious confession – in particular, the inviolability of the confessional seal to people of some faiths, particularly the Catholic faith. However, we heard evidence of a number of instances where disclosures of child sexual abuse were made in religious confession, by both victims and perpetrators. We are satisfied that confession is a forum where Catholic children have disclosed their sexual abuse and where clergy have disclosed their abusive behaviour in order to deal with their own guilt.

We also heard evidence that the practice of religious confession is declining, at least in the Catholic Church. However, it remains possible that information about child sexual abuse held by people associated with a relevant institution is communicated to a priest hearing a religious confession.

Submissions to the Royal Commission argued that any intrusion by the civil law on the practice of religious confession would undermine the principle of freedom of religion. In a civil society, it is fundamentally important that the right of a person to freely practise their religion in accordance with their beliefs is upheld.

However, that right is not absolute. This is recognised in article 18 of the *International Covenant on Civil and Political Rights* on the freedom of religion, which provides that the freedom to manifest one's religion or beliefs may be the subject of such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The right to practise one's religious beliefs must accommodate civil society's obligation to provide for the safety of all and, in particular, children's safety from sexual abuse. Institutions directed to caring for and providing services for children, including religious institutions, must provide an environment where children are safe from sexual abuse. Reporting information relevant to child sexual abuse to the police is critical to ensuring the safety of children.

Our inquiry has demonstrated that there is significant risk that perpetrators may continue with their offending if they are not reported to police. Reporting child sexual abuse to police can lead to the prevention of further abuse. In relation to religious confessions, we heard evidence that perpetrators who confessed to sexually abusing children went on to reoffend and seek forgiveness again.

We heard other arguments for why there should be an exemption or privilege for religious confessions, including that:

- religious confessions privilege should operate in the same manner as legal professional privilege
- there would be little utility in imposing a reporting requirement, as religious confession is infrequently attended and the practice of confession is such that information given about child sexual offences would not be of use to the police
- perpetrators of child sexual abuse are unlikely to attend confession anyway; however, in the face of a reporting requirement, perpetrators would cease attending confession and would be unable to access a source of guidance and contrition
- priests would be unlikely to adhere to a reporting requirement and there may be subsequent damage to the reputation of the legal system
- a reporting requirement is inconsistent with the privilege contained in the Uniform Evidence Act.

We address each of these arguments, concluding that there should be no exemption or privilege from the failure to report offence for clergy who receive information during religious confession that an adult associated with the institution is sexually abusing or had sexually abused a child.

Recommendation

35. Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows:

    a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.

    b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.

    c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.

Failure to protect

In Chapter 17, we discuss a failure to protect offence.

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 the failure to report offence 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 exists in relation to an offence having 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 that have the required knowledge and the ability to take action
- requires knowledge of a 'substantial risk' from an adult associated with the institution – theoretically, any adult associated with the institution could be thought to pose some level of risk to children in the institution
- punishes failures to act that are criminally negligent – it must involve a great falling short of the standard of care that a reasonable person would exercise in the same circumstances.

We are satisfied that all states and territories should introduce legislation to enact a failure to protect offence. The Victorian offence in section 49C of the *Crimes Act 1958* (Vic), including the amendments commencing in 2017, provides a useful precedent.

The failure to report offence that we recommend in Chapter 16, if implemented, is likely to require reporting of institutional child sexual abuse in a considerably greater number of circumstances than would be covered by the offences in section 316(1) of the *Crimes Act 1900* (NSW) and section 327 of the *Crimes Act 1958* (Vic). However, even with a broader failure to report offence, we consider that there is still a need for a failure to protect offence.

A failure to protect offence focuses on preventing child sexual abuse rather than reporting abuse that has occurred to police. It can apply to action taken or not taken before it is suspected that a child sexual abuse offence is being or has been committed. For example, the Victorian offence applies where there is 'knowledge' of a 'substantial risk' that an adult associated with the institution will commit a sexual offence against a child in the institutional context.

We are satisfied that a criminal offence targeting responsible persons within the institution is necessary and appropriate to focus on the individual's responsibility to act to protect children from known substantial risks.

We discuss some modifications that we recommend should be made to the Victorian offence in section 49C of the *Crimes Act 1958* (Vic). We consider that the offence should only be able to be committed by adults in the institution and not by children who are in leadership positions. We also consider that the offence should not be able to be committed by individual foster carers and kinship carers. However, we consider that the offence should be extended to protect children who are 16 or 17 years of age from risks presented by an adult in a position of authority.

Recommendation

36. State and territory governments should introduce legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution as follows:

    a. The offence should apply where:

        i. an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against:

            - a child under 16
            - a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child

        ii. the person has the power or responsibility to reduce or remove the risk

        iii. the person negligently fails to reduce or remove the risk.

    b. The offence should not be able to be committed by individual foster carers or kinship carers.

    c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster care and kinship care services should be included, but individual foster carers and kinship carers should not be included. Facilities and services provided by religious institutions, and any service or functions performed by persons in religious ministry, should be included.

    d. State and territory governments should consider the Victorian offence in section 49C of the *Crimes Act 1958* (Vic) as a useful precedent, with an extension to include children of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.

Offences by institutions

We discuss offences by institutions in Chapter 18.

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 they discuss 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.

We discuss what we were told in submissions in response to the Consultation Paper and in the public hearing in Case Study 46.

In the course of this Royal Commission, we have identified many shortcomings in the policies and procedures of institutions and in their implementation. Some of these shortcomings have continued for years, and some have either facilitated or contributed to the failure to prevent the sexual abuse of children.

In spite of this, we are satisfied that we should not recommend the introduction of criminal offences targeted at institutions.

We consider that the primary effort of governments and institutions at this time should be to develop and improve regulatory standards and practices and oversight mechanisms. We will address these issues in detail in our final report.

We consider that governments, regulatory and oversight agencies and institutions should be given an opportunity to do this as well as to improve their expertise and practices. There has been, and continues to be, a significant amount of change in relation to the regulation of children's services.

We also appreciate that our work, particularly through our public hearings, has already prompted some change in particular institutions and more broadly. The recommendations we make in our various reports, if implemented, will lead to further changes.

We are not satisfied that the introduction at this stage of one or more criminal offences targeting institutions will assist governments, regulatory and oversight agencies or institutions to implement these significant changes.

We are also not satisfied that the regulatory expertise currently exists, at least in respect of some types of institutions, to identify systemic failures, exercise appropriate discretion in relation to prosecutions, or design and oversee the implementation of appropriate sanctions.

Issues in prosecution responses

In Chapter 20, we discuss issues in prosecution responses to child sexual abuse.

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.

Principles for prosecution responses

In the Consultation Paper, we suggested that 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.

Submissions generally expressed support for the possible principles we outlined in the Consultation Paper. We are satisfied we should recommend these general principles.

PWDA suggested additional principles or guidance in relation to prosecution responses and charging and plea decisions in cases where a person with disability is a victim.

We are not satisfied that we should recommend principles that require prosecutors to apply different tests or standards in prosecutions for child sexual abuse offences where a victim is a person with disability. However, we consider that a more generally stated principle may help to ensure that prosecution responses take account of the particular vulnerabilities of children with disability to child sexual abuse offences.

An additional issue emerged from submissions and in Case Study 46 in relation to the provision of information to survivors. A number of submissions and witnesses identified that complainants would benefit from having more information about what to expect in court in relation to giving evidence and particularly in relation to cross-examination.

We consider that many survivors would be assisted by being given an explanation of various matters such as:

- the purpose of giving evidence in chief and the purpose of cross-examination
- the detail in which they are likely to be required to give their evidence in chief if a recorded police investigative interview is not being used
- the obligation on defence counsel to challenge their evidence on some or all grounds
- particularly difficult forms of questions that might be used in cross-examination, which we discuss in detail in Chapter 30
- what they can say if they do not understand a question or if they have not finished an answer or need to clarify an answer.

Lawyers with any experience in criminal law would understand these matters, yet it would not be suggested that, for this reason, a lawyer giving evidence as a complainant in a criminal trial has been rehearsed or coached.

We understand that prosecutors and Witness Assistance Service officers may fear being accused of rehearsing or coaching the witness if they discuss these matters. We consider that this risk could be avoided by having standard material available for the complainant or other witness to read or to be taken through orally.

We recommend the development of standard material for complainants and other witnesses.

Recommendations

37. All Australian Directors of Public Prosecutions, with assistance from the relevant government in relation to funding, should ensure that prosecution responses to child sexual abuse are guided by the following principles:

    a. All prosecution staff who may have professional contact with victims of institutional child sexual abuse should be trained to have a basic understanding of the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and how it can affect people who are involved in a prosecution process, including those who may have difficulties dealing with institutions or person in positions of authority.

    b. While recognising the complexity of prosecution staffing and court timetables, prosecution agencies should recognise the benefit to victims and their families and survivors of continuity in prosecution team staffing and should take steps to facilitate, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution.

    c. Prosecution agencies should continue to recognise the importance to victims and their families and survivors of the prosecution agency maintaining regular communication with them to keep them informed of the status of the prosecution unless they have asked not to be kept informed.

    d. Witness Assistance Services should be funded and staffed to ensure that they can perform their task of keeping victims and their families and survivors informed and ensuring that they are put in contact with relevant support services, including staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.

e. Particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff who are involved in giving early charge advice or in prosecuting child sexual abuse matters should be trained to:

   i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record

   ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

f. Prosecution agencies should recognise that children with disability are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences.

38. Each state and territory government should facilitate the development of standard material to provide to complainants or other witnesses in child sexual abuse trials to better inform them about giving evidence. The development of the standard material should be led by Directors of Public Prosecutions in consultation with Witness Assistance Services, public defenders (where available), legal aid services and representatives of the courts to ensure that it:

    a. is likely to be of adequate assistance for complainants who are not familiar with criminal trials and giving evidence

    b. is fair to the accused as well as to the prosecution

    c. does not risk rehearsing or coaching the witness.

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.

Submissions generally expressed support for the possible principles we outline in the Consultation Paper. We are satisfied we should recommend these general principles.

Recommendation

39. All Australian Directors of Public Prosecutions should ensure that prosecution charging and plea decisions in prosecutions for child sexual abuse offences are guided by the following principles:

    a. Prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. Prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought.

    b. Regardless of whether such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to minimise the risk that charges will have to be downgraded or withdrawn closer to the trial date.

    c. While recognising the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered.

    d. Prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea and that the complainant is given the opportunity to obtain assistance from relevant witness assistance officers or other advocacy and support services before they give their opinion on the proposal. If the complainant is a child, prosecutors must endeavour to ensure that they give the child the opportunity to consult their carer or parents unless the child does not wish to do so.

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.

We outline the various complaints and oversight mechanisms applying in England and Wales, particularly the Victims' Right to Review (VRR) scheme and judicial review and Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI). We also outline the current position for Australian DPPs, including their independence and the current accountability measures that apply to them.

Having considered submissions in response to the Consultation Paper, we are satisfied that all Australian DPPs should be able to implement the measures we identified as minimum requirements if they do not already have them in place.

In relation to a complaints mechanism, we are satisfied that each Australian DPP or Office of the Director of Public Prosecutions (ODPP) should adopt a formalised internal complaints mechanism which would allow victims to seek an internal merits review of key decisions, particularly decisions that would result in a prosecution not being brought or being discontinued in relation to charges for alleged offending against that victim.

We accept that the form of internal merits review will be quite different from that applying in England and Wales under the VRR scheme. In particular, given the difference in size of the Crown Prosecution Service (CPS) and even the largest Australian ODPPs, decision-making in Australian ODPPs already occurs at a higher level of seniority than in the CPS.

We remain of the view that a formalised complaints mechanism should not in any way reduce the priority given to consulting victims in the course of preparing a prosecution, including obtaining their 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.

It seems clear that judicial review is not favoured either by the High Court or by DPPs – or, indeed, by a number of other interested parties who made submissions in response to the Consultation Paper.

We remain of the view that the absence of judicial review leaves a gap capable of causing real injustice if a prosecutor makes a decision not to prosecute or to discontinue a prosecution without complying with the relevant prosecution guidelines and policies and the affected victim is left with no opportunity to seek judicial review.

However, in light of the strong opposition to judicial review, we do not consider that our recommending it would be likely to provide an effective means for victims to seek review of prosecution decisions.

In the absence of judicial review, it is critical that DPPs and ODPPs – and relevant governments – ensure that complaints mechanisms providing for internal merits review are robust and effective, both to protect the interests of individual victims and to reassure the broader community that key prosecution decisions are made in compliance with prosecution guidelines and policies.

We are also satisfied that internal audits of compliance with prosecution guidelines and policies are needed. While complaints mechanisms provide an important form of review, they rely on individual victims being willing and able to complain.

Although an external audit process might offer additional assurance to the community that DPPs and ODPPs are complying with their guidelines and policies, we accept that an external audit process is not warranted, particularly given the resources that are likely to be required to establish and participate in an external audit process.

We are satisfied that each Australian DPP or ODPP should put in place internal audit processes to audit compliance with guidelines and policies for decision-making and requirements for consultation with victims and police. We consider that these internal audit processes should be ongoing, in the sense that compliance is assessed at least annually, and that any areas of noncompliance should be targeted for follow-up audits.

We are also satisfied that publishing the existence of complaints mechanisms and internal audit processes and data on their use and outcomes is an important means of promoting transparency and accountability of DPPs and ODPPs.

Recommendations

40. Each Australian Director of Public Prosecutions should:

    a. have comprehensive written policies for decision-making and consultation with victims and police

    b. publish all policies online and ensure that they are publicly available

    c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.

41. Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.

42. Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.

43. Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.

Tendency and coincidence evidence and joint trials

We discuss tendency and coincidence evidence and joint trials in chapters 22 to 28.

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

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.

In Chapter 23, we outline tendency and coincidence reasoning and relationship or context evidence. We also outline the current law in Australian jurisdictions, particularly:

- the common law, which is the 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 prosecution of Robert Hughes, who in 2014 was convicted by a jury of 10 child sexual abuse offences against four victims. The prosecution relied on tendency evidence. Hughes unsuccessfully appealed his conviction to the New South Wales Court of Criminal Appeal, and he was granted special leave to appeal to the High Court. The High Court heard argument in the appeal in February 2017, and gave judgment on 14 June 2017. We have added a discussion of the High Court's reasons in section 28.6

The High Court has considered the correct approach to the admissibility of tendency evidence under the Uniform Evidence Act. It has resolved the difference between the New South Wales and Victorian approaches in favour of the New South Wales approach. However, it is not clear to us that the majority's statement of the test for admissibility provides sufficient guidance for trial and appellate courts to be able to apply the test consistently with each other in an area of the law as 'vexed' as this.

Even if the majority's statement of the test for admissibility does give sufficient guidance to trial and appellate courts, it does not address the admissibility of tendency and coincidence evidence to the extent we consider is necessary in order to prevent injustice to victims of child sexual abuse, including institutional child sexual abuse, who seek justice through the criminal justice system.

In Chapter 24 we discuss a number of examples from our case studies. These include:

- 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
- the prosecution of 'Alexander', which we examined in Case Study 46
- the prosecution of John Rolleston, which we examined in Case Study 27 in relation to the experiences of a number of patients in health care services in New South Wales and Victoria.

In Chapter 25 we 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.

A number of submissions in response to the Consultation Paper and a number of witnesses who gave evidence in Case Study 46 commented on the Jury Reasoning Research.

We discuss the submissions and evidence that raised concerns about or criticisms of the Jury Reasoning Research, including how it was conducted and its findings. We also discuss the researchers' responses to the concerns and criticisms.

In Chapter 26 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.

In Chapter 27 we discuss our consultations on tendency and coincidence evidence. We outline:

- the discussion in the Consultation Paper, including the opinion provided by Counsel Assisting in Case Study 38
- the draft model Bill – the Evidence (Tendency and Coincidence) Model Provisions – that we released for public consultation in November 2016, shortly before the public hearing in Case Study 46 began
- what we were told in our consultations from a range of stakeholders.

We have heard from some stakeholders in relation to tendency and coincidence evidence on a number of occasions, particularly in the public hearings in case studies 38 and 46. We also obtained advice from barristers Mr Tim Game SC, Ms Julia Roy and Ms Georgia Huxley in 2015. We have drawn together the opinions provided by particular stakeholders over the course of our consultations and we outline them in Chapter 27.

Finally, in Chapter 28 we discuss all the material we have considered and draw our conclusions.

We are 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 expressed this view in the Consultation Paper on a provisional basis. Nothing we have heard since we published the Consultation Paper, including in submissions in response to the Consultation Paper and in Case Study 46, has changed our opinion. Indeed, our view has been reinforced by what we have heard, and we are now satisfied that the current law not only needs to change but needs to change as a matter of urgency.

We are persuaded that, given the scope of our Terms of Reference, we should limit our recommendations for reform to criminal prosecutions for child sexual abuse offences and not include other criminal offences or civil litigation.

We outline our views on the relevance and probative value of tendency and coincidence evidence in child sexual abuse prosecutions.

We then discuss how we consider that the work of law reform commissions has both understated the probative value of tendency and coincidence evidence and overstated the risk of unfair prejudice.

It is clear to us – not just from the Jury Reasoning Research but also from court data on convictions and acquittals – that juries distinguish between counts in child sexual abuse prosecutions.

Data from New South Wales courts from July 2012 to June 2016 shows that in only 33 per cent of matters were offenders convicted of all the child sexual abuse offences with which they were charged. In 40 per cent of matters, persons charged with child sexual abuse offences were not convicted of any child sexual abuse offence; and, in 27 per cent of matters, offenders were convicted of at least one but not all child sexual abuse offences with which they were charged.

The data also shows that the overall conviction rate for child sexual abuse offences of 60 per cent, while higher than for adult sexual assault (50 per cent), was substantially lower than the average conviction rate for all offences of 89 per cent.

These low conviction rates for child sexual abuse offences would not be a reason to consider law reform if we were satisfied that many complainants of child sexual abuse are lying or mistaken, but this is not the case.

Data from New South Wales courts in relation to child sexual abuse offences finalised at a defended hearing (that is, excluding any matters dealt with by guilty plea, withdrawal of charges or the like) from July 2012 to June 2016 does not support a hypothesis that juries are engaging in unfairly prejudicial reasoning. When faced with one or more counts of child sexual abuse, this data suggests that the jury is as likely to acquit as to convict. Even where the accused is convicted of at least one child sexual assault offence, the accused stands a good chance of not being convicted of all of the child sexual assault offences with which he or she has been charged.

This data suggests that juries are distinguishing between counts on the indictment and the evidence that relates to the respective counts. Juries are not assuming that someone they have determined to be guilty of at least one child sexual assault offence must be guilty of the other child sexual assault offences with which he or she has been charged. This data is not compatible with a concern that juries will improperly reason that child sex offenders must be guilty of other child sexual abuse offences with which they are charged.

We are satisfied that concerns that tendency or coincidence evidence carries a high risk of unfair prejudice to the accused are misplaced.

We are satisfied that the current law in relation to tendency and coincidence evidence and joint trials must change to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters. A number of considerations have led us to this conclusion, as follows:

- There are unwarranted acquittals in prosecutions for child sexual abuse offences. This is demonstrated through particular examples we have examined in our public hearings and more generally by the low conviction rate for child sexual abuse offences. Our public hearings are but a limited snapshot of the injustice of which we are aware. It is reasonable to conclude that there are many more. Unless one believes that many complainants of child sexual abuse are lying or mistaken about the abuse they allege, it is clear that many perpetrators of child sexual abuse are being acquitted.
- We are satisfied that tendency and coincidence evidence will often have a high probative value in relation to child sexual abuse offences, and we consider that the probative value of tendency and coincidence evidence generally has been understated, particularly in child sexual abuse prosecutions where the complainant has identified the accused as the perpetrator of the abuse.
- We are satisfied that the risk of unfair prejudice to the accused arising from tendency and coincidence evidence has been overstated – it is not borne out by outcomes in child sexual abuse prosecutions or experience in jurisdictions with more liberal approaches, and the Jury Reasoning Research found no evidence of unfair prejudice.
- We are satisfied that excluding tendency and coincidence evidence unfairly risks undermining the credibility and reliability of the evidence given by some complainants in the eyes of the jury.
- We do not consider it acceptable that the prospects of a complainant obtaining criminal justice can depend so significantly on the jurisdiction in which the child sexual abuse offences are prosecuted. Victims – and the community – are entitled to expect a consistency in the approach of each state and territory of Australia.

Tendency or coincidence evidence is particularly important in child sexual abuse prosecutions which are, typically, 'word against word' cases. We have examined a number of cases in which juries have been denied the opportunity to hear accounts that give the true picture of what is alleged to have happened. We are satisfied that there have been unjust outcomes in the form of unwarranted acquittals because of the exclusion of tendency or coincidence evidence.

Recommendation

44. In order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials.

We are satisfied that legislative reform is required.

Although the High Court's decision in the *Hughes* appeal addresses the meaning of 'significant probative value' and resolves the difference between New South Wales and Victoria in how it is applied, we do not consider that it has resolved all the difficulties we have identified. The High Court gave judgement in *Hughes* on 14 June 2017, as this report was being finalised for printing. We have added a discussion of the High Court's reasons at the end of Chapter 28, which we discuss below.

We are conscious of the evidence given in Case Study 46 that the problems are largely resolved and the outstanding issues may be addressed by the High Court in the *Hughes* appeal.

However, we do not consider the current position to be acceptable given that the Uniform Evidence Act has been in operation for some 20 years in New South Wales and seven years in Victoria. With hundreds of child sexual abuse trials proceeding each year in each jurisdiction, the law needs to be reformed without further delay.

It is also important to recognise that, other than in Queensland, the tests for admissibility of tendency or coincidence evidence are set out in legislation. If there are significant problems with how they are operating in practice – and we are satisfied that, with the exception of Western Australia, there are – then it is the responsibility of governments rather than the courts to address the problems by introducing amending legislation.

In relation to the test for admissibility of tendency and coincidence evidence, we have concluded that the first limb of the test for admissibility should reflect a test of relevance but with some enhancement. In order to avoid the more practical concerns of the courts and others about collateral litigation and the jury being distracted from the issues in the trial, we consider that a test – drawing on the approach in England and Wales – that requires that the tendency or coincidence evidence be 'relevant to an important evidentiary issue' in the case should be adopted.

In relation to the second limb of the test for admissibility, we do not accept the current unequal weighting of the test in favour of exclusion. That is, it is not clear why the probative value of the evidence should be required to '*substantially* outweigh' the risk of unfair prejudice.

We are satisfied that there should be provision made to enable a judge to exclude the tendency or coincidence evidence if it is more likely than not to result in the trial, as a whole, being unfair to the accused in a manner that will not be cured by directions.

At both stages of the test for admissibility, we consider it necessary to expressly exclude the common law. The interpretation of the Uniform Evidence Act provisions to date demonstrates how difficult it has been for the courts to apply the statutory provisions without importing common law assumptions, particularly as to unfair prejudice.

We also recommend that the possibility of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence. The impact of any evidence of concoction, collusion or contamination should be left to the jury.

Recommendations

45. Tendency or coincidence evidence about the defendant in a child sexual offence prosecution should be admissible:

    a. if the court thinks that the evidence will, either by itself or having regard to the other evidence, be 'relevant to an important evidentiary issue' in the proceeding, with each of the following kinds of evidence defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:

        i. evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding

        ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole

    b. unless, on the application of the defendant, the court thinks, having regard to the particular circumstances of the proceeding, that both:

        i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant

        ii. if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.

46. Common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.

47. Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution. The court should determine admissibility on the assumption that the evidence will be accepted as credible and reliable, and the impact of any evidence of concoction, collusion or contamination should be left to the jury or other fact-finder.

Generally, it is only the elements of the offence charged that, as a matter of law, must be proved beyond reasonable doubt. However, following a decision of the High Court, the New South Wales Court of Criminal Appeal determined that tendency evidence should be required to be proved beyond reasonable doubt.

Victoria has made clear by legislation that tendency and coincidence evidence does not need to be proved beyond reasonable doubt.

We agree with this approach. We see no reason to insist upon a particular standard of proof for a particular piece of tendency or coincidence evidence.

Recommendation

48. Tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.

We are satisfied that prior convictions for child sexual abuse offences should be admissible in prosecutions for child sexual abuse offences. Generally, it will be the facts of the prior offending rather than the fact of conviction that will be of most assistance to the jury.

The provisions in Western Australia permit prior convictions and evidence of the conduct underlying the convictions to be admitted. The experience of Western Australia in more readily admitting tendency or coincidence evidence, including evidence of prior convictions or admissions reflecting prior convictions, is not suggested to be causing unfair convictions.

Similarly, England and Wales allow the admission of prior convictions; and prior alleged offences even though the accused has been acquitted. No evidence has been given or submission made to us that the experience of England and Wales in allowing much greater admissibility of evidence of the accused's bad character is causing wrongful convictions.

We consider that there may be circumstances in which evidence of acts for which the defendant has been acquitted should be admissible. However, this was not the subject of detailed evidence before us, and we are content to leave this issue for more detailed consideration by law reform commissions in the future.

Recommendation

49. Evidence of:

    a. the defendant's prior convictions

    b. acts for which the defendant has been charged but not convicted (other than acts for which the defendant has been acquitted)

    should be admissible as tendency or coincidence evidence if it otherwise satisfies the test for admissibility of tendency or coincidence evidence about a defendant in a child sexual offence prosecution.

We obtained the assistance of the New South Wales Parliamentary Counsel's Office to draft provisions to reflect the reforms we now recommend.

The draft provisions are drafted as amendments to the Uniform Evidence Act. We consider that the substance of the provisions is also suitable for enactment in non–Uniform Evidence Act jurisdictions as amendments to the relevant evidence legislation.

The draft provisions are discussed in Chapter 28 and set out in full in Appendix N.

Recommendations

50. Australian governments should introduce legislation to make the reforms we recommend to the rules governing the admissibility of tendency and coincidence evidence.

51. The draft provisions in Appendix N provide for the recommended reforms for Uniform Evidence Act jurisdictions. Legislation to the effect of the draft provisions should be introduced for Uniform Evidence Act jurisdictions and non–Uniform Evidence Act jurisdictions.

In relation to the High Court's decision in the *Hughes* appeal, it is not clear to us that the majority's statement of the test for admissibility provides sufficient guidance for trial and appellate courts to be able to apply the test consistently with each other in an area of the law as 'vexed' as this.

Even if the majority's statement of the test for admissibility does give sufficient guidance to trial and appellate courts, it does not address the admissibility of tendency and coincidence evidence to the extent we consider is necessary in order to prevent injustice to victims of child sexual abuse, including institutional child sexual abuse, who seek justice through the criminal justice system.

The High Court's decision in *Hughes* is likely to lead to the greater admissibility of tendency evidence and to more trials where tendency evidence is cross-admissible, particularly in Victoria. However, it may make little difference to the position in other Uniform Evidence Act jurisdictions, and of course it may have little if any effect on the position in the non-Uniform Evidence Act jurisdictions.

Our reasons for concluding that the current law in relation to tendency and coincidence evidence and joint trials must change, stated at length in section 28.1 and summarised in section 28.1.7, continue to apply in spite of the High Court's decision in *Hughes*.

The scope of the High Court's decision was necessarily limited by the legislative provisions under consideration and the issues raised in the appeal. We remain satisfied that it is the responsibility of governments and parliaments rather than courts to address the problems we have identified in relation to the admissibility of tendency and coincidence evidence.

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.

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

We outline 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.

Special measures

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 outline 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. We also discuss relevant aspects of the Memory Research.

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. We heard evidence in Case Study 46 about the operation of the intermediary schemes which have recently commenced in New South Wales and South Australia.

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 we identified in the Consultation Paper and what we were told about them in submissions and in Case Study 46:

- 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 victims and survivors.

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. However, we have concluded that special measures should be expanded to enable witnesses in child sexual abuse cases to give their best evidence.

Prerecording

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

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

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

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

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

It is clear to us, including from what we have heard in public hearings and private sessions, that many survivors of institutional child sexual abuse who are now adults and do not have disability are 'vulnerable', particularly when they are describing their experiences of abuse and particularly in the very unfamiliar and stressful environment of a court.

While CCTV and audiovisual links may be available currently, some adult survivors are likely to benefit significantly from being able to use a prerecorded police investigative interview as their evidence in chief and to prerecord their full evidence, including cross-examination and re-examination.

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

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

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

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

While ground rules are essential to get the full benefit of the use of intermediaries, discussed below, there may be other circumstances where they are of benefit.

The full benefits of using prerecorded or remote evidence may not be realised if there are technical problems with the recording and playback of such evidence, whether through the failure of the technology or through poor use of the technology. Governments should work with courts to improve the technical quality of CCTV and audiovisual links and the equipment and staff training used in taking and replaying prerecorded and remote evidence.

Recommendations

52. State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions. This should include both:

    a. in summary and indictable matters, the use of a prerecorded investigative interview as some or all of the witness's evidence in chief

    b. in matters tried on indictment, the availability of pre-trial hearings to record all of a witness's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.

53. Full prerecording should be made available for:

    a. all complainants in child sexual abuse prosecutions

    b. any other witnesses who are children or vulnerable adults

    c. any other prosecution witness that the prosecution considers necessary.

54. Where the prerecording of cross-examination is used, it should be accompanied by ground rules hearings to maximise the benefits of such a procedure.

55. State and territory governments should work with courts to improve the technical quality of closed circuit television and audiovisual links and the equipment used and staff training in taking and replaying prerecorded and remote evidence.

Recording

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

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

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

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

We are satisfied that reliable audiovisual recordings should be made of evidence given by complainants in child sexual abuse matters and that these recordings should be able to be tendered as the complainant's evidence in any subsequent trial or retrial. Recordings should be made in both indictable and summary matters.

We consider that these provisions should extend beyond the complainant to other prosecution witnesses that the prosecution considers necessary.

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

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

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

Recommendations

56. State and territory governments should introduce legislation to require the audiovisual recording of evidence given by complainants and other witnesses that the prosecution considers necessary in child sexual abuse prosecutions, whether tried on indictment or summarily, and to allow these recordings to be tendered and relied on as the relevant witness's evidence in any subsequent trial or retrial. The legislation should apply regardless of whether the relevant witness gives evidence live in court, via closed circuit television or in a prerecorded hearing.

57. State and territory governments should ensure that the courts are adequately resourced to provide this facility, in terms of both the initial recording and its use in any subsequent trial or retrial.

58. If it is not practical to record evidence given live in court in a way that is suitable for use in any subsequent trial or retrial, prosecution guidelines should require that the fact that a witness may be required to give evidence again in the event of a retrial be discussed with witnesses when they make any choice as to whether to give evidence via prerecording, closed circuit television or in person.

Intermediaries

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

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

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

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

We also see significant benefits arising from the use of ground rules hearings with intermediaries. Ground rules not only provide for a more precise and less stressful experience for the witness but may also narrow the issues to be taken by the parties, thus improving the efficiency of the trial.

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

Recommendations

59. State and territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales which are available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution. Governments should ensure that the scheme:

    a. requires intermediaries to have relevant professional qualifications to assist in communicating with vulnerable witnesses

    b. provides intermediaries with training on their role and in understanding that their duty is to assist the court to communicate with the witness and to be impartial

    c. makes intermediaries available at both the police interview stage and trial stage

    d. enables intermediaries to provide recommendations to police and the court on how best to communicate with the witness and to intervene in an interview or examination where they observe a communication breakdown.

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

Other special measures

We are satisfied that the other special measures generally used for vulnerable witnesses should be available for complainants, other vulnerable witnesses and other prosecution witnesses that the prosecution considers necessary in child sexual abuse matters.

Recommendation

61. The following special measures should be available in child sexual abuse prosecutions for complainants, vulnerable witnesses and other prosecution witnesses where the prosecution considers it necessary:

    a. giving evidence via closed circuit television or audiovisual link so that the witness is able to give evidence from a room away from the courtroom

    b. allowing the witness to be supported when giving evidence, whether in the courtroom or remotely, including, for example, through the presence of a support person or a support animal or by otherwise creating a more child-friendly environment

    c. if the witness is giving evidence in court, using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence

    d. clearing the public gallery of a courtroom during the witness's evidence

    e. the judge and counsel removing their wigs and gowns.

Courtroom issues

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.

We are satisfied that, where there is any doubt about a child's competence to give evidence, a judge should establish the child's ability to understand basic questions asked of them by asking simple, non-theoretical questions. Where it does not appear that the child can give sworn evidence, the judge should simply ask the witness for a promise to tell the truth and allow the examination of the witness to proceed.

Recommendation

62. State and territory governments should introduce legislation to allow a child's competency to give evidence in child sexual abuse prosecutions to be tested as follows:

    a. Where there is any doubt about a child's competence to give evidence, a judge should establish the child's ability to understand basic questions asked of them by asking simple, non-theoretical questions – for example, about their age, school, family et cetera.

    b. Where it does not appear that the child can give sworn evidence, the judge should simply ask the witness for a promise to tell the truth and allow the examination of the witness to proceed.

In relation to reforming courtroom questioning, we consider that introducing intermediaries and ground rules hearings should help to improve the skills of police, prosecutors, defence counsel and judges in dealing with vulnerable witnesses. Training and education for judges and the legal profession and judicial directions containing educative information about children and the impact of child sexual abuse should also assist. We discuss these further in Chapter 31.

In relation to the rule in *Browne v Dunn*, we are satisfied that, for some child witnesses, or witnesses with disability, offering them the opportunity to dispute a proposition that they are not telling the truth, even if done with a view to providing that witness with procedural fairness, may be confusing and distressing. While such an approach might be appropriate in some cases, we are satisfied that, in any guidance prepared to assist courts and practitioners in conducting ground rules hearings in relation to vulnerable witnesses, the issue of whether, or the extent to which, it is necessary for the defence to comply with the rule in *Browne v Dunn* should be considered.

Use of interpreters

All Australian jurisdictions accept that interpreters should be provided for witnesses who require them in order to understand and reply to questions. The need for interpreters to assist witnesses from culturally and linguistically diverse backgrounds is obvious. In our consultations, participants have raised the particular interpreting needs of Aboriginal and Torres Strait Islander victims and survivors.

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

Recommendation

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

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 31, 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.

Reforming judicial directions

In the Consultation Paper, we discussed reforming judicial directions as a possible option for reform.

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.

We recognise that the Victorian legislation is not a complete codification of judicial directions. Such an exercise may not be possible given the variety of directions that might be required depending on the evidence in the particular trial.

We consider that there is merit in codification of judicial directions as implemented in Victoria. The codification has now been in operation for some years without significant criticism and with the support and endorsement of the judiciary and experienced practitioners. We recognise that this reform extends considerably beyond child sexual abuse trials and, indeed, trials for sexual offences generally. We will not make a recommendation in favour of codification, but we consider that other states and territories should follow Victoria's experience with interest and should reconsider codification now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.

Recommendation

64. State and territory governments should consider or reconsider the desirability of partial codification of judicial directions now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.

Abolishing or reforming particular judicial directions

We are satisfied that no state or territory should retain the common law directions or warnings arising from *Kilby, Murray, Longman, Crofts, Crampton* or *Doggett*.

Our discussion of the legislative responses of the New South Wales and Victorian parliaments to these High Court cases demonstrates that New South Wales and Victoria have addressed these problems.

In other states, some of these directions or warnings are still given, in spite of calls for reform by a law reform commission and the judiciary.

We are satisfied that each state and territory should review its legislation to ensure that these directions or warnings are not required or allowed. The New South Wales and Victorian provisions provide precedents for consideration.

In relation to the Markuleski direction, we consider that the arguments against the direction are considerably more persuasive than the arguments in favour of it. New South Wales, Queensland and any other states or territories in which Markuleski directions are required should consider introducing legislation to abolish any requirement for such directions.

Recommendations

65. Each state and territory government should review its legislation and introduce any amending legislation necessary to ensure that it has the following provisions in relation to judicial directions and warnings:

    a. **Delay and credibility:** Legislation should provide that:

        i. there is no requirement for a direction or warning that delay affects the complainant's credibility

        ii. the judge must not direct, warn or suggest to the jury that delay affects the complainant's credibility unless the direction, warning or suggestion is requested by the accused and is warranted on the evidence in the particular circumstances of the trial

        iii. in giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.

    b. **Delay and forensic disadvantage:** Legislation should provide that:

        i. there is no requirement for a direction or warning as to forensic disadvantage to the accused

        ii. the judge must not direct, warn or suggest to the jury that delay has caused forensic disadvantage to the accused unless the direction, warning or suggestion is requested by the accused and there is evidence that the accused has suffered significant forensic disadvantage

        iii. the mere fact of delay is not sufficient to establish forensic disadvantage

        iv. in giving any direction, warning or comment, the judge should inform the jury of the nature of the forensic disadvantage suffered by the accused

        v. in giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.

    c. **Uncorroborated evidence:** Legislation should provide that the judge must not direct, warn or suggest to the jury that it is 'dangerous or unsafe to convict' on the uncorroborated evidence of the complainant or that the uncorroborated evidence of the complainant should be 'scrutinised with great care'.

d. **Children's evidence:** Legislation should provide that:

   i. the judge must not direct, warn or suggest to the jury that children as a class are unreliable witnesses

   ii. the judge must not direct, warn or suggest to the jury that it would be 'dangerous or unsafe to convict' on the uncorroborated evidence of a child or that the uncorroborated evidence of a child should be 'scrutinised with great care'

   iii. the judge must not give a direction or warning about, or comment on, the reliability of a child's evidence solely on account of the age of the child.

66. The New South Wales Government, the Queensland Government and the government of any other state or territory in which Markuleski directions are required should consider introducing legislation to abolish any requirement for such directions.

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.

There was widespread support in submissions in response to the Consultation Paper for increased training and education for all those involved in child sexual abuse trials, including trial and appellate judges and legal practitioners.

Identifying the most effective means by which to provide increased training and education is the challenge.

An important benefit of introducing witness intermediaries, which we recommend in Chapter 30, is their role in educating judges and legal practitioners in the context of the particular trial and particular witness.

Another area in which better information, or training and education, might be particularly useful is in assisting the judiciary and legal practitioners to understand and keep up to date with current social science research that is relevant to understanding child sexual abuse.

The Memory Research we commissioned and published provides up-to-date information about some relevant issues. The Memory Research is intended to contribute to the development of guidance for judges, magistrates and the legal profession, including through bench books and legal education.

There are a number of existing bodies that should provide significant leadership in ensuring that the relevant information and training is made available to the judiciary and potentially the broader legal profession. In particular, the following bodies already perform important roles in educating the judiciary and profession:

- the Australasian Institute of Judicial Administration
- the National Judicial College of Australia
- the Judicial Commission of New South Wales
- the Judicial College of Victoria.

Recommendations

67. State and territory governments should support and encourage the judiciary, public prosecutors, public defenders, legal aid and the private Bar to implement regular training and education programs for the judiciary and legal profession in relation to understanding child sexual abuse and current social science research in relation to child sexual abuse.

68. Relevant Australian governments should ensure that bodies such as:

    a. the Australasian Institute of Judicial Administration

    b. the National Judicial College of Australia

    c. the Judicial Commission of New South Wales

    d. the Judicial College of Victoria

    are adequately funded to provide leadership in making relevant information and training available in the most effective forms to the judiciary and, where relevant, the broader legal profession so that they understand and keep up to date with current social science research that is relevant to understanding child sexual abuse.

Improving information for jurors

Jurors may need assistance in better understanding children's responses to child sexual abuse.

Expert evidence

Experiences of the value of expert evidence in child sexual abuse trials appear to differ widely across jurisdictions.

Given issues such as cost, the difficulty in identifying suitable and qualified experts, and some uncertainty as to the extent to which expert evidence assists the jury, we do not consider that expert evidence is likely to be used in many, let alone most, child sexual abuse trials in Australian jurisdictions. However, we see no reason why it should not be an available option in all jurisdictions in those trials where the prosecution considers that it might be useful and the issues of cost and the like can be overcome.

We are satisfied that provisions such as those in sections 79(2) and 108C of the Uniform Evidence Act make appropriate provision for the use of expert evidence.

Recommendation

69. In any state or territory where provisions such as those in sections 79(2) and 108C of the Uniform Evidence Act or their equivalent are not available, the relevant government should introduce legislation to allow for expert evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of child sexual abuse offences.

Particular judicial directions

We consider that judicial directions containing educative information about children and the impact of child sexual abuse would enhance justice for victims of child sexual abuse.

It is clear from a number of cases we discuss that it will be difficult for trial judges to assist juries by providing information about what is known from the social science research without specific legislative authority to do so.

A number of recommendations have previously been made in favour of introducing judicial directions, including directions recommended by the National Child Sexual Assault Reform Committee in 2010.

We are concerned that, in spite of these various recommendations, very little seems to have been done, apart from the new directions the Victorian Government has proposed be given in sexual offence trials in relation to inconsistencies in the complainant's account.

We are satisfied that directions such as these should be settled and authorised – and, indeed, required, at least if requested by the prosecution – by legislation as a priority. We do not consider that more research is needed. Of course, such directions should be kept under review and amended from time to time to take account of up-to-date expert knowledge and opinion.

We consider that governments should lead a process to consult the prosecution, defence, judiciary and academics with relevant expertise in relation to the directions, with a view to settling them and introducing legislation as soon as possible to authorise and require the directions to be given.

Recommendation

70. Each state and territory government should lead a process to consult the prosecution, defence, judiciary and academics with relevant expertise in relation to judicial directions containing educative information about children and the impact of child sexual abuse, with a view to settling standard directions and introducing legislation as soon as possible to authorise and require the directions to be given. The National Child Sexual Assault Reform Committee's recommended mandatory judicial directions and the Victorian Government's proposed directions on inconsistencies in the complainant's account should be the starting point for the consultation process, subject to the removal of the limitation in the third direction recommended by the National Child Sexual Assault Reform Committee in relation to children's responses to sexual abuse so that it can apply regardless of the complainant's age at trial.

The timing of giving judicial directions

There is considerable merit in allowing the trial judge to give directions at any time before the close of evidence at the discretion of the judge and requiring some directions to be given at particular times – generally earlier than might otherwise occur – in the trial. The *Jury Directions Act 2015* (Vic) requires some directions to be given as soon as practicable and before relevant evidence is given.

In advance of any more general codification of judicial directions, state and territory governments (other than the Victorian Government) should work with the judiciary to provide any necessary legislation.

Recommendation

71. In advance of any more general codification of judicial directions, each state and territory government should work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial or to otherwise assist juries by providing them with more information about the issues in the trial. If legislation is required, state and territory governments should introduce the necessary legislation.

Providing educational material to juries

There may be methods – other than or in addition to expert evidence and judicial directions – that might help to inform and educate juries.

The Victorian Government is currently trialling a jury guide. The outcomes of the Victorian trial should be of interest to all states and territories. We also heard evidence about material provided to jurors in New South Wales.

The material in Victoria and New South Wales is general and is not directed at material that is specifically relevant to child sexual abuse trials.

We note that the views of interested parties were mixed as to the benefits or otherwise of providing video or other material to the jury, particularly in relation to material about child sexual abuse.

At this stage, we consider that providing legislative authority for the trial judge to give judicial directions on child witnesses and child sexual abuse is preferable to developing additional educational materials to assist juries. Further, ensuring legislation permits the use of expert evidence in appropriate cases enables the jury to be assisted by evidence that is particularly relevant to the particular circumstances in that trial.

Delays and case management

Many survivors have told us in private sessions of their experiences in participating in criminal trials. In a number of our public hearings, we have also heard evidence about the experiences of victims and their families and survivors in court processes. A number of submissions to Issues Paper 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 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. As we observed in the Consultation Paper, it is probably unrealistic to think that we could recommend particular structures or processes that would be effective in eight states and territories, each with its own different system. However, there seem to be common themes and elements that might contribute to reducing delay and creating more efficient court processes and case management.

In Chapter 32, we discuss the extent and impact of delay in child sexual abuse prosecutions and the causes of 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 in some detail examples of approaches that some jurisdictions are currently taking to addressing delay.

We also discuss what we were told in submissions in relation to 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, we are satisfied that it is not feasible for us to make detailed recommendations about how eight very different prosecution and court systems should operate.

It also seems likely that other recommendations we make in this report, if implemented, will have an effect on delay, although it might not be clear whether that effect is positive or negative.

For example, the experience of the child sexual assault evidence pilot in New South Wales suggests that greater prerecording of complainants' evidence might reduce delay by requiring earlier briefing of the prosecutor and defence counsel; earlier identification of the issues; and earlier assessment of the strength of the evidence. It might also encourage appropriate guilty pleas to be made earlier, and it might reduce the likelihood of charges being withdrawn late in the pre-trial process.

However, to the extent the pilot encourages complainants to come forward and to remain in the criminal justice process, and if it enables them to give their best evidence so that trials are more likely to proceed, it may increase the number of prosecutions in the system, potentially leading to increased delay.

The interconnectedness of the criminal justice system makes it likely that any significant changes will require additional resources, at least initially, not just for the courts but also for prosecution agencies and publicly funded defence services and in some cases for police. Even where reforms achieve improvements, these may require an initial additional investment, and they may lead to increased demand rather than reducing the need for resources.

It is likely that each jurisdiction will differ as to where resources are best directed across the system and in relation to particular reforms, depending on the problems being experienced most acutely in the relevant jurisdiction, and this is likely to change over time.

It is clear that delay can be a significant problem in the criminal justice system in child sexual abuse prosecutions, even though such prosecutions are often afforded a degree of priority. Delays can be particularly damaging for complainants, encouraging them to give up on obtaining a criminal justice response or even discouraging them from reporting the abuse they have suffered to police.

It is also clear that a number of jurisdictions have adopted measures to seek to reduce delays, to better case manage child sexual abuse prosecutions and to trial different programs that might both reduce delays and bring about other improvements in child sexual abuse prosecutions. Some jurisdictions are conducting reviews and evaluations or are preparing responses to relevant recommendations of law reform bodies, and the outcomes of these processes should be of interest to all jurisdictions that are experiencing delays.

Recommendations

72. Each state and territory government should work with its courts, prosecution, legal aid and policing agencies to ensure that delays are reduced and kept to a minimum in prosecutions for child sexual abuse offences, including through measures to encourage:

    a. the early allocation of prosecutors and defence counsel

    b. the Crown – including subsequently allocated Crown prosecutors – to be bound by early prosecution decisions

    c. appropriate early guilty pleas

    d. case management and the determination of preliminary issues before trial.

73. In those states and territories that have a qualified privilege in relation to sexual assault communications, the relevant state or territory government should work with its courts, prosecution and legal aid agencies to implement any necessary procedural or case management reforms to ensure that complainants are effectively able to claim the privilege without risking delaying the trial.

Sentencing

We discuss sentencing of child sexual abuse offenders in Chapter 34.

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 have 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 report 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.

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.

In the Consultation Paper, we identified a number of possible areas for reform. We discuss the submissions and evidence we received in response to the Consultation Paper.

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.

In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator's good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend despite complaints or allegations being made.

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.

Many submissions in response to the Consultation Paper expressed support for other states and territories to adopt the approach applying in New South Wales and South Australia.

Very few submissions opposed the proposal that other states and territories adopt the position that applies in New South Wales and South Australia. Those that expressed opposition generally submitted that good character had minimal application in child sexual abuse cases and so the provision was not needed. It would therefore seem uncontroversial to exclude its consideration where it was of assistance to the offender in the commission of the offence.

Although the sentencing courts appear to give only slight consideration to good character in cases of child sexual abuse, we are satisfied that all other states and territories should introduce legislation similar to that applying in New South Wales and South Australia. In child sexual abuse cases, including institutional child sexual abuse cases, there should be no place for evidence of good character to be led on behalf of an offender as a mitigating factor in sentencing where that apparently good character has facilitated the offending.

Recommendation

74. All state and territory governments (other than New South Wales and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in New South Wales and South Australia.

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.

In states and territories other than Victoria, there is a common law presumption in favour of imposing concurrent sentences. 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.

A number of submissions in response to the Consultation Paper addressed this issue.

It would appear that the principles behind concurrent sentencing are not well understood, and, perhaps as a consequence, the imposition of sentences that are to be served concurrently can cause distress to victims and survivors.

However, given the principle of totality, adopting a simple presumption in favour of cumulative sentencing would be unlikely to provide victims and survivors with any greater comfort. In order to comply with the principle, head sentences for child sex offences would need to be reduced in order to avoid a crushing sentence, which might be just as distressing to victims and survivors.

We consider that sentencing for multiple offences should, to the greatest degree possible, provide separate recognition for separate episodes of child sexual abuse offending, and certainly for multiple victims.

We are not satisfied that legislating for a presumption in favour of cumulative sentencing would achieve this. However, we are satisfied that there is scope for states and territories to legislate toensure that the separate harm done to victims by separate offences is recognised where there are multiple discrete episodes of offending and/or where there are multiple victims.

Adopting a provision similar to that used in New South Wales, which requires the sentencing court to give an indication of the sentence that would have been imposed for each offence when setting an aggregate sentence, should assist in ensuring that separate episodes of offending are given their own recognition in any aggregated sentence.

We do not put this recommendation forward with an expectation that it is likely to lead to longer sentences. Sentencing for multiple offences is a difficult task, and we share the concern expressed in some submissions that preserving discretion for sentencing courts is the most appropriate course to recognise the many and various circumstances that arise in sentencing.

Recommendation

75. State and territory governments should introduce legislation to require sentencing courts, when setting a sentence in relation to child sexual abuse offences involving multiple discrete episodes of offending and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed.

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.

Some submissions expressed support for adopting the approach applying in England and Wales, while other submissions suggested that it would breach the principle against retrospectivity and may be unfair to the offender.

We are satisfied that, provided the maximum penalty that applied at the time of the offence continues to apply, there is no unfairness in applying contemporary sentencing standards within that maximum penalty. We are also satisfied that this would not result in an offender receiving a higher penalty than the one that was applicable at the time when the offence was committed.

We are satisfied that historical sentencing standards were in error, based on misunderstandings of the impact of child sexual abuse on victims. We also note that, where an offender is being sentenced for historical child sexual abuse offences, it is likely that that offender has benefitted from many years of living in freedom in the community – a benefit that may well not have been available if the offender had admitted to the offending and subjected themselves to the criminal justice system at the relevant time.

We are satisfied that states and territories should legislate to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales.

Recommendation

76. State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.

Victim impact statements

Victims can participate in the sentencing process through victim impact statements.

A number of submissions raised concerns about victim impact statements and the limits that can be placed on them.

We acknowledge the difficulties and stress that victims may face in preparing a victim impact statement which reflects the harm they feel they have suffered but does not contain material that goes beyond what an offender has been convicted of, particularly in circumstances where the conviction is the result of charge negotiation.

However, we also note that an offender can only be sentenced for that which they have been convicted of, and, in this context, an offender and their counsel may object to material that is not relevant to the sentencing.

We are satisfied that state and territory governments should improve the information provided to victims and survivors to better prepare them for the process of making a victim impact statement and give them a better understanding of its role in the sentencing process. This should be done in consultation with DPPs.

We are also satisfied that state and territory governments should ensure that all relevant special measures to assist victims in giving evidence in criminal matters are extended to victims when they are giving their victim impact statements, if they choose to use them.

Recommendations

77. State and territory governments, in consultation with their respective Directors of Public Prosecutions, should improve the information provided to victims and survivors of child sexual abuse offences to:

    a. give them a better understanding of the role of the victim impact statement in the sentencing process

    b. better prepare them for making a victim impact statement, including in relation to understanding the sort of content that may result in objection being taken to the statement or parts of it.

78. State and territory governments should ensure that, as far as reasonably practicable, special measures to assist victims of child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them.

Appeals

We discuss appeals in relation to child sexual abuse offences in Chapter 35.

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.

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

In the Consultation Paper, we identified a number of areas for possible reform. In Chapter 30 we address the issue of the importance of recording complainants' evidence more broadly, rather than only in relation to appeals.

Interlocutory appeals by the prosecution

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.

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.

Interlocutory decisions may significantly reduce, and in some cases even destroy, the prosecution's prospects of success in the prosecution. We consider that the prosecution's interlocutory appeal rights should not be subject to a requirement for leave. We note that the New South Wales DPP appears to have exercised his interlocutory appeal rights, which do not require leave, with appropriate restraint.

We received submissions suggesting that, despite certain differences in operation, the interlocutory appeal provisions in New South Wales and Victoria were working well. As such, we do not recommend that one jurisdiction's provisions be used in preference to the others.

However, we are satisfied that states and territories should, where necessary, expand the DPP's right to bring an interlocutory appeal to a broad general right.

We also consider that appellate courts should be sufficiently well resourced to ensure that interlocutory appeals can be dealt with expeditiously so as to avoid delay in trials affected by an interlocutory appeal.

Recommendations

79. State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right:

    a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case

    b. is not subject to a requirement for leave

    c. extends to 'no case' rulings at trial.

80. State and territory governments should work with their appellate court and the Director of Public Prosecutions to ensure that the court is sufficiently well resourced to hear and determine interlocutory appeals in prosecutions involving child sexual abuse offences in a timely manner.

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.

Taking account of the submissions we received in relation to this issue, we are satisfied that the approach to arguments on appeal that verdicts are inconsistent has now been satisfactorily resolved by the courts and that there is no need for us to recommend any reform in this area of the law.

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, we are satisfied that prosecution guidelines should explicitly address this issue and should require consultation with the complainant and the relevant police officer before the DPP decides whether or not to retry a matter after a conviction has been overturned. We cannot see that an explicit statement of this requirement could cause any harm.

Recommendation

81. Directors of Public Prosecutions should amend their prosecution guidelines, where necessary, in relation to the decision as to whether there should be a retrial following a successful conviction appeal in child sexual abuse prosecutions. The guidelines should require that the prosecution consult the complainant and relevant police officer before the Director of Public Prosecutions decides whether to retry a matter.

Monitoring appeals

In the Consultation Paper we suggested that it may be beneficial if relevant government agencies monitor the number, type and success rate of appeals in child sexual abuse prosecutions, and the issues raised, to identify areas of the law in need of reform.

We are satisfied that governments should monitor the number, type and success rate of appeals generally, and the issues raised, to identify areas of the law in need of reform.

We consider that this will be particularly important following any significant reforms to crimes or evidence legislation – including reforms arising from the implementation of the recommendations in this report – to ensure that the reforms are working as intended.

Recommendation

82. State and territory governments should ensure that a relevant government agency, such as the Office of the Director of Public Prosecutions, is monitoring the number, type and success rate of appeals in child sexual abuse prosecutions and the issues raised to:

    a. identify areas of the law in need of reform

    b. ensure any reforms – including reforms arising from the Royal Commission's recommendations in relation to criminal justice, if implemented – are working as intended.

Post-sentencing issues

In Chapter 36, we discuss three criminal justice responses that can occur at sentencing or after a child sexual abuse offender has been sentenced:

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

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

We 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 (WWCC) 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.

Some submissions in response to the Consultation Paper commented on these measures.

Based on what we have heard, including the views of experts canvassed at our public roundtable, we are satisfied that there is not sufficient evidence to demonstrate that the completion of a sex offender treatment program should entitle an offender to be eligible to apply for a role working with children. We note the various programs made available by state and territory corrective service agencies and encourage the continued evaluation and development of offender treatment programs.

In relation to supervision and detention orders and indefinite sentences, we outline the provisions for and use of these measures in different states and territories.

Extended supervision and detention orders are used in relatively few cases to manage those sex offenders who continue to pose a risk beyond the term of their sentence. Given the limited use of such orders, we do not consider that there is sufficient evidence to justify making a recommendation on their broader adoption. We encourage all state and territory governments to consider their regimes for managing serious sex offenders beyond their imprisonment, including the use of the most accurate risk prediction methodologies available.

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 WWCC schemes and the different approaches adopted between the states and territories.

Implementation of our recommendations on WWCC schemes would strengthen some of the current provisions preventing convicted child sexual offenders – who would be on the sex offender registers – from seeking or obtaining WWCC clearances. We encourage state and territory governments to continue to review their sex offender registration and WWCC schemes to ensure that all registered sex offenders are prohibited from working or applying to work in child-related employment.

Juvenile offenders

We discuss the criminal justice system's response to child-to-child sexual abuse in Chapter 37. We are conducting a separate project in relation to children with harmful sexual behaviours generally, including children whose behaviour would not attract a criminal justice response. We will report on that work in our final report.

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.

We outline the data on child-to-child sexual abuse that was analysed in the Police Data Report.

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.

The issue of what should be the minimum age for criminal responsibility has been the subject of debate over a number of years within the legal profession, and it has been considered by various law reform commissions. The issue arises generally across all categories of crime and extends considerably beyond our Terms of Reference. We have not heard evidence or received submissions to the effect that children aged under 12 are being inappropriately caught in the criminal justice system in relation to conduct involving institutional child sexual abuse. We do not see that raising the age of criminal responsibility would contribute to the prevention of child sexual abuse in an institutional context.

One submission in response to the Consultation Paper drew our attention to an additional matter that was not raised in the Consultation Paper. It is a presumption that boys under the age of 14 are incapable of having sexual intercourse. The origin of the presumption can be traced to English common law from at least the 1700s.

With the exception of Tasmania and the Northern Territory, states and territories abolished the presumption in the late 1970s or 1980s following criticism at that time by the legislature and judiciary. In Tasmania, there is a legislated presumption that a male under seven years of age is conclusively presumed to be incapable of having sexual intercourse. In the Northern Territory, the presumption never formed part of the Criminal Code.

The presumption that a boy under the age of 14 was incapable of having sexual intercourse has the potential to cause real injustice to a complainant and to protect an alleged perpetrator from being charged.

When governments introduced legislation to abolish the presumption in the 1970s and 1980s, they did not legislate to give the abolition of the presumption retrospective operation. However, they would not then have known what we now know about the delay in reporting child sexual abuse, including institutional child sexual abuse. However, we also recognise that retrospectively extending criminal liability – even to correct a presumption made by the law which is factually incorrect – is a significant step.

Apart from the Northern Territory, which never adopted the presumption, we consider that each state and territory government should now give consideration to whether the abolition of the presumption should be given retrospective effect and any immunity which has already arisen for a perpetrator as a result of the operation of the presumption up until the time it was abolished should be abolished.

Recommendation

83. State and territory governments (other than the Northern Territory) should give further consideration to whether the abolition of the presumption that a male under the age of 14 years is incapable of having sexual intercourse should be given retrospective effect and whether any immunity which has arisen as a result of the operation of the presumption should be abolished. State and territory governments (other than the Northern Territory) should introduce any legislation they consider necessary as a result of this consideration.

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. In particular, diversion from the criminal justice system is generally considered to be a more important priority for juveniles than for adults. 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 our separate project and we will report on it separately from our work on criminal justice.

It seems clear that some children who may have committed child sexual abuse offences should be diverted from the criminal justice system. Most states and territories appear to do this without requiring the child to participate in the criminal justice system beyond the stage of investigation by police or child protection services. In Victoria, diversion to treatment also often occurs at the Children's Court stage after criminal proceedings have been commenced against the child.

We have no evidence to suggest that one approach is better than the other. We also have no evidence to suggest that children who have committed child sexual abuse offences are being prosecuted through the criminal justice system in circumstances where they should be diverted from it.

In what circumstances and by what procedures children should be diverted from the criminal justice system are questions that arise much more broadly than in relation to child sexual abuse, or institutional child sexual abuse. We do not recommend any reforms in relation to these issues. As Victoria appears to be pursuing quite a different approach from that adopted in other states and territories, Victoria's experiences and any evaluation of its approach should be of interest to the other states and territories.

States and territories have adopted different approaches to determining which court should deal with juveniles who are charged with child sexual abuse offences. We have no evidence to suggest that one approach is better than the other. We also have no evidence to suggest that juveniles charged with child sexual abuse offences are being dealt with in one court when they should be dealt with in another court.

Given what we have learned about how difficult it is for complainants of child sexual abuse to give evidence, we consider that state and territory governments should review their legislation to ensure that complainants in child sexual abuse prosecutions do not have to give evidence on an additional occasion in any circumstance where the alleged offender is a juvenile, including where:

- there are co-accused and one or more of the co-accused is a juvenile – in which case, in the absence of reform, the complainant may have to give evidence once against the adult accused(s) and again against the juvenile accused(s)
- a Children's Court magistrate must hear the prosecution evidence before committing a charge for trial in a higher court – in which case, in the absence of reform, the complainant may have to give evidence at what is effectively a committal in the Children's Court and then again at the trial if the matter is committed for trial.

There may be a number of ways in which such problems can be addressed. For example, where necessary, legislation could be amended to allow juveniles charged with child sexual abuse offences to be dealt with in the adult courts where there are co-accused, and legislation could be amended to prevent a Children's Court magistrate from hearing any evidence from

the complainant other than a prerecorded police interview before committing a charge for trial in a higher court. Alternatively, it might be possible to address the issue by ensuring that the complainant can prerecord evidence on one occasion which is allowed to be used for the purposes of any proceedings in both the higher courts and the Children's Court.

Recommendation

84. State and territory governments should review their legislation – and if necessary introduce amending legislation – to ensure that complainants in child sexual abuse prosecutions do not have to give evidence on any additional occasion in circumstances where the accused, or one of two or more co-accused, is a juvenile at the time of prosecution or was a juvenile at the time of the offence.

The issue of sentencing juveniles is a much broader issue than sentencing juveniles who commit child sexual abuse offences. However, focusing on child sexual abuse offences – and sexual offences more generally – committed by juveniles demonstrates that juveniles can commit the most serious, violent offences and that the offences can have a devastating impact on their victims.

Of course, we also recognise that juveniles may commit child sexual abuse offences in a variety of circumstances, many of which may warrant a focus on rehabilitation rather than punishment. Some offending by juveniles – such as adolescent peer consensual sex – may not warrant the attention of the criminal justice system at all.

We are satisfied that the sentencing principles and sentencing options that can be applied to juveniles who commit child sexual abuse offences should be broad enough to respond to the spectrum of juvenile offending.

In relation to risk management issues, we do not consider that reducing sex offender registration requirements for juvenile offenders or making it easier for juvenile offenders to obtain a WWCC clearance would help protect children against child sexual abuse in an institutional context. Both these measures – sex offender registration and WWCC – are intended to manage risk and protect children rather than to punish offenders.

However, we note that some jurisdictions have provided for judicial discretion in relation to whether a juvenile offender will be required to register on a child sex offender registry. State and territory governments may wish to keep under consideration from time to time the adequacy and appropriateness of the coverage of their child sex offender registration schemes in relation to juveniles.

Criminal justice and regulatory responses

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 recommendation 1.

Both the criminal justice system and the regulatory system respond to child sexual abuse, including institutional child sexual abuse.

One point of interaction occurs when both the criminal justice system and the regulatory system – either directly and/or through the institution – are responding to an allegation of institutional child sexual abuse. Police may be investigating an allegation at the same time as a reportable conduct scheme or other industry regulatory scheme is responding or requiring the institution to respond. In Chapter 9, we discuss how the police and the institution should cooperate.

Another point of interaction occurs when allegations that may involve criminal child sexual abuse in an institutional context are made to a regulatory agency and not directly to police. While we recommend in Chapter 16 that known or suspected institutional child sexual abuse *should* be reported directly to police – in addition to complying with any other regulatory reporting requirements – we also recommend that state and territory governments should ensure that they have systems in place in relation to their mandatory reporting scheme and any reportable conduct scheme to ensure that any reports made under those schemes that may involve child sexual abuse offences are brought to the attention of police.

The other significant point of interaction is how regulatory responses can interact effectively with the outcomes of a criminal justice response, whether they are a decision not to charge, a withdrawal of charges, an acquittal or a conviction.

In Chapter 38, we outline the evidence we have heard about how regulatory responses interact with the criminal justice system. We discuss regulatory responses both where there is no conviction and where there is a conviction.

We recognise that an effective response to institutional child sexual abuse will often require both a criminal justice response and a regulatory response.

However, there are many circumstances in which the criminal justice response will not result in a conviction. In some cases, charges may not be laid.

In these circumstances, it is particularly important that regulatory responses work effectively with criminal justice responses and can respond to risks to children's safety. It is also important that regulators can respond urgently to risks to children's safety where required while the criminal justice response continues.

Where the criminal justice response does not result in a conviction, regulators cannot afford to assume that no regulatory response is required. Equally, institutions cannot assume that the absence of a conviction means that there is no risk for the institution to address.

There is no inherent inconsistency in a person who has been acquitted of a crime nevertheless facing a regulatory response if the available evidence supports a regulatory response.

We will discuss and make recommendations in relation to regulatory and institutional responses to institutional child sexual abuse in our final report.

Regulatory responses that rely on outcomes of the criminal justice response, including convictions and sex offender registration, must also be effective. State and territory governments need to ensure that legislation in relation to their regulatory schemes works effectively not only with their crimes legislation but also with the crimes legislation of all other Australian jurisdictions.

Recommendation

85. State and territory governments should keep the interaction of:

    a. their legislation relevant to regulatory responses to institutional child sexual abuse

    b. their crimes legislation and the crimes legislation of all other Australian jurisdictions, particularly in relation to child sexual abuse offences and sex offender registration

    under regular review to ensure that their regulatory responses work together effectively with their relevant crimes legislation and the relevant crimes legislation of all other Australian jurisdictions in the interests of responding effectively to institutional child sexual abuse.

Recommendations

Our approach to criminal justice reforms

1. In relation to child sexual abuse, including institutional child sexual abuse, the criminal justice system should be reformed to ensure that the following objectives are met:

    a. the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused

    b. criminal justice responses are available for victims and survivors

    c. victims and survivors are supported in seeking criminal justice responses.

Current police responses

2. Australian governments should refer to the Steering Committee for the Report on Government Services for review the issues of:

    a. how the reporting framework for police services in the Report on Government Services could be extended to include reporting on child sexual abuse offences

    b. whether any outcome measures that would be appropriate for police investigations of child sexual abuse offences could be developed and reported on.

Issues in police responses

Principles for initial police responses

3. Each Australian government should ensure that its policing agency:

    a. recognises that a victim or survivor's initial contact with police will be 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

    b. ensures that all police who may come into contact with victims or survivors of institutional child sexual abuse are trained to:

        i. 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)

        ii. treat anyone who approaches the police to report child sexual abuse with consideration and respect, taking account of any relevant cultural safety issues

    c. establishes arrangements to ensure that, on initial contact from a victim or survivor, police refer victims and survivors to appropriate support services.

Encouraging reporting

4. To encourage reporting of allegations of child sexual abuse, including institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. takes steps to communicate to victims (and their families or support people where the victims are children or are particularly vulnerable) that their decision whether to participate in a police investigation will be respected – 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

    b. provides 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 groups and support services to provide it to victims and survivors

    c. makes available a range of channels to encourage reporting, including specialist telephone numbers and online reporting forms, and provides information about what to expect from each channel of reporting

    d. works with survivor advocacy and support groups and support services, including those working with people from culturally and linguistically diverse backgrounds and people with disability, to facilitate reporting by victims and survivors

    e. allows victims and survivors to benefit from the presence of a support person of their choice if they so wish throughout their dealings with police, provided that this will not interfere with the police investigation or risk contaminating evidence

    f. is willing to take statements from victims and survivors in circumstances where the alleged perpetrator is dead or is otherwise unlikely to be able to be tried.

5. To encourage reporting of allegations of child sexual abuse, including institutional child sexual abuse, among Aboriginal and Torres Strait Islander victims and survivors, each Australian government should ensure that its policing agency:

    a. takes the lead in developing good relationships with Aboriginal and Torres Strait Islander communities

    b. provides channels for reporting outside of the community (such as telephone numbers and online reporting forms).

6. To encourage prisoners and former prisoners to report allegations of child sexual abuse, including institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. provides channels for reporting that can be used from prison and that allow reports to be made confidentially

    b. does not require former prisoners to report at a police station.

Police investigations

7. Each Australian government should ensure that its policing agency conducts investigations of reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

    a. 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 steps to facilitate, to the extent possible, continuity in police staffing on an investigation of a complaint.

    b. 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.

    c. 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:

        i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record

        ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

8. State and territory governments should introduce legislation to implement Recommendation 20-1 of the report of the Australian Law Reform Commission and the New South Wales Law Reform Commission *Family violence: A national legal response* in relation to disclosing or revealing the identity of a mandatory reporter to a law enforcement agency.

Investigative interviews for use as evidence in chief

9. Each Australian government should ensure that its policing agency conducts investigative interviewing in relation to reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

    a. 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.

    b. 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.

c. 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.

d. Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:

   i. a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses

   ii. skill development in planning and conducting interviews, including use of appropriate questioning techniques.

e. 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.

f. 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.

g. 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 should not authorise the use of video recorded interviews for general training in a manner that would raise privacy concerns.

h. Police should continue to work towards improving the technical quality of video recorded interviews so that they are technically as effective as possible in presenting the complainant's and other witnesses' evidence in chief.

i. Police should recognise the importance of interpreters, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses.

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

Police charging decisions

10. Each Australian government should ensure that its policing agency makes decisions in relation to whether to lay charges for child sexual abuse offences in accordance with the following principles:

a. Recognising that 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.

b. In making decisions about whether to charge, police should not:

   i. expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available

   ii. 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.

11. The Victorian Government should review the operation of section 401 of the *Criminal Procedure Act 2009* (Vic) and consider amending the provision to restrict the awarding of costs against police if it appears that the risk of costs awards might be affecting police decisions to prosecute. The government of any other state or territory that has similar provisions should conduct a similar review and should consider similar amendments.

Police responses to reports of historical child sexual abuse

12. Each Australian government should ensure that, if its policing agency does not provide a specialist response to victims and survivors reporting historical child sexual abuse, its policing agency develops and implements a document in the nature of a 'guarantee of service' which sets out for the benefit of victims and survivors – and as a reminder to the police involved – what victims and survivors are entitled to expect in the police response to their report of child sexual abuse. The document should include information to the effect that victims and survivors are entitled to:

    a. be treated by police with consideration and respect, taking account of any relevant cultural safety issues

    b. have their views about whether they wish to participate in the police investigation respected

    c. be referred to appropriate support services

    d. contact police through a support person or organisation rather than contacting police directly if they prefer

    e. have the assistance of a support person of their choice throughout their dealings with police unless this will interfere with the police investigation or risk contaminating evidence

    f. have their statement taken by police even if the alleged perpetrator is dead

g. be provided with the details of a nominated person within the police service for them to contact

h. be kept informed of the status of their report and any investigation unless they do not wish to be kept informed

i. have the police focus on the credibility of the complaint or allegations rather than focusing only on the credibility of the complainant, recognising 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.

Police responses to reports of child sexual abuse made by people with disability

13. Each Australian government should ensure that its policing agency responds to victims and survivors with disability, or their representatives, who report or seek to report child sexual abuse, including institutional child sexual abuse, to police in accordance with the following principles:

    a. Police who have initial contact with the victim or survivor should be non-judgmental and should not make any adverse assessment of the victim or survivor's credibility, reliability or ability to make a report or participate in a police investigation or prosecution because of their disability.

    b. Police who assess or provide an investigative response to allegations made by victims and survivors with disability should focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant, and they should not make any adverse assessment of the victim or survivor's credibility or reliability because of their disability.

    c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to ensure that the victim or survivor is able to give their best evidence in the investigative interview.

    d. Decisions in relation to whether to lay charges for child sexual abuse offences should take full account of the ability of any available intermediary scheme, and communication supports, to assist the victim or survivor to give their best evidence when required in the prosecution process.

Police responses and institutions

Police communication and advice

14. In order to assist in the investigation of current allegations of institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. develops and keeps under review procedures and protocols to guide police and institutions about the information and assistance police can provide to institutions where a current allegation of institutional child sexual abuse is made

    b. develops and keeps under review procedures and protocols to guide the police, other agencies, institutions and the broader community on the information and assistance police can provide to children and parents and the broader community where a current allegation of institutional child sexual abuse is made.

15. The New South Wales Standard Operating Procedures for Employment Related Child Abuse Allegations and the Joint Investigation Response Team Local Contact Point Protocol should serve as useful precedents for other Australian governments to consider.

Blind reporting

16. In relation to blind reporting, institutions and survivor advocacy and support groups should:

    a. be clear that, where the law requires reporting to police, child protection or another agency, the institution or group or its relevant staff member or official will report as required

    b. develop and adopt clear guidelines to inform staff and volunteers, victims and their families and survivors, and police, child protection and other agencies as to the approach the institution or group will take in relation to allegations, reports or disclosures it receives that it is not required by law to report to police, child protection or another agency.

17. If a relevant institution or survivor advocacy and support group adopts a policy of reporting survivors' details to police without survivors' consent – that is, if it will not make blind reports – it should seek to provide information about alternative avenues for a survivor to seek support if this aspect of the institution or group's guidelines is not acceptable to the survivor.

18. Institutions and survivor advocacy and support groups that adopt a policy that they will not report the survivor's details without the survivor's consent should make a blind report to police in preference to making no report at all.

19. Regardless of an institution or survivor advocacy and support group's policy in relation to blind reporting, the institution or group should provide survivors with:

    a. information to inform them about options for reporting to police

    b. support to report to police if the survivor is willing to do so.

20. Police should ensure that they review any blind reports they receive and that they are available as intelligence in relation to any current or subsequent police investigations. If it appears that talking to the survivor might assist with a police investigation, police should contact the relevant institution or survivor advocacy and support group, and police and the institution or group should cooperate to try to find a way in which the survivor will be sufficiently supported so that they are willing to speak to police.

Persistent child sexual abuse offences

21. Each state and territory government should introduce legislation to amend its persistent child sexual abuse offence so that:

    a. the actus reus is the maintaining of an unlawful sexual relationship

    b. an unlawful sexual relationship is established by more than one unlawful sexual act

    c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts

    d. the offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed

    e. on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.

22. The draft provision in Appendix H provides for the recommended reform. Legislation to the effect of the draft provision should be introduced.

23. State and territory governments (other than Victoria) should consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.

24. State and territory governments should consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.

Grooming offences

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

26. Each state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child.

Position of authority offences

27. State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim. If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.

28. State and territory governments should review any provisions allowing consent to be negatived in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim. If the provisions require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), state and territory governments should introduce legislation to amend the provisions so that the existence of the relationship is sufficient.

29. If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.

Limitation periods and immunities

30. State and territory governments should introduce legislation to remove any remaining limitation periods, or any remaining immunities, that apply to child sexual abuse offences, including historical child sexual abuse offences, in a manner that does not revive any sexual offences that are no longer in keeping with community standards.

31. Without limiting recommendation 30, the New South Wales Government should introduce legislation to give the repeal of the limitation period in section 78 of the *Crimes Act 1900* (NSW) retrospective effect.

Failure to report offence

Moral or ethical duty to report to police

32. Any person associated with an institution who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police (and, if relevant, in accordance with any guidelines the institution adopts in relation to blind reporting under recommendation 16).

Failure to report offence

33. Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context as follows:

    a. The failure to report offence should apply to any adult person who:

        i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions

        ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution

        but it should not apply to individual foster carers or kinship carers.

    b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child.

    c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster and kinship care services should be included (but not individual foster carers or kinship carers). Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included.

    d. If the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:

        i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years).

ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:

- still associated with the institution
- known or believed to be associated with another relevant institution.

iii. The knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years.

e. If the knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:

i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution).

ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:

- still associated with the institution
- known or believed to be associated with another relevant institution.

Interaction with regulatory reporting

34. State and territory governments should:

a. ensure that they have systems in place in relation to their mandatory reporting scheme and any reportable conduct scheme to ensure that any reports made under those schemes that may involve child sexual abuse offences are brought to the attention of police

b. include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct schemes.

Treatment of religious confessions

35. Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows:

a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.

b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.

c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.

Failure to protect offence

36. State and territory governments should introduce legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution as follows:

    a. The offence should apply where:

        i. an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against:

            - a child under 16
            - a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child

        ii. the person has the power or responsibility to reduce or remove the risk

        iii. the person negligently fails to reduce or remove the risk.

    b. The offence should not be able to be committed by individual foster carers or kinship carers.

    c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster care and kinship care services should be included, but individual foster carers and kinship carers should not be included. Facilities and services provided by religious institutions, and any service or functions performed by persons in religious ministry, should be included.

    d. State and territory governments should consider the Victorian offence in section 49C of the *Crimes Act 1958* (Vic) as a useful precedent, with an extension to include children of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.

Issues in prosecution responses

Principles for prosecution responses

37. All Australian Directors of Public Prosecutions, with assistance from the relevant government in relation to funding, should ensure that prosecution responses to child sexual abuse are guided by the following principles:

a. All prosecution staff who may have professional contact with victims of institutional child sexual abuse should be trained to have a basic understanding of the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and how it can affect people who are involved in a prosecution process, including those who may have difficulties dealing with institutions or person in positions of authority.

b. While recognising the complexity of prosecution staffing and court timetables, prosecution agencies should recognise the benefit to victims and their families and survivors of continuity in prosecution team staffing and should take steps to facilitate, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution.

c. Prosecution agencies should continue to recognise the importance to victims and their families and survivors of the prosecution agency maintaining regular communication with them to keep them informed of the status of the prosecution unless they have asked not to be kept informed.

d. Witness Assistance Services should be funded and staffed to ensure that they can perform their task of keeping victims and their families and survivors informed and ensuring that they are put in contact with relevant support services, including staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.

e. Particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff who are involved in giving early charge advice or in prosecuting child sexual abuse matters should be trained to:

    i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record

    ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

f. Prosecution agencies should recognise that children with disability are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences.

38. Each state and territory government should facilitate the development of standard material to provide to complainants or other witnesses in child sexual abuse trials to better inform them about giving evidence. The development of the standard material should be led by Directors of Public Prosecutions in consultation with Witness Assistance Services, public defenders (where available), legal aid services and representatives of the courts to ensure that it:

    a. is likely to be of adequate assistance for complainants who are not familiar with criminal trials and giving evidence

    b. is fair to the accused as well as to the prosecution

    c. does not risk rehearsing or coaching the witness.

Charging and plea decisions

39. All Australian Directors of Public Prosecutions should ensure that prosecution charging and plea decisions in prosecutions for child sexual abuse offences are guided by the following principles:

    a. Prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. Prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought.

    b. Regardless of whether such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to minimise the risk that charges will have to be downgraded or withdrawn closer to the trial date.

    c. While recognising the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered.

    d. Prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea and that the complainant is given the opportunity to obtain assistance from relevant witness assistance officers or other advocacy and support services before they give their opinion on the proposal. If the complainant is a child, prosecutors must endeavour to ensure that they give the child the opportunity to consult their carer or parents unless the child does not wish to do so.

DPP complaints and oversight mechanisms

40. Each Australian Director of Public Prosecutions should:

    a. have comprehensive written policies for decision-making and consultation with victims and police

    b. publish all policies online and ensure that they are publicly available

    c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.

41. Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.

42. Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.

43. Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.

Tendency and coincidence and joint trials

44. In order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials.

45. Tendency or coincidence evidence about the defendant in a child sexual offence prosecution should be admissible:

    a. if the court thinks that the evidence will, either by itself or having regard to the other evidence, be 'relevant to an important evidentiary issue' in the proceeding, with each of the following kinds of evidence defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:

        i. evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding

        ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole

    b. unless, on the application of the defendant, the court thinks, having regard to the particular circumstances of the proceeding, that both:

        i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant

        ii. if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.

46. Common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.

47. Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution. The court should determine admissibility on the assumption that the evidence will be accepted as credible and reliable, and the impact of any evidence of concoction, collusion or contamination should be left to the jury or other fact-finder.

48. Tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.

49. Evidence of:

    a. the defendant's prior convictions

    b. acts for which the defendant has been charged but not convicted (other than acts for which the defendant has been acquitted)

    should be admissible as tendency or coincidence evidence if it otherwise satisfies the test for admissibility of tendency or coincidence evidence about a defendant in a child sexual offence prosecution.

50. Australian governments should introduce legislation to make the reforms we recommend to the rules governing the admissibility of tendency and coincidence evidence.

51. The draft provisions in Appendix N provide for the recommended reforms for Uniform Evidence Act jurisdictions. Legislation to the effect of the draft provisions should be introduced for Uniform Evidence Act jurisdictions and non–Uniform Evidence Act jurisdictions.

Evidence of victims and survivors

Prerecording

52. State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions. This should include both:

    a. in summary and indictable matters, the use of a prerecorded investigative interview as some or all of the witness's evidence in chief

    b. in matters tried on indictment, the availability of pre-trial hearings to record all of a witness's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.

53. Full prerecording should be made available for:

    a. all complainants in child sexual abuse prosecutions

    b. any other witnesses who are children or vulnerable adults

    c. any other prosecution witness that the prosecution considers necessary.

54. Where the prerecording of cross-examination is used, it should be accompanied by ground rules hearings to maximise the benefits of such a procedure.

55. State and territory governments should work with courts to improve the technical quality of closed circuit television and audiovisual links and the equipment used and staff training in taking and replaying prerecorded and remote evidence.

Recording

56. State and territory governments should introduce legislation to require the audiovisual recording of evidence given by complainants and other witnesses that the prosecution considers necessary in child sexual abuse prosecutions, whether tried on indictment or summarily, and to allow these recordings to be tendered and relied on as the relevant witness's evidence in any subsequent trial or retrial. The legislation should apply regardless of whether the relevant witness gives evidence live in court, via closed circuit television or in a prerecorded hearing.

57. State and territory governments should ensure that the courts are adequately resourced to provide this facility, in terms of both the initial recording and its use in any subsequent trial or retrial.

58. If it is not practical to record evidence given live in court in a way that is suitable for use in any subsequent trial or retrial, prosecution guidelines should require that the fact that a witness may be required to give evidence again in the event of a retrial be discussed with witnesses when they make any choice as to whether to give evidence via prerecording, closed circuit television or in person.

Intermediaries

59. State and territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales which are available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution. Governments should ensure that the scheme:

    a. requires intermediaries to have relevant professional qualifications to assist in communicating with vulnerable witnesses

    b. provides intermediaries with training on their role and in understanding that their duty is to assist the court to communicate with the witness and to be impartial

c. makes intermediaries available at both the police interview stage and trial stage

d. enables intermediaries to provide recommendations to police and the court on how best to communicate with the witness and to intervene in an interview or examination where they observe a communication breakdown.

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

Other special measures

61. The following special measures should be available in child sexual abuse prosecutions for complainants, vulnerable witnesses and other prosecution witnesses where the prosecution considers it necessary:

    a. giving evidence via closed circuit television or audiovisual link so that the witness is able to give evidence from a room away from the courtroom

    b. allowing the witness to be supported when giving evidence, whether in the courtroom or remotely, including, for example, through the presence of a support person or a support animal or by otherwise creating a more child-friendly environment

    c. if the witness is giving evidence in court, using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence

    d. clearing the public gallery of a courtroom during the witness's evidence

    e. the judge and counsel removing their wigs and gowns.

Courtroom issues

62. State and territory governments should introduce legislation to allow a child's competency to give evidence in child sexual abuse prosecutions to be tested as follows:

    a. Where there is any doubt about a child's competence to give evidence, a judge should establish the child's ability to understand basic questions asked of them by asking simple, non-theoretical questions – for example, about their age, school, family et cetera.

    b. Where it does not appear that the child can give sworn evidence, the judge should simply ask the witness for a promise to tell the truth and allow the examination of the witness to proceed.

Use of interpreters

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

Judicial directions and informing juries

Reforming judicial directions

64. State and territory governments should consider or reconsider the desirability of partial codification of judicial directions now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.

65. Each state and territory government should review its legislation and introduce any amending legislation necessary to ensure that it has the following provisions in relation to judicial directions and warnings:

    a. **Delay and credibility:** Legislation should provide that:

        i. there is no requirement for a direction or warning that delay affects the complainant's credibility

        ii. the judge must not direct, warn or suggest to the jury that delay affects the complainant's credibility unless the direction, warning or suggestion is requested by the accused and is warranted on the evidence in the particular circumstances of the trial

        iii. in giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.

    b. **Delay and forensic disadvantage:** Legislation should provide that:

        i. there is no requirement for a direction or warning as to forensic disadvantage to the accused

        ii. the judge must not direct, warn or suggest to the jury that delay has caused forensic disadvantage to the accused unless the direction, warning or suggestion is requested by the accused and there is evidence that the accused has suffered significant forensic disadvantage

        iii. the mere fact of delay is not sufficient to establish forensic disadvantage

iv. in giving any direction, warning or comment, the judge should inform the jury of the nature of the forensic disadvantage suffered by the accused

v. in giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.

c. **Uncorroborated evidence:** Legislation should provide that the judge must not direct, warn or suggest to the jury that it is 'dangerous or unsafe to convict' on the uncorroborated evidence of the complainant or that the uncorroborated evidence of the complainant should be 'scrutinised with great care'.

d. **Children's evidence:** Legislation should provide that:

i. the judge must not direct, warn or suggest to the jury that children as a class are unreliable witnesses

ii. the judge must not direct, warn or suggest to the jury that it would be 'dangerous or unsafe to convict' on the uncorroborated evidence of a child or that the uncorroborated evidence of a child should be 'scrutinised with great care'

iii. the judge must not give a direction or warning about, or comment on, the reliability of a child's evidence solely on account of the age of the child.

66. The New South Wales Government, the Queensland Government and the government of any other state or territory in which Markuleski directions are required should consider introducing legislation to abolish any requirement for such directions.

Improving information for judges and legal professionals

67. State and territory governments should support and encourage the judiciary, public prosecutors, public defenders, legal aid and the private Bar to implement regular training and education programs for the judiciary and legal profession in relation to understanding child sexual abuse and current social science research in relation to child sexual abuse.

68. Relevant Australian governments should ensure that bodies such as:

a. the Australasian Institute of Judicial Administration

b. the National Judicial College of Australia

c. the Judicial Commission of New South Wales

d. the Judicial College of Victoria

are adequately funded to provide leadership in making relevant information and training available in the most effective forms to the judiciary and, where relevant, the broader legal profession so that they understand and keep up to date with current social science research that is relevant to understanding child sexual abuse.

Improving information for jurors

69. In any state or territory where provisions such as those in sections 79(2) and 108C of the Uniform Evidence Act or their equivalent are not available, the relevant government should introduce legislation to allow for expert evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of child sexual abuse offences.

70. Each state and territory government should lead a process to consult the prosecution, defence, judiciary and academics with relevant expertise in relation to judicial directions containing educative information about children and the impact of child sexual abuse, with a view to settling standard directions and introducing legislation as soon as possible to authorise and require the directions to be given. The National Child Sexual Assault Reform Committee's recommended mandatory judicial directions and the Victorian Government's proposed directions on inconsistencies in the complainant's account should be the starting point for the consultation process, subject to the removal of the limitation in the third direction recommended by the National Child Sexual Assault Reform Committee in relation to children's responses to sexual abuse so that it can apply regardless of the complainant's age at trial.

71. In advance of any more general codification of judicial directions, each state and territory government should work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial or to otherwise assist juries by providing them with more information about the issues in the trial. If legislation is required, state and territory governments should introduce the necessary legislation.

Delays and case management

72. Each state and territory government should work with its courts, prosecution, legal aid and policing agencies to ensure that delays are reduced and kept to a minimum in prosecutions for child sexual abuse offences, including through measures to encourage:

    a. the early allocation of prosecutors and defence counsel

    b. the Crown – including subsequently allocated Crown prosecutors – to be bound by early prosecution decisions

    c. appropriate early guilty pleas

    d. case management and the determination of preliminary issues before trial.

73. In those states and territories that have a qualified privilege in relation to sexual assault communications, the relevant state or territory government should work with its courts, prosecution and legal aid agencies to implement any necessary procedural or case management reforms to ensure that complainants are effectively able to claim the privilege without risking delaying the trial.

Sentencing

Excluding good character as a mitigating factor

74. All state and territory governments (other than New South Wales and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in New South Wales and South Australia.

Cumulative and concurrent sentencing

75. State and territory governments should introduce legislation to require sentencing courts, when setting a sentence in relation to child sexual abuse offences involving multiple discrete episodes of offending and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed.

Sentencing standards in historical cases

76. State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.

Victim impact statements

77. State and territory governments, in consultation with their respective Directors of Public Prosecutions, should improve the information provided to victims and survivors of child sexual abuse offences to:

    a. give them a better understanding of the role of the victim impact statement in the sentencing process

    b. better prepare them for making a victim impact statement, including in relation to understanding the sort of content that may result in objection being taken to the statement or parts of it.

78. State and territory governments should ensure that, as far as reasonably practicable, special measures to assist victims of child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them.

Appeals

79. State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right:

    a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case

    b. is not subject to a requirement for leave

    c. extends to 'no case' rulings at trial.

80. State and territory governments should work with their appellate court and the Director of Public Prosecutions to ensure that the court is sufficiently well resourced to hear and determine interlocutory appeals in prosecutions involving child sexual abuse offences in a timely manner.

81. Directors of Public Prosecutions should amend their prosecution guidelines, where necessary, in relation to the decision as to whether there should be a retrial following a successful conviction appeal in child sexual abuse prosecutions. The guidelines should require that the prosecution consult the complainant and relevant police officer before the Director of Public Prosecutions decides whether to retry a matter.

82. State and territory governments should ensure that a relevant government agency, such as the Office of the Director of Public Prosecutions, is monitoring the number, type and success rate of appeals in child sexual abuse prosecutions and the issues raised to:

    a. identify areas of the law in need of reform

    b. ensure any reforms – including reforms arising from the Royal Commission's recommendations in relation to criminal justice, if implemented – are working as intended.

Juvenile offenders

83. State and territory governments (other than the Northern Territory) should give further consideration to whether the abolition of the presumption that a male under the age of 14 years is incapable of having sexual intercourse should be given retrospective effect and whether any immunity which has arisen as a result of the operation of the presumption should be abolished. State and territory governments (other than the Northern Territory) should introduce any legislation they consider necessary as a result of this consideration.

84. State and territory governments should review their legislation – and if necessary introduce amending legislation – to ensure that complainants in child sexual abuse prosecutions do not have to give evidence on any additional occasion in circumstances where the accused, or one of two or more co-accused, is a juvenile at the time of prosecution or was a juvenile at the time of the offence.

Criminal justice and regulatory responses

85. State and territory governments should keep the interaction of:

    a. their legislation relevant to regulatory responses to institutional child sexual abuse

    b. their crimes legislation and the crimes legislation of all other Australian jurisdictions, particularly in relation to child sexual abuse offences and sex offender registration

    under regular review to ensure that their regulatory responses work together effectively with their relevant crimes legislation and the relevant crimes legislation of all other Australian jurisdictions in the interests of responding effectively to institutional child sexual abuse.

PART I
OUR APPROACH

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 report 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 has not inquired into the courts. While we have considered relevant decisions by courts, our interest is 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 are 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 definitions of 'institution' and 'institutional context' in our Terms of Reference.

In our criminal justice work, we have sought 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 have not excluded issues or reforms that also affect child sexual abuse in other contexts. Because the issues are in many instances the same, it is inevitable that the problems are common to both institutional child sexual abuse and the sexual abuse of children in other contexts.

As recognised in the Letters Patent, while we have not specifically examined the issue of child sexual abuse and related matters outside institutional contexts, the recommendations we make in this report are likely to improve the response to all forms of child sexual abuse in all contexts.

In this report, 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

The Royal Commission has conducted extensive research and consultation programs in relation to criminal justice issues, in addition to examining criminal justice issues in a number of our public hearings.

Commissioners have now formed concluded views on the appropriate recommendations in relation to criminal justice issues. We have agreed to make our recommendations in relation to criminal justice in advance of our final report to enable governments to implement our recommendations as soon as possible.

Our concluded views have been informed by the significant input we have obtained in relation to criminal justice issues from a broad range of sources, as discussed in section 1.4 below.

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

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* (Cth) 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 15 May 2017, the Royal Commission had held 6,800 private sessions and 1,606 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 15 May 2017, the Royal Commission had received 938 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

The Royal Commission has held 57 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 our 57 case studies, we have heard evidence relevant to criminal justice. We refer to these case studies throughout this report. 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 chapters 22 to 28 of this report.

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 report but particularly in Chapter 30.

On 5 September 2016, the Royal Commission published the *Consultation paper: Criminal justice* (the Consultation Paper). In November and December 2016, we held a further public hearing in relation to the issues raised in the Consultation Paper. This public hearing is Case Study 46. We discuss the Consultation Paper and the public hearing in Case Study 46 in sections 1.4.3 and 1.4.4.

1.4.3 Consultations

We have conducted a wide range of public and private consultations on criminal justice issues.

Issues papers

The Royal Commission has 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 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 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 were told in submissions.

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

Roundtables

From February 2016 to June 2016 we held 11 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 Professor Helen Milroy for the private roundtable with Aboriginal and Torres Strait Islander people and agencies.

We held two further roundtables in relation to criminal justice data and research projects, giving a total of 13 public and private roundtables in relation to our criminal justice work.

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.

Most of 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 report.

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 report.

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.

February 2016 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 services
- criminal justice policy officials.

April 2016 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.

May 2016 roundtable

On 27 May 2016 we convened a private roundtable in relation to the police administrative data project, which we discuss in section 1.4.6 and chapters 7 and 37.

June 2016 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.

March 2017 roundtable

On 31 March 2017 we convened a roundtable on the memory of complainants of child sexual abuse. This roundtable was held in conjunction with finalising the research report *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*[2] (Memory Research). It involved a number of invited academics and clinicians with research and practice expertise in this area.

As the roundtable coincided with the last day of the public hearing in Case Study 57 in relation to the nature, cause and impact of child sexual abuse, the roundtable was open to participants only. We published the transcript of the roundtable and the attendance list on the Royal Commission's website on 5 April 2017.

Consultation Paper

On 5 September 2016, the Royal Commission published the Consultation Paper. The Consultation Paper set out the issues we had considered to that date. On some issues the way forward seemed fairly clear, while on other issues there were a range of options presented. We invited submissions on the issues raised in the Consultation Paper.

Submissions to the Consultation Paper were originally due by 17 October 2016. The Royal Commission received a number of requests for extensions from individuals and organisations in order to provide an appropriate response to the complex issues within the Consultation Paper. Therefore, we extended the time for submissions to 31 October 2016.

The Royal Commission received a wide range of submissions in response to the Consultation Paper from a broad range of parties, including governments and government agencies, public prosecutors, legal aid services, legal representative bodies, survivor advocacy and support groups, survivors, institutions, academics and other interested parties.

The submissions have helped us to develop our thinking and to reach our conclusions and final recommendations on criminal justice.

Most of the submissions we received in response to the Consultation Paper are published on our website. However, we did not publish submissions if:

- the authors expressly request that their submission not be published
- the Royal Commission made the decision not to publish a submission. The Royal Commission generally makes the decision not to publish a submission for 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 received 93 submissions, and 81 submissions are published on the Royal Commission's website.

Consultation on model Bill

The Royal Commission released a public consultation draft Bill, *Evidence (Tendency and Coincidence) Model Provisions* (model Bill) on 25 November 2016.

The model Bill was designed to provide a specific example of possible amendments to evidence laws to allow for greater admissibility of tendency and coincidence evidence and facilitate more joint trials.

The model Bill was drafted by the New South Wales Parliamentary Counsel's Office, on instructions of Royal Commission staff, for the purposes of consultation.

A number of lawyers who were witnesses in the public hearing in Case Study 46 were asked to give their opinions about the draft legislation. In addition, we invited any interested party to provide comments on the model Bill.

Following the public hearing in Case Study 46, we received five submissions, which are published on the Royal Commission's website.

The model Bill is particularly relevant to the issues discussed in chapters 22 to 28 of this report.

1.4.4 Public hearing in Case Study 46

On 28 November 2016, the Royal Commission began a second public hearing on criminal justice issues. The public hearing ran for five days. The public hearing enabled us to examine issues raised in the Consultation Paper and to inquire into the experience of some survivors in recently concluded prosecutions. We heard from a number of expert witnesses, including DPPs and representatives of the private Bar. We also heard from a number of organisations and individuals who made written submissions to the Consultation Paper.

All six Commissioners sat for this public hearing. All Commissioners were involved in finalising the Consultation Paper and it was important that all Commissioners had the opportunity to hear oral submissions from those who were invited to speak at the public hearing and to ask questions of them. All Commissioners have determined the Royal Commission's conclusions and recommendations on criminal justice as set out in this report.

It was not possible to invite everyone who had made a submission to speak at the public hearing. It was not possible even to invite all those who expressed a particular wish to speak. In issuing invitations to speak at the public hearing, we selected witnesses with the purpose of ensuring that those listening to the public hearing would hear from a broad range of perspectives, including:

- survivors
- governments
- police and prosecution representatives
- defence representatives and legal aid services
- survivor advocacy and support groups
- organisations that provide services to survivors
- groups with particular expertise in issues of importance to Aboriginal and Torres Strait Islander survivors
- institutions
- legal representative bodies
- academics.

The hearing was open to the public and broadcast on the Royal Commission's website.

The transcripts of the public hearing are available on the Royal Commission's website.

We refer to what we were told at the public hearing throughout this report.

1.4.5 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.

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 evidencein 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.
Memory of complainants of child sexual abuse	**Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence** (Memory Research) Authors: Professor Jane Goodman-Delahunty, Associate Professor Mark Nolan and Dr Evianne van Gijn-Grosvenor The research looks at contemporary psychological understandings of scientific research on memory relevant to the work of the Royal Commission and addresses the questions: • What is known about what victims of child sexual abuse can be expected to remember about experiences of child sexual abuse? • How do victims optimally remember experiences of child sexual abuse? • How does this affect their reporting to police and the evidence they should be expected to be able to give in the criminal justice system?

1.4.6 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 chapters 22 to 28 of this report.

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 Report: 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. The report, *Police responses to child sexual abuse 2010–2014: An analysis of administrative data for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Police Data Report) gives 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 Police Data Report is available on the Royal Commission's website. The Police Data Report is discussed in detail in chapters 7 and 37 of this report.

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.

1.4.7 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 1.4.6
- 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 1.4.5.

We also used these powers to obtain many documents and information for public hearings, including Case Study 38 and Case Study 46 in relation to criminal justice issues.

1.5 Final steps

As set out by the Letters Patent, any report published before our final report, which is required to be submitted to the Governor-General by 15 December 2017, will be considered an interim report.[3]

However, this report on criminal justice contains the Royal Commission's final recommendations on criminal justice.

Commissioners wish to thank all interested individuals, governments and non-government organisations that have contributed to the extensive consultation processes that the Royal Commission has undertaken in relation to criminal justice issues.

2 Our approach

2.1 The role of criminal justice

An effective criminal justice response to child sexual abuse in an institutional context is essential for both victims and the community.

Whether victims or survivors seek punishment of the perpetrator, acknowledgement and recognition that the abuse happened or satisfaction that they have supported other victims and helped to protect the community, the availability of a criminal justice response is critical.

An effective criminal justice response must punish the convicted offender, protect children from the offender and restate the community's abhorrence of such crimes. A criminal justice response can help to bring the occurrence of institutional child sexual abuse into the public domain and ensure that the community is aware of the nature and extent of that abuse and the institutional contexts in which it has occurred.

We have heard many accounts from victims and survivors of their experiences in the criminal justice system. We have also heard many accounts from those who have been unwilling to seek a criminal justice response because of how the criminal justice system works and its capacity to re-traumatise them. We have heard from many interested parties, including many participants in the criminal justice system, about the difficulties the criminal justice system has in responding to child sexual abuse cases. While acknowledging recent improvements in the system, it is clear to us that many people do not consider the current criminal justice response to child sexual abuse to be effective.

There are features of the criminal justice system, and features of child sexual abuse cases, that make achieving an effective criminal justice response in these cases particularly difficult. Our criminal justice system is adversarial, and it affords a number of protections for the accused in order to ensure that criminal proceedings are conducted fairly for the accused. While increasing recognition is given to the interests of victims and the community, the fairness of the criminal proceedings for the accused will always be of central importance. An accused person is entitled to the presumption of innocence, and the primary role of the criminal proceedings is to establish the guilt of, or to acquit, the accused.

In this report, we recommend the reforms that we consider should be made to ensure that a criminal justice response is available for victims and survivors and that it is as effective as possible for victims and survivors without undermining the fairness of the criminal proceedings for the accused.

2.2 Criminal justice for victims

2.2.1 Civil justice and criminal justice

In our *Redress and civil litigation report,* tabled on 14 September 2015, we set out 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 those found guilty of crimes 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.[4]

2.2.2 What survivors seek in criminal justice

As we stated in the Consultation Paper, 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.

In submissions in response to the Consultation Paper and in evidence in the public hearing in Case Study 46, a number of survivor advocacy and support groups told us of their experiences of the differing needs of survivors.

Ms Clare Leaney, representing the In Good Faith Foundation, suggested that decisions on how and when to proceed may differ from survivor to survivor. She told the public hearing:

> One of the points we make in our submission is that it needs to be individualised. There may be some people who are further progressed in terms of their mental health care, who may be able to say, 'Yes, I am definitely able to go through with a criminal prosecution', and there may be someone who is just disclosing for the first time and doesn't have that necessary resilience.[5]

Ms Miranda Clarke, representing the Centre Against Sexual Violence Queensland (CASV), told the public hearing:

> I think from our perspective it is about clients having choice and autonomy within the whole criminal justice system. Often we hear from our clients that they don't feel like they have any control over what's happening and they are not informed about the process, so at all levels of the criminal justice process I just think it's important to have those different options and for essentially the survivor to be the one who makes that choice.[6]

Mr James McDougall, representing the Commission for Children and Young People, Victoria, told the public hearing that a child's conception of justice may differ from an adult's. He said:

> In listening to children and young people, their world, their experience, is more immediate. They may have an awareness of what's happening in a broader context, but their most immediate concerns are the people that are around them; they are concerned not only for their own safety but often for the safety of those people that they care about around them, and that gives a different sense of priority to the things that matter for them.[7]

Ms Jeannie McIntyre, representing the Victorian Aboriginal Child Care Agency, told the public hearing about the particular needs of Aboriginal and Torres Strait Islander survivors. She said:

> I think it's really important that, for Aboriginal survivors to engage in the justice system, there needs to be advocacy, time and genuine engagement. And I've talked about the time element, which is a challenge to other professions.
>
> Engaging really requires a relationship built on trust and integrity; an appreciation of the cultural competency to respond to Aboriginal history, cultures and contemporary social dynamics and to the diversity of Aboriginal communities; valuing the cultural skills and knowledge of community organisations and Aboriginal people; power inequalities – and sincere attempts need to be made to share power; understandingof the historical, cultural and social contexts and complexity of specific local or regional Aboriginal contexts.
>
> Just to reinforce, there is no Aboriginal support service or sexual abuse specific service in Australia today. In the spirit of self-determination, we must provide specific Aboriginal sexual abuse services so victims can be assured of a culturally safe response.[8]

Survivor advocacy groups also spoke of the value to survivors of simply 'being heard'. Ms Clarke, representing CASV, told the public hearing:

> I think my experience in working with the police is that the focus is on getting the evidence and getting a conviction, where I think the Royal Commission has shown how powerful it can be just to bear witness to someone coming forward and talking about their experience. So I've still had clients who have had positive experiences with the police when they have felt like they have been heard and believed, even when there is insufficient evidence to take it further.[9]

In its submission in response to the Consultation Paper, Micah Projects reported on a forum it held with survivors of historical sexual and physical abuse. Micah Projects reported that survivors wanted to see offenders receive appropriate criminal sanctions and they wanted public acknowledgement of the offenders' guilt, but they also wanted:

- the criminal justice system to respond to their need for an opportunity for public accountability and awareness of the devastating effect of offending on victims
- appropriate psychological support
- access to legal representation
- clear and consistent communication around decision-making through the criminal justice process.[10]

Mr Michael O'Connell APM, the South Australian Commissioner for Victims' Rights, told the public hearing that it is important for the criminal justice system itself to operate in a fair way, sometimes described as 'procedural justice'. He said:

> It's my view that the system should be just, fair and equitable to the people who are impacted by crime and also impacted by the criminal justice system, and that includes both the accused person who may become the defendant and offender but also the victim of crime.
>
> The way that I liken it is to have a parallel system of justice that recognises victims clearly as a participant in the criminal justice process from beginning to end.[11]

In his submission in response to the Consultation Paper, Mr O'Connell cited a range of research which he submitted showed that victims' satisfaction with the criminal justice process can be affected by the way they are treated throughout the criminal justice process as well as simply by the outcome of the process.[12]

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.

In Case Study 46, we examined the experiences of a survivor, FAB. FAB alleged that he was sexually abused by a teacher when at school. The teacher was charged but acquitted on all counts. Because the trial proceeded before a judge alone, the judge was required to provide reasons for the acquittal. In those reasons, the judge said that, notwithstanding the acquittal, he was satisfied that the accused did sexually abuse the complainant at school and rejected the accused's blanket denial as a reasonable possibility.

Reflecting on his experience with the criminal justice system, FAB told the public hearing in Case Study 46:

> If I had to go through the criminal process again, I would, because it would help somebody else. I don't think doing it again for me would change anything, but I'm more concerned about this happening to some other child.[13]

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

> We agree with the Royal Commission's view that reporting their abuse to the police is important for many survivors, even in cases where the complaint does not progress further, and many survivors have felt that they were speaking on behalf of other survivors who were not able to report their abuse.[14]

We acknowledge the breadth of survivors' concepts of 'justice' in criminal justice responses. We recognise that, for many survivors, whether they feel they can obtain 'justice' from a criminal justice response is likely to include considerations of:

- how they will be treated by the various participants in the criminal justice system
- whether they will be given the information they need to make decisions
- whether their decisions will be listened to and respected
- what support they will be given, both immediately within the criminal justice system and alongside it.

These considerations are likely to apply in addition to what are more typically measured as the outcomes of the criminal justice system – charges, convictions and sentences. For many survivors, these considerations may be more important than some of these outcomes. It is also clear that many survivors will draw strength from the fact that their participation in the criminal justice system may help to protect other children and give a voice to other survivors who are not able to come forward themselves.

2.3 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, the personal submissions in response to Issues Paper 8 and in the case studies, 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 the Consultation Paper, we focused on the contemporary response of the criminal justice system. We indicated that we would give a much fuller account of the past experiences and more recent improvements, and this is set out particularly in Chapter 6 in relation to police responses.

In our policy work on criminal justice responses, our main focus is 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 during our work 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.

Our recommendations in this report focus on those aspects of the contemporary responses of the criminal justice system that we believe require further reform.

2.4 Criminal justice and institutional child sexual abuse

2.4.1 Effectiveness of the criminal justice response

As we outlined in the Consultation Paper, 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 of age, 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.[15]
- **Higher attrition rates:** A study in 2006 found that police commenced proceedings in only 15 per cent of reported child sexual assault matters.[16] This rate may have improved since 2006 as the police administrative data we discuss in Chapter 7 suggests that police commenced proceedings in 28 per cent of child sexual abuse matters reported to police in the period 1 January 2010 to 31 December 2014.
- **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.[17] 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.[18]
- **Fewer guilty pleas:** The New South Wales Bureau of Crime Statistics and Research (BOCSAR) 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.[19]
- **Fewer convictions:** Drawing from a number of studies, the Delayed Reporting Research quotes figures ranging between 8 and 15 per cent of all child sexual abuse matters reported to police ending with conviction.[20] Australian Bureau of Statistics data for New South Wales higher courts for 2014 to 2015 suggests that conviction rates for sexual assault and related offences generally are lower – at approximately 67 per cent – than the conviction rate for all offences – at approximately 85 per cent. The conviction rates for burglary offences, fraud and drug offences were all over 90 per cent.[21]

  Criminal court statistics prepared by BOCSAR show that, across all New South Wales courts from July 2012 to June 2016 in prosecutions for child sexual abuse offences:

  - in 40 per cent of matters, the defendant was not convicted of any relevant offence
  - in 33 per cent of matters, the defendant was convicted of all relevant offence
  - in 27 per cent of matters, the defendant was convicted of at least one but not all relevant offences

Looking only at matters finalised in a defended hearing, the BOCSAR data shows that:

- in 52 per cent of matters, the defendant was not convicted of any relevant offence
- in 32 per cent of matters, the defendant was convicted of all relevant offences
- in 16 per cent of matters, the defendant was convicted of at least one but not all relevant offences.

This data is presented in more detail in tables 2.1 and 2.2.

Table 2.1 shows the outcomes for court appearances for child sexual assault offences in the different New South Wales courts. The table shows the outcomes for all appearances (including guilty pleas and withdrawn matters).[22]

Table 2.1: Child sexual assault offences, New South Wales courts, 2012–2016 – all matters[23]

	Total number of matters	Convicted of all relevant offences (%)	Convicted of at least one but not all relevant offences (%)	Convicted of no relevant offences (%)
Supreme Court	4	50	0	50
District Court	1,215	34	33	32
Local Court	1,015	33	18	49
Children's Court	370	27	35	38
Total	**2,604**	**33**	**27**	**40**

Table 2.2 shows a subset of the figures in Table 2.1. It includes only those matters where all of the matters were finalised at a defended hearing. The total number of matters is included in each case to give some context to the overall percentages.

The tables include breakdowns of the percentage of matters where the defendant was facing multiple charges on the indictment and was convicted of some but not all charges. For Table 2.2, this indicates that the fact-finder, whether jury, magistrate or judge sitting alone, found that some matters were proven, and some were not proven, either through an acquittal or a hung jury.

The column showing the percentage of matters where the defendant was convicted of all relevant charges includes matters where the defendant was facing only one charge and was found guilty. The column showing matters where the defendant was convicted of no relevant charges will include both matters where the defendant was acquitted and where there was a hung jury on all matters.

Table 2.2: Child sexual assault offences, New South Wales courts, 2012–2016 – matters finalised at a defended hearing or at trial[24]

	Total number of matters	Convicted of all relevant offences (%)	Convicted of at least one but not all relevant offences (%)	Convicted of no relevant offences (%)
Supreme Court	1	0	0	100
District Court	408	25	24	51
Local Court	264	43	4	53
Children's Court	52	35	12	54
Total	**725**	**32**	**16**	**52**

The New South Wales District Court is the main trial court for child sexual abuse offences tried on indictment in New South Wales. Table 2.3 shows the conviction rates for child sexual assault offences in defended hearings in the New South Wales District Court, broken down by year. It shows that, while there has been an increase in the number of matters prosecuted, the conviction rates have remained stable over the last four years, notwithstanding any increase in community awareness of child sexual assault as a result of the work of this Royal Commission and other recent inquiries into child sexual abuse.

Table 2.3: Child sexual assault offences, New South Wales District Court, 2012–2016 – matters finalised at a defended hearing or at trial, year by year[25]

	2012–13	2013–14	2014–15	2015–16
Total number of matters	73	99	94	142
Convicted of all relevant offences (%)	29	23	24	24
Convicted of at least one but not all relevant offences (%)	27	25	22	23
Convicted of no relevant offences (%)	44	52	53	54

Table 2.4 compares the overall conviction rate for child sexual assault offences against other types of offences, specifically all other sexual assault matters, assault, robbery and illicit drug matters.

Table 2.4: Comparative table – total matters and conviction rates for child sexual assault (CSA) offences and other offence categories, New South Wales courts, 2012–2016[26]

	CSA offences		Sexual assault (non-CSA)		Assault		Robbery		Illicit drugs		All offences	
	Total	%	Total	%	Total	%	Total	%	Total	%	Total	%
Supreme Court	4	50	5	60	69	55	39	67	13	54	430	76
District Court	1215	68	817	47	2624	71	2468	83	4128	90	14457	86
Local Court	1015	51	1524	51	89326	70	468	50	59678	95	462933	90
Children's Court	370	62	142	49	8074	75	1955	66	1806	93	27877	88
Total	**2604**	**60**	**2488**	**50**	**100093**	**70**	**4930**	**73**	**65625**	**94**	**505697**	**89**

In Table 2.4, the conviction rate includes all matters that were finalised by findings of guilty, whether to one, some or all charges and pleas of guilty. The rate also includes where the defendant was found not guilty of the original charges on the indictment but pleaded guilty to other charges, although the guilty pleas must be to other offences within the same category (that is, if originally charged with a child sexual assault offence, the plea is included in the conviction rate only if the plea is to another child sexual assault offence).

The overall conviction rate for sexual assault offences that are not child sexual assault offences (that is, sexual assault offences against adults) is lower than that for child sexual assault offences (50 per cent as against 60 per cent). A possible explanation for this is that, in addition to the fact that, like child sexual assault offences, these are generally word against word cases, in adult sexual assault cases the disputed issue is often the presence or absence of consent.

The conviction rate for assault matters is higher than for child sexual assault matters (70 per cent as against 60 per cent). That is notwithstanding that, in many assault cases, the identity of the offender may well be an issue in the case, whereas this is rarely the case for child sexual assault matters.

The conviction rate for illicit drug matters is significantly higher than for child sexual assault matters (94 per cent as against 60 per cent). This is likely because, in a substantial number of drug cases, offenders will be found to have the drugs on them. Therefore, proof of the offence is much simpler than in child sexual assault matters, and the cases are more likely to end with a guilty plea.

It is also noted that the overall conviction rate for all offences is 89 per cent. This reflects the volume of offences that are rarely contested, including drug offences and traffic offences.

Research also identifies the importance of detection – which is dependent upon reporting and investigation – in deterring offending generally. BOCSAR 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.[27] 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.[28] 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.

2.4.2 Features of child sexual abuse cases

There are also features of child sexual abuse cases, including institutional child sexual abuse cases, that may affect the criminal justice system's ability 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 fact-finder – whether a jury, a judge sitting without a jury or a magistrate – 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.

In their responses to the Consultation Paper, a number of interested parties made submissions in relation to the particular challenges that children and people with disability face in engaging with the criminal justice system.

The Victorian Commission for Children and Young People submitted that a fundamental challenge for the criminal justice system is that:

> the circumstances where children are able to complain about experiences of abuse remain limited and exceptional. The reasons for this are complex and often deeply cultural, in that they reflect the ongoing invisibility of children as agents and rights bearers and the dominance of adult-focused behaviours and decision making.[29]

The Victorian Commission for Children and Young People also stated:

> While it is recognised that a criminal justice system exists to punish offenders, condemn abuse, raise awareness and deter future abuse, much more work needs to be done to support victims and survivors of abuse particularly as children. This has to occur before the system can be said to meet the justice needs of children who have experienced sexual abuse.[30]

Micah Projects submitted that it is particularly important to examine the effect of the criminal justice system on vulnerable members of society. It stated that the Royal Commission's work has demonstrated a need to recognise the vulnerability of victims of child sexual abuse and ensure that they are not further traumatised through their interaction with the criminal justice process.[31]

People with Disability Australia submitted that a situation where prosecutions fail to convict those who offend against children with disability can create impunity amongst perpetrators, making other children with disability 'low-risk targets' for further offending.[32]

The CREATE Foundation submitted that young people had expressed to them concern about barriers to making complaints and highlighted the importance of ensuring that children and young people are supported in gaining access to the criminal justice system. They also noted misconceptions or negative preconceptions about behaviours that children and young people exhibit.[33]

An important focus of the broader work we are doing, beyond our consideration of the criminal justice system, is on ways to encourage and support disclosures. We recognise that disclosure may be a first step that a victim takes to engage with the criminal justice system. Without effective means to encourage and support children to disclose abuse, incidents of child sexual abuse may not come to the attention of the criminal justice system at all. We will make recommendations in relation to encouraging and supporting disclosure in our final report.

We examine and make recommendations in relation to particular measures that can be taken within the criminal justice system in this report. For example:

- we discuss ways for police to encourage reporting in Chapter 8
- we make recommendations about failure to report and failure to protect offences in chapters 16 and 17
- we make recommendations to assist victims and survivors, particularly children and people with disability, to participate in the criminal justice system in chapters 8 and 30.

2.4.3 Myths and misconceptions

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.[34]

We discuss misconceptions about memory and research in relation to the suggestibility of children and adults in Chapter 4.

In its submission in response to the Consultation Paper, the Bar Association of Queensland made two comments with respect to myths and misconceptions. Firstly, it noted that, in the experience of its members, false complaints about sexual offences are made and that:

> To dismiss as myth or misconception the potential for lies to be told by women and children in sexual abuse cases is to suggest that there is a particular class of witness who, in a particular class of case, should always be believed. This is, in our view, as concerning as a presumption against the truthfulness of a particular class of witness, and would seriously erode the presumption of innocence.[35]

The Bar Association of Queensland submitted that, in the experience of its members, in cases of child sexual abuse the accused typically faces assumptions on the part of members of the community that children would not readily make such things up. It also noted that, if defence counsel attempted to use many of the assumptions we listed in the Consultation Paper as myths and misconceptions, it would be likely to be the subject of judicial intervention, whether through unfavourable comments during cross-examination or in summing up.[36] We discuss some examples of judicial interventions in Chapter 31.

The Bar Association of Queensland also suggested that, in the experience of its members, the majority of sexual offence matters resolve by way of guilty plea, and 'if there is a trial, an acquittal is by no means the result, with many convictions resulting from trials which do go ahead'.[37]

The Australian Bureau of Statistics has published data in relation to sexual assault and related offences (including both adult and child sexual assault) dealt with in the higher courts in Queensland in 2014–15. The data show that 513 defendants had their matters finalised by way of guilty plea. There were 77 defendants found guilty after trial, and 114 defendants were acquitted.[38] Thus, of these 191 defendants whose guilt or innocence was determined through a trial in the District Court or Supreme Court, some 40 per cent were convicted of at least one count (they may have been acquitted on some counts) and some 60 per cent were acquitted on all counts.

2.5 Operation of the criminal justice system

2.5.1 Purpose

In the Consultation Paper, we noted that 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.[39] 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*.[40] [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.[41]

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.[42] However, as cities became more densely populated, particularly following the Industrial Revolution, there was a rise in crime, and it proved to be unsustainable to rely on private prosecutions. The early 1800s saw the establishment of a modern police force in England, accompanied by a shift in responsibility for prosecutions from private individuals to police.[43]

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 specifically to deter the offender from reoffending and generally to 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 to accept any redress or compensation offered. Even where there are formal systems and requirements, the survivor's role is central. 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. We discuss the role of victims in the criminal justice system in Chapter 3.

2.5.2 Adversarial nature

As discussed in the Consultation Paper, 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,*[44] 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.*[45] [Emphasis added.]

The adversarial system of justice is 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.[46]

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.[47]

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 with 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.

The courts have given some recognition to the interests of victims and the community.

In 1989, in the High Court's decision in *Jago v District Court,*[48] Brennan J referred to the interests of the community and victims in criminal proceedings. He stated:

> although our system of litigation adopts the adversary method in both the criminal and civil jurisdiction, interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances.[49]

Discussing the lower court's permanent stay of criminal proceedings for alleged abuse of process arising from delay, Brennan J stated:

> In the onward march to the unattainable end of perfect justice, the court must not forget those who, though not represented, have a legitimate interest in the court's exercise of its jurisdiction. In broadening the notion of abuse of process, however, the interests of the community and of the victims of crime in the enforcement of the criminal law seem to have been depreciated, if not overlooked … But it will not do.[50]

A number of submissions in response to the Consultation Paper referred to the terminology of a 'triangulation of interests' in the modern criminal trial. In particular, they quoted Lord Steyn's remarks in a 2001 appeal case in the United Kingdom concerning the lower court's making of a non-publication order.[51] Lord Steyn stated:

> There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.[52]

In 2007, in sentencing an offender convicted of murder, Cummins J in the Victorian Supreme Court stated:

> Every victim matters … The law has always given, and rightly so, scrupulous attention to proper process to ensure accused persons receive fair trials. That process should never be deflected or diluted or diminished. Further, the criminal law is founded upon the protection of society as a whole. It is a public, not a private, matter. Thus proceedings are brought by the State, not by the victim. Even so, I do not think the law has given sufficient attention to the rights of victims.[53]

As we discuss in section 3.3, in a report published in November 2016 the Victorian Law Reform Commission (VLRC) found that more is required to recognise the interests of victims in the criminal trial process. It also advocated a 'triangulation of interests', characterising the role of the victim as that of 'a participant, but not a party, with an inherent interest in the criminal trial process'.[54] We discuss the role of victims in Chapter 3.

2.5.3 Protections for the accused

As discussed in the Consultation Paper, the State undertakes the investigation and prosecution of criminal matters. This gives rise to a perceived imbalance of resources between the prosecution and the accused.[55] 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 criminal proceedings are conducted fairly. The VLRC identified that they 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.[56]

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.

It is often said that the accused has a 'right to a fair trial'. However, as Deane J explained in *Jago v District Court:*

> Strictly speaking, however, there is no such directly enforceable 'right' since no person has the right to insist upon being prosecuted or tried by the State. What is involved is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.[57]

Exactly what fairness requires cannot be defined with precision. Justice Deane stated:

> The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.[58]

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:

- The standard of 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.

2.5.4 What we were told in submissions and Case Study 46

Adversarial nature

In their submissions in response to the Consultation Paper and in the public hearing in Case Study 46, a number of interested parties addressed the issue of the adversarial nature of the criminal justice system.

Mr Craig Hughes-Cashmore, representing the Survivors & Mates Support Network (SAMSN), told the public hearing:

> I think a lot of our members feel very let down by the justice system, and most refer to it as the legal system. I can recall one of the guys who I was talking to about his experience at court described it as *not an adversarial system but a conspiratorial system, because he felt that, along with the jury, he was the only person in that courtroom that did not have a copy of the script.* He didn't know and understand the well-honed tactics and strategies that are commonly employed by defence lawyers, and he felt completely out of his depth, having no training as a lawyer, no experience in a court. He felt very much alone and basically that the Crown didn't really intervene, that the judge even less so, and so he felt very burnt. That's, unfortunately, quite a common experience that has been shared with us.[59] [Emphasis added.]

Ms Leaney, representing the In Good Faith Foundation, told the public hearing that the impact of the adversarial system on survivors of child sexual abuse can be re-traumatising. She said:

> Once again, they experience that loss of control. There is that distinct power imbalance that they experience, which is so reminiscent of the initial abuse. So that, in itself, is a very retraumatising experience for someone.[60]

In its submission in response to the Consultation Paper, the Victorian CASA Forum stated:

> Our adversarial system is weighted against the victim in many cases of institutional abuse. The adversarial system does not acknowledge the inequality inherent in the situation of institutional sexual abuse where many victims are extremely vulnerable due to age or disability compared to (for example) paid, adult staff of the institution.[61]

The Victorian CASA Forum submitted that the victim of the crime should remain the focus throughout the criminal justice process, on the basis that the system should exist to provide justice for the person harmed.[62] It submitted that:

> the system itself, with its complex processes, requiring others to make the meanings and understandings, parallels the violence already experienced by the victim. The experience of many victims is that it has not provided them with justice or even a sense of justice. For many CASA clients, navigating and understanding the criminal justice system is extremely difficult and, ultimately, unsatisfying.[63]

Ms Biljana Milosevic, representing the Jannawi Family Centre (Jannawi), told the public hearing that the adversarial system is not always appropriate to achieve healing and recovery for a child. She said:

> I think the original premise of the justice system being established that is very adversarial does not actually include the rights of children, does not create a child-friendly justice system. So from that overall premise about having to justify and prove and establish a cause for harm is actually detrimental to children's wellbeing and safety, so as a non-child-friendly system, it then creates multiple barriers.[64]

In its submission in response to the Consultation Paper, Jannawi submitted that the adversarial system should be replaced for child sexual abuse cases. It stated:

> Jannawi advocates for the removal of the adversarial processes currently in place which we believe are not suitable for child sexual abuse in that they mirror the dynamics of abuse by attempting to discredit victims or shift responsibility for harm caused. Jannawi strongly believes that the current approach inappropriately maintains a visibility on victims (and therefore accountability) by virtue of this. Furthermore and disturbingly, it hides the accused behind legal representation and gives a sense of 'letting them off the hook' by not requiring or at all demanding that they give evidence or speak to the charges the way victims are required to. This inherent inequity is clear to the children we work with who are victims, and yet is easily justified by many professionals in the sector. A system which requires vulnerable witnesses to turn up, give evidence and be challenged in a public arena is in itself abusive, ineffective and does not achieve the very outcomes of justice as intended. A non-adversarial process which has victim safety and protection at its core needs to be implemented in Australia.[65]

Ms Milosevic said that, while Jannawi would not discourage anyone from reporting to police if they wished to,[66] Jannawi took the view that the current model needed to change because, in the drive to investigate and establish whether the criminal threshold had been met, child safety processes were a secondary process.[67] Ms Milosevic acknowledged that making fundamental changes to the adversarial system was a challenging suggestion, but she told the public hearing:

> It was a huge tension for us in our service to respond to suggestions made that we think are very great and solid suggestions about how the system can change, while also understanding that the system we currently have needs significant reform. As a professional that has been part of making those changes, those little tweaks along the way are very important, but you almost feel like you are just fixing a broken car all the time. If we had a different system, to start off with, for children that is a child friendly system – the criminal justice system is an institution in itself, like the other ones, with thousands of years of history behind it, and it does not fit for child sexual abuse matters today.[68]

Ms Milosevic suggested that a more appropriate model for dealing with allegations of child sexual assault may be the Barnahus model, which does not operate on an adversarial basis.[69] We discuss this model in Chapter 3.

Protections for the accused

Some submissions in response to the Consultation Paper commented on protections for the accused.

A number of interested parties commented on the importance of a fair trial for the accused. For example, the Tasmanian Government submitted that the right of a person to a fair trial is fundamental to our legal system and the rule of law. While acknowledging that protections for vulnerable witnesses recognise the importance of treating all participants in criminal proceedings fairly, the Tasmanian Government submitted that any reforms that might affect the right to a fair trial should be considered in the context of maintaining the appropriate balance between the need to protect vulnerable victims and the right to a fair trial.[70]

A number of interested parties commented on the importance of the 'balance' of interests and the importance of the trial being fair to all of the parties.

For example, in her submission in response to the Consultation Paper, Professor Annie Cossins submitted that the quality of a criminal justice response will determine whether the objectives outlined in our proposed approach to the criminal justice system will be achieved. She stated that:

> The quality of a criminal justice response in the child sexual abuse context is dependent on a re-consideration of balancing the interests of justice within the trial process (justice for society, the complainant and the accused) such that relevant evidence (such as tendency/coincidence or delay in complaint evidence) is routinely admitted unless there is demonstrable, rather than speculative, evidence about unfair prejudice to the accused.[71]

Mr Hughes-Cashmore and Professor Judy Cashmore gave evidence in relation to the joint submission by SAMSN and Sydney Law School in response to the Consultation Paper. Professor Cashmore gave evidence reporting on a forum held with SAMSN. Professor Cashmore said that survivors often feel that they are at a distinct disadvantage in a criminal trial. She told the public hearing:

> I think what they are asking for – what victim/complainants are asking for, whether they are children or adults, is a fairer and equal playing field. I think that people understand that there needs to be a balance between the rights of the accused and the rights of those who are coming forward to give evidence.
>
> The issue is that those who are the complainants often feel as though, as Craig [Hughes-Cashmore] said, they don't have the script. They don't have the knowledge. They don't know the rules of the game. They are in a non-familiar environment. They are at a power imbalance. They don't understand the language. And on top ofall that, they are incredibly stressed by having to talk about those very sensitive events in a lot of detail, that they often don't understand the reason for in terms of the particularisation that is required.[72]

2.5.5 Discussion

It is clear that many survivors have felt marginalised, vulnerable, attacked and traumatised in their experiences of the adversarial system. Many survivors have told us that, while they were willing to report their abuse to police, they would not proceed to a trial because the experience would simply be too damaging for them.

We also understand why, from the perspective of a survivor who is giving evidence as the complainant or another witness in a trial for child sexual abuse offences, the system could be seen to be a 'conspiratorial system', where the judge and the lawyers – and the accused – know what is going on, but the witness – and the jury – do not.

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 examining 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.

Shortly after we published the Consultation Paper, the VLRC published its report, *The role of victims of crime in the criminal trial process.* The VLRC gave extensive consideration to the operation of the criminal justice system in Victoria and its adversarial nature. It received submissions from victims stating how their experiences of the existing system left them feeling marginalised and disrespected.[73]

However, after reviewing the developments and reforms over recent decades that have improved the information, support and rights afforded to victims in the criminal justice system, the VLRC considered that changes to the adversarial trial process itself were not warranted, as this would be a major shift, and victims' participation in criminal proceedings could be enhanced in ways that were compatible with an adversarial system.[74] The VLRC concluded that, while the role of the victim in a modern criminal trial should be clearly conceptualised and understood, ultimately that role is one of a participant, but not a party, in a criminal trial.[75]

We acknowledge the submissions suggesting that alternative methods of investigating and prosecuting child sexual abuse, such as an inquisitorial approach, may deliver better outcomes for victims.

However, we remain of the view that we expressed in the Consultation Paper. We do 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.

As we indicated in the Consultation Paper, a recommendation that would move us from an adversarial to an inquisitorial system of criminal justice for all criminal offences would take us considerably beyond our Terms of Reference.

We remain of the view that we should recommend reforms to the existing – and adversarial – criminal justice system that are intended to make it as effective as possible for responding to child sexual abuse cases.

To this end, we have examined many aspects of the adversarial system that present challenges for survivors, including:

- initial police interviews
- how police and prosecutors communicate with and provide information to survivors
- how and when survivors are required to give evidence
- the nature of cross-examination
- the conduct of trials, including the admissibility of tendency and coincidence evidence and the availability of joint trials.

In the Consultation Paper, we 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.

We consider that our recommendations in this report, if implemented, will make a significant positive difference to the experience of many survivors in the criminal justice system and will reduce the extent to which they might feel marginalised, vulnerable, attacked or traumatised.

We also consider that our recommendations, if implemented, will not in any way undermine the fairness of the trial for an accused. Rather, they will promote the conduct of trials with fairness to all interested parties – the accused, the complainant and the public – and the determination of the issues on the basis of the best relevant evidence.

2.6 Other responses to institutional child sexual abuse

2.6.1 Restorative justice

Discussion in the Consultation Paper

In the Consultation Paper, we stated that 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.

We outlined our understanding of restorative justice and the work we had done in relation to it as follows.

'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.[76]

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, and some stakeholders believe 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.[77]

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.[78] None of the programs that were identified had used restorative justice to address institutional child sexual abuse.[79]

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.[80]

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 for a number of reasons, including the following:

- 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.[81] One is the South Australian Family Conferences program and the other program operates in New Zealand.[82] The operation of the criminal justice system in relation to juveniles is discussed in Chapter 37.

What we were told in submissions and Case Study 46

A number of interested parties made submissions in response to the Consultation Paper and gave evidence in the public hearing in Case Study 46 in relation to restorative justice approaches in institutional child sexual abuse cases.

In its submission in response to the Consultation Paper, the South Eastern Centre Against Sexual Assault & Family Violence (SECASA) suggested that restorative justice options should be available to victims if they wanted to pursue such an approach.[83]

Jannawi submitted that restorative alternatives that promote the safety, protection and welfare of the victim should be developed.[84]

The Victorian CASA Forum submitted that:

> Restorative Justice is an alternative to Criminal Justice which is able to provide 'justice' for SOME survivors. Over the past 10 years, SECASA and other CASAs [Centres Against Sexual Assault] have facilitated numerous 'in-house' Restorative Justice sessions instigated by victims and survivors. In terms of the sense of justice experienced by the victim or survivor, this option has proved to be successful in many cases.[85] [Emphasis original.]

The Law Society of New South Wales submitted that the criminal justice system may not always meet the needs of some victims and that it is important that alternative avenues are available for victims, including redress and, where appropriate, restorative justice.[86]

Ms Elizabeth Blades-Hamilton, representing the Victorian Multicultural Commission, told the public hearing that restorative justice processes can be important in maintaining relationships in smaller communities:

> I think one of the things can be that in collected [sic – collective] cultures, they're used to making decisions in a joint way and think about the broader implications of things within the community rather than individual to individual as we might interpret things. And of course they have their own different faith communities, so they're used to encountering

> one another in these environments. So from a pragmatic point of view, restorative justice processes can move justice from retribution to restoration, which can be important for relationships moving forwards and maintaining contact with their community, which might be very important.[87]

Ms Blades-Hamilton also spoke about the imbalance of power inherent in cases of institutional child sexual abuse and suggested that this may make restorative justice less appropriate than in other cases. She told the public hearing:

> So in terms of restorative justice, we are not proposing it as a panacea and we appreciate those issues altogether, but it does have merit and it does have usefulness in some circumstances. It can be used either as an adjunct or integral to criminal justice processes. It has merit whether or not a case proceeds. So if a case does not proceed and a survivor is left in limbo, not able to move on, there is the potential of an apology within the process of conferencing, and that can't be underestimated.[88]

Ms Blades-Hamilton said that restorative justice processes may be more appropriate in cases where the offender is a juvenile and the power imbalance may not be so stark.[89]

In its submission in response to the Consultation Paper, ACT Policing expressed the view that:

> Restorative Justice is an effective option which can empower victims and assist in offenders gaining insight into the consequences of their behaviour. However, due to the particularly sensitive nature of sexual abuse, full consideration needs to be made on the possible impacts on the victim and the victim's family in participating in the process.[90]

Mr John Hinchey, the Victims of Crime Commissioner for the Australian Capital Territory, told the public hearing that restorative justice approaches have a place in dealing with child sexual assault. He said:

> We talk about needing to give victims some say in what happens to them. We criticise our criminal justice system because it takes a lot of choices away from them, and yet we want to deny them the opportunity to face their abuser either directly or indirectly through a restorative justice process.
>
> The ACT formed a view some time ago, ten years or more, through a committee that formed the model of restorative justice, that that choice should not be taken from victims of crime, that if the process is victim centred, if there are sufficient safeguards and supports given to victims to make their choice to participate in restorative justice, that choice should be given to them. But it has to be a victim-centred process. Victims have to decide whether they wish to participate, and, if they don't, it doesn't go ahead.

> And it has to be open to victims or referral processes have to be put in place at all points of the criminal justice system. My position is: let people have the choice and then put the supports around them to exercise that choice.[91]

Mr Hinchey reported that the Australian Capital Territory's restorative justice scheme had been operating for over 10 years and had been positively evaluated. However, he also noted that, until recently, the scheme had only been available for juvenile offenders and for a limited number of offences, and it was not proposed that it be rolled out for all offences (for example, child sex offences) for a further two years.[92]

Mr Greg Davies APM, the Victorian Victims of Crime Commissioner, agreed with Mr Hinchey that any restorative justice process should be victim driven. He told the public hearing that there are some dangers inherent in the process because:

> there is always the potential for a victim to, in a safe environment, as safe as it can be, confront their abuser and then be further victimised because there's an opportunity for an offender to say, 'Yes, I'll participate and I'll be very good' and then get into that forum and do or say something outrageous that then further victimizes the victim.
>
> I know that's a small chance. Nevertheless it's a real one.[93]

Mr Davies also stated that restorative justice should always be subsequent to the conclusion of any legal proceedings.[94]

Mr O'Connell, the South Australian Commissioner for Victims' Rights, told the public hearing about his view of restorative justice in South Australia as follows:

> In South Australia we have used restorative practices in family conferencing involving young offenders and also young victims in sexual offence matters, and that has returned some very positive outcomes in terms of prevention in a recidivist sense of reoffending and those people going on, which I think is an important element if we really are to tackle the issue of sexual abuse.[95]

He also identified some risks, telling the public hearing:

> In the two examples where restorative justice has been offered in South Australia as a possible remedy in sexual assault matters involving adults, in those situations, on both occasions I've been asked to provide legal counsel to the victims so that the victim can be better informed about what are the implications of the decision. In one of those cases, it appeared – and I emphasise it appeared – that one of the outcomes that the offender, or the accused, was pursuing was to actually suppress some of the details of the offending to a behind closed door forum rather than be determined in an open court setting. I think that actually runs the risk of being disempowering for some victims.[96]

Several interested parties expressed concerns about the suitability of restorative justice as an option for survivors of institutional child sexual abuse.

In its submission in response to the Consultation Paper, Protect All Children Today submitted that:

> In relation to restorative justice approaches, we believe their value is highly dependent on the age and emotional maturity of the particular victim. Child victims generally fear coming into contact with their abuser and would find this approach extremely stressful and confronting. There is an imbalance of power which needs to be managed if a restorative justice approach is considered.[97]

The Victim Support Service South Australia submitted that restorative justice may not be of assistance to survivors of institutional child sexual abuse because of the possibility that it may lead to secondary victimisation and the likely significant power imbalances between victims and offenders.[98]

In its submission, knowmore stated that restorative justice approaches can be important alternatives to court processes, particularly in relation to juvenile offending. However, it submitted:

> based on our experience assisting survivors of institutional child sexual abuse, in our submission a restorative justice approach is unlikely to be viewed by many survivors as a satisfactory alternative to formal prosecution, either in their matters, or generally.[99]

knowmore agreed that the three factors identified in the Consultation Paper (power dynamics, unwillingness of survivors and unwillingness or unavailability of perpetrators) reduced the utility of restorative justice approaches for survivors of institutional child sexual abuse. knowmore also submitted that restorative justice does not operate to generally and publicly deter criminal conduct by others. knowmore submitted that the inherent power imbalance between the survivor and the perpetrator would be difficult to overcome and may be re-enacted through the restorative justice process.[100]

Discussion

As discussed in section 2.2, 'justice' can mean different things to different survivors of institutional child sexual abuse. We recognise that many survivors may not seek justice through the criminal justice system and that many may find the process of reporting to police, and participating in a prosecution, daunting.

However, based on current evidence, we are not satisfied that formal restorative justice approaches should be included as part of the criminal justice response to institutional child sexual abuse, at least in relation to adult offenders.

As discussed above, few programs that use restorative justice approaches for sexual abuse cases have been evaluated, and the literature review we commissioned found no studies of restorative justice programs being used in criminal justice responses to institutional child sexual abuse cases.

We note that the Victorian Royal Commission into Family Violence concluded that a restorative justice approach should be made available to victims of family violence who wish to pursue such an option, provided that there were 'robust safeguards in place' for the victim and the restorative justice approach was an additional option, and not a substitute or precondition for, pursuing action through the courts.[101]

It concluded that the 'development of a restorative justice approach should proceed cautiously' and with 'the utmost care' by way of a pilot program.[102] It stated that it is of 'primary importance' that 'victims who are invited to participate [in a restorative justice approach] are fully informed about the process and their options, and that their consent is a precondition to any conference'.[103] It also stated that the victim must be central to decisions about whether restorative justice processes are appropriate in the particular situation, and that 'her control and choice is central to the success of any restorative justice initiative'.[104]

It recommended:

> The Department of Justice and Regulation, in consultation with victims' representatives and experts in restorative justice, develop a framework and pilot program for the delivery of restorative justice options for victims of family violence. The framework and pilot program should have victims at their centre, incorporate strong safeguards, be based on international best practice, and be delivered by appropriately skilled and qualified facilitators [within two years].[105]

We remain of the view that restorative justice approaches are unlikely to be able to be made available for, or to be of assistance to, many survivors of institutional child sexual abuse for the following reasons:

- 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.

We provided for elements of restorative justice approaches in institutional child sexual abuse through the 'direct personal response' component of redress. We consider that these approaches are more likely to be taken up by more survivors and are in general likely to be more effective for survivors who seek a restorative justice response.

In relation to juvenile offenders, we note that youth conferencing provisions may allow for some elements of restorative justice. However, youth conferences generally occur because of decisions made by the offender (for example, to admit the offence and/or consent to a conference) rather than decisions made by the victim, and some models of youth conferencing may occur without the victim's consent or participation. We discuss youth conferencing in more detail in Chapter 37.

2.6.2 Redress and civil litigation

Our *Redress and civil litigation report*, 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, if it is to be regarded by survivors as being capable of delivering justice, 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. 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 *Redress and civil litigation report*. 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 that 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 manner 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.

2.6.3 Victims of crime compensation schemes

As discussed in the Consultation Paper, 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.[106]

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 that the relevant victims of crime tribunals or administrators made gave the survivors official recognition of the crimes committed against them.

Submissions to our Consultation Paper did not indicate any concerns with the way in which survivors of institutional child sexual abuse engage with existing victims of crime compensation schemes. We do not make any recommendations in relation to these schemes.

2.7 Our approach to criminal justice reforms

In the Consultation Paper, we set out our proposed approach to criminal justice reforms. We sought the views of all interested parties on that approach and our view of the importance of seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context.

Many of those who made submissions, including survivor advocacy and support groups,[107] legal stakeholders[108] and governments,[109] expressed support for our proposed approach.

In the Consultation Paper, we 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 still 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.

Some interested parties expressed concern that our reference to punishing the offender might suggest that incarceration is the only appropriate punishment.[110] We do not intend to confine punishment to custodial sentences, although custodial sentences are commonly the penalty for committing child sexual abuse offences. We discuss sentencing for adult offenders in Chapter 34 and for juvenile offenders in Chapter 37.

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. We accept that survivors have a right not to report abuse and that this right should be respected. There are also 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:

- the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
- 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.

Recommendation

1. In relation to child sexual abuse, including institutional child sexual abuse, the criminal justice system should be reformed to ensure that the following objectives are met:
    a. the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
    b. criminal justice responses are available for victims and survivors
    c. victims and survivors are supported in seeking criminal justice responses.

In this report, we recommend the reforms that we consider are necessary to achieve these objectives.

We recognise that the reforms we recommend, if implemented, are likely to have flow-on consequences for various parts of the criminal justice system.

For example, if police are successful in encouraging more reporting, this will not only lead to an increased volume of reports for police to investigate or otherwise respond to; it is also likely to lead to an increase in charges being laid and prosecutions being pursued.

Similarly, if trial processes are reformed to provide more support to complainants so that they can give their best evidence, more victims may be encouraged to come forward to report to police.

We also anticipate that reforms in relation to offences, criminal procedures and evidence laws are likely to lead to more appeals, particularly in the short term as parties test the provisions and courts determine how they are to be interpreted.

Such impacts should be anticipated – and, indeed, welcomed – as signs that the reforms are having an impact and contributing to the achievement of the desired outcomes in improving the criminal justice system's response to institutional child sexual abuse and to child sexual abuse generally.

3 The role of victims

3.1 Introduction

As we stated in the Consultation Paper, 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.

In Chapter 2, we discussed aspects of the operation of the criminal justice system, particularly its adversarial nature and the protections it affords the accused, that are likely to make the criminal justice system particularly difficult for 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.

Recognition of victims has increased over the last 50 years.

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.[111] 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.[112] Victims' compensation schemes were introduced in the states and territories between 1967 and 1983.[113] These systems recognise that the victim has suffered harm that should be compensated but divorce 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.[114]

In the 1990s, emphasis shifted towards providing greater support for victims.[115] Australian jurisdictions have also implemented legislation that allows victims to describe the impact of the offence on them as part of the sentencing process. 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.

In 2013, Australia's Attorneys-General endorsed the National Framework for Rights and Services for Victims of Crime, which included principles relating to:

- respectful and dignified treatment
- information and access to support services
- justice and fair treatment
- financial assistance.[116]

In some circumstances, victims themselves may have legal representation in connection with an aspect of a trial. While the prosecutor represents the state or the public interest, there may be circumstances where the victim's interests warrant separate representation.

In the Consultation Paper, we noted that the Victorian Law Reform Commission (VLRC) was conducting an extensive reference regarding victims of crime in the criminal trial process and it was due to report to the Victorian Attorney-General by 1 September 2016. Its report was published after the Consultation Paper, and we discuss it in this chapter.

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.

Many submissions in response to the Consultation Paper commented on the role of victims in the criminal justice system, and a number of submissions included proposals for reforms. A number of witnesses who gave evidence in the public hearing in Case Study 46 also spoke on these issues.

In this chapter, we outline the current law in relation to the role of victims and the VLRC's recommendations regarding victims in the criminal trial process.

We then discuss what we were told in submissions in response to the Consultation Paper and Case Study 46, focusing in particular on proposals for change, including:

- inquisitorial models
- a model based on the International Criminal Court
- providing victims with legal representation or creating statutory victims' advocates
- giving victims enforceable legal rights.

We conclude that, while there are aspects of the system that can be improved to better meet the needs of survivors, a major structural change to the role of the victim in the criminal justice system is not required or recommended. Our recommendations throughout this report, if implemented, will significantly improve the criminal justice system's response to victims and survivors of child sexual abuse.

3.2 Current approach

3.2.1 Principles and charters

One of the ways in which the increased recognition of victims has been promoted over the last 50 years is through the adoption of statements of principle and charters at international and domestic levels.

United Nations principles

In 1985 the General Assembly of the United Nations adopted the *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power.*[117] The Declaration created a series of non-binding minimum standards for the treatment of victims of crime within domestic criminal justice systems. Its key principles were that there ought to be access to justice and fair treatment; restitution (from the offender); compensation (from the state if not otherwise available); and practical, medical and other assistance. Accordingly, key provisions of the Declaration included that victims should:

- be treated with compassion and respect for their dignity[118]
- receive necessary material, medical, psychological and social assistance[119]
- be informed of the available health and social services and other assistance.[120]

In addition, criminal justice systems should:

- inform victims of their role and the scope, timing and progress of proceedings, especially where serious crimes are involved and the victim has requested such information[121]
- allow the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system[122]
- provide proper assistance to victims throughout the legal process[123]
- protect the privacy of victims and ensure their safety from intimidation and retaliation[124]
- avoid unnecessary delay in the disposition of cases.[125]

The provisions were to apply to all victims without distinction on the basis of race, colour, sex, age, language, religion or disability.[126] In providing services and assistance, attention should be given to victims who have special needs because of such factors or because of the nature of the crime committed.[127] The General Assembly also recognised that police, justice, health, social services and other relevant professionals should receive training to sensitise them to the needs of victims.[128]

Victims' charters

The United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* led to the adoption of victims' rights charters or similar instruments throughout Australia. All Australian states and territories now have in place a charter or declaration of principles which reflects the key principles of the United Nations Declaration. In all jurisdictions except Tasmania and the Northern Territory, these are provided for by legislation.[129]

The charters or principles are as follows:

- New South Wales – Charter of Victims Rights[130]
- Victoria – Victims' Charter principles governing response to victims[131]
- Queensland – Fundamental principles of justice for victims[132]
- Western Australia – Guidelines as to how victims should be treated[133]
- South Australia – Declaration of principles governing treatment of victims[134]
- Tasmania – Charter of Rights for Victims of Crime[135]
- Australian Capital Territory – Governing principles[136]
- Northern Territory – Charter for Victims of Crime.[137]

Australian victims' charters generally incorporate the following elements:

- Victims are to be treated with courtesy and respect – and many states and both territories expressly provide for regard to be had to any special needs they may have arising from personal circumstances.
- Victims are to be provided with information about support that may be provided to them, the investigation and prosecution, bail applications and conditions of bail, the trial process and the offender's release from custody.
- Victims are to be protected from:
    - intrusions on privacy, particularly the release of details that would identify them
    - unnecessary contact with the accused
    - unnecessary requirements to attend hearings.
- Victims are to have any of their property that was required for the investigation or prosecution promptly returned by police.
- Victims are entitled to make known the impact of the crime on them.

Some of the charters require information about the investigation to be provided to victims at stated intervals or 'at reasonable intervals'.[138] Other charters require information about the investigation to be provided to victims if the victim requests it.[139]

Some of the charters require information about changes to or withdrawal of charges to be provided only if the victim requests it. Other charters provide that victims of serious offences have the right to consult with the prosecution in relation to such decisions.[140]

The victims' charters generally do not expressly require that victims be provided with information about their rights as victims as opposed to information about particular matters such as the investigation and trial. However, most jurisdictions provide information about victims' rights in a form designed for victims. The information is available online. In some jurisdictions, police also provide hard-copy booklets to victims.[141]

Victims' charter rights are largely unenforceable. The New South Wales charter provides for information to be provided to victims on request about how to complain about a breach of charter rights, and the Queensland charter provides a complaint resolution process through the victim services coordinator.[142] In New South Wales and South Australia, the relevant statutory commissioner for victims' rights can receive, and attempt to resolve, complaints about breaches of their charters.[143]

Human rights legislation

Victoria and the Australian Capital Territory have general human rights legislation.[144] The legislation sets out basic rights, freedoms and responsibilities and requires public authorities, and people delivering services on behalf of government, to act consistently with the rights in the legislation. New legislation before Parliament needs to be checked to ensure that it is compatible with the human rights legislation.

Courts must interpret new legislation in a way that is consistent with the rights articulated in the legislation, and the Supreme Courts of each jurisdiction may issue declarations of inconsistent interpretation, which require Parliament to reconsider any inconsistent legislation.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) sets out a number of rights for persons charged with a criminal offence: ss 21–27. It does not contain rights expressed for the benefit of victims of crimes. However, some of the broader rights might have some application in some circumstances in relation to victims.

In the 2009 case of *RK v Mirik and Mirik,*[145] Bell J in the Victorian Supreme Court referred to the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and the *International Covenant on Civil and Political Rights* in relation to the interests of victims of crime. The case involved a victim of crime's application for an order for civil compensation. Justice Bell stated:

> The bedrock value is that every person without exception has a unique dignity which is the common concern of humanity and the general function of the law to respect and protect. As Brennan J said in Marion's Case, '[h]uman dignity is a value common to our municipal law and to international instruments relating to human rights', to which I would add certain pertinent legislation. It finds common law expression in the 'fundamental right to personal inviolability ... which underscores the principles

> of assault, both criminal and civil'. It finds international law expression in the International Covenant on Civil and Political Rights which (among other things) protects 'the right to ... security of the person'. It finds legislative expression in (for example) the *Crimes Act 1958* and now also in the *Charter of Human Rights and Responsibilities Act 2006*, which gives several recognition to the human right to personal integrity. More and more it has found expression in legislation allowing criminal courts to order offenders to pay civil compensation to victims of crime.
>
> Thus, in Victoria, the modern legislation – which is in Part 4 of the *Sentencing Act* – is more beneficial to victims, in procedure and content, than its historical antecedents. The scheme in Part 4 is part of a set of enactments that assists and supports victims of crime. It reflects developments in legislative policy and social attitudes about how the courts should take greater account of the interests of the victims of crime. Doing so is now embedded more deeply in law and public administration than it once was.
>
> These developments may be tracked by reference to the legislation ... and the plethora of official reports prepared on the subject in Victoria over the past 20 or so years. An important milestone was the adoption by the General Assembly of the United Nations, on 29 November 1985, of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The annex of the Declaration states the basic principles to be applicable to the treatment of victims of crime. The principles are access to justice and fair treatment, restitution (which includes offender-paid compensation), compensation (meaning state-paid compensation) and assistance.[146] [References omitted.]

Justice Bell cited the following rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) as being relevant to the right to personal integrity: the right not to be treated in a degrading way: s 10(b); the right not to be subjected to medical treatment without full, free and informed consent: s 19(c); the right not to have your privacy unlawfully or arbitrarily interfered with: s 13(a); and the right of every person to security: s 21(1).[147]

In its report, *The role of victims of crime in the criminal trial process*, which we discuss in section 3.3, the VLRC recommended that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to include a right for a victim of a criminal offence that contains the following minimum guarantees:

- to be acknowledged as a participant (but not a party) with an interest in the proceedings
- to be treated with respect at all times
- to be protected from unnecessary trauma, intimidation and distress when giving evidence.[148]

Like the Victorian legislation, the *Human Rights Act 2004 (*ACT) sets out a number of rights for persons charged with a criminal offence: ss 18–25. It does not contain rights expressed for the benefit of victims of crimes, although, like Victoria, some broader rights might have some application in some circumstances in relation to victims.

3.2.2 Other measures

As noted above, greater recognition of victims' rights has been accompanied by various reforms to the criminal justice system to protect victims in the criminal justice process and to allow victims to participate in ways additional to giving evidence as a witness.

Special measures and other procedural reforms

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

- restrict the scope of questions that can be asked in cross-examination
- require the court to disallow improper questions in cross-examination

- allow third parties to give evidence of the disclosure of abuse as evidence that the abuse occurred
- allow expert evidence to be given about child development and child behaviour, including about the impact of sexual abuse on children.

Other protective reforms include restrictions on calling sexual assault complainants in committal hearings and disallowing self-represented accused from personally cross-examining their alleged victims. A category of 'sensitive evidence' was also created applying to the victim's medical and sexual history. In some jurisdictions, additional protections are in place to guard against the disclosure of a victim's confidential treatment material.

We discuss special measures in Chapter 30.

Victim impact statements

All jurisdictions have implemented legislation that allows victims to describe the impact of the offence on them as part of the sentencing process.[149] Victim impact statements were first introduced in South Australia in 1989.[150] They are made after a conviction has been entered but before sentencing.[151] 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. Victim impact statements are discussed further in Chapter [34.]

Criminal compensation

As noted in Chapter 2, 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 institutional child sexual abuse may apply for redress under these schemes if they meet the eligibility requirements.

In most jurisdictions, a sentencing court may make a compensation order as an ancillary order to a sentence.[152] As noted by Bell J in *RK v Mirik and Mirik,*[153] such orders give victims 'easy access to civil justice' given that the judge is in a good position to consider compensation, as the relevant evidence may have been established in the criminal proceedings. This saves the victim the time, expense, inconvenience and possible additional trauma of having to institute a civil proceeding.[154]

Legal representation

In some circumstances, victims 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 New South Wales, Legal Aid NSW provides a service to all victims of sexual violence who seek to protect these records.[155]

In its report on the role of victims of crime in the criminal trial process (discussed in section 3.3), the VLRC recommended funding for a dedicated legal service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW, to assert substantive legal entitlements in connection with the trial process and human rights and, in exceptional circumstances, to protect vulnerable individuals.[156]

In South Australia, the Commissioner for Victims' Rights, Mr O'Connell, has funded legal representation for some victims in these circumstances.[157]

Mr O'Connell gave evidence in Case Study 46 regarding the circumstances in which he has funded legal representation for victims, including:

- in an application for restitution where the DPP felt it was inappropriate for it to advise the victim[158]
- in the context of a dispute between parents, a child victim of sexual assault required an independent child representative in criminal proceedings[159]

Mr O'Connell provided us with an article in which he outlines further examples of circumstances where he has funded legal representation for victims:

- in apprehended violence order proceedings where the prosecutor struck an agreement with the defendant without consulting the victim and the victim had abiding safety concerns[160]
- in relation to privacy and recovery of property where evidence of the offender's grooming of a child victim was held on a laptop used by other family members and which contained their personal information[161]
- in an application by a persistent sex offender for supervised release.[162]

3.3 VLRC report

In October 2014, the Victorian Attorney-General gave the VLRC a reference to review the role of victims of crime in the criminal trial process in that state. The VLRC's final report, *The role of victims of crime in the criminal trial process,*[163] was published in November 2016, after the publication of the Consultation Paper.

The VLRC's inquiry focused on the trial process in the County Court and Supreme Court.[164] The VLRC made 51 recommendations, noting that many were relevant and adaptable to criminal cases in lower courts.[165]

In his preface to the report, the chair of the VLRC, the Hon Philip Cummins AM, attempted to answer the question: how is it that the efforts of so many judicial officers could be so greatly at odds with victim's experiences? He stated:

> I think that the foundational reason that there is such a clear divergence between the responsible work of the courts and the legitimate expectations of victims and of the community is that the courts have remained confined by the binary interests of the prosecution and defence, whereas jurisprudence has evolved to a broader understanding of the criminal trial, and legitimate public expectation has likewise evolved. While the courts have secured the responsibilities of the prosecution and the rights of the accused, the rights of the victim have not been addressed.
>
> During the twentieth century, the law developed a suite of protections for the accused in the criminal trial. Properly so … In the late twentieth and early twenty-first centuries, the proper rights of victims in the trial process have come to be articulated …
>
> The time has come for the proper interests of the victim as a participant – whether a witness or not – in the criminal trial process to be recognised. This is part of the evolution of the criminal law. While securing the proper rights of the State and of the accused, this report shows a way forward for securing the rights of victims as participants in the modern criminal trial.[166]

3.3.1 The victim's role

Law and policy reform over the last three decades has progressively enhanced opportunities for victims to engage with the trial process. This has improved victims' experiences of and confidence in it. In view of the reforms, the VLRC concluded that there is now 'in a profound and significant sense' a place for victims.[167]

However, the VLRC observed that there remains a 'significant disparity' between the victim's role as provided for in legislation and victims' experiences in practice.[168] The VLRC reports submissions to its inquiry that contained statements similar to the ones we have heard – about victims feeling marginalised and offended by the attitude conveyed by prosecution and defence lawyers and by their treatment in the courtroom generally.[169]

The VLRC concluded that the role of the victim in the criminal trial process needs to be reconceptualised and that such re-casting of the victim's role is possible without adversely impacting on the rights of defendants or usurping prosecutorial independence. What is required is a 'triangulation' of interests. While it remains essential to ensure that accused persons receive a fair trial, fairness to the accused does not preclude recognition of the victim's interest.[170] The VLRC characterises the role for the victim as that of 'a participant, but not a party, with an inherent interest in the criminal trial process'.[171]

The VLRC found that the role should be clarified in statute, referencing both the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Victims' Charter Act 2006* (Vic). It found that, to consolidate the change in practice, education and training to bring about cultural change should be accompanied by strengthened complaint and accountability mechanisms and consolidation of the policy framework which supports the *Victims' Charter Act 2006* (Vic).[172]

On 7 May 2017, the Victorian Government announced a number of initiatives in response to the recommendations of the VLRC.[173] These included providing:

- $2.6 million for a two year pilot of an intermediary scheme, state-wide
- $6 million to strengthen the role of the Victims of Crime Commissioner to better identify and investigate any systemic issues that victims experience when in contact with the justice system
- $1 million for the Alannah & Madeline Foundation for its Cubby House program which provides children a safe place to play when attending court. A full-time youth worker will be located at the existing Cubby House at the Broadmeadows Children's Court, and the program will be expanded to the Melbourne Children's Court
- $18.9 million in additional funding for the Office of Public Prosecutions (OPP) for the prosecution of a range of serious criminal matters, including sexual offences, and to recruit more social workers to support victims before and during trials, including victims of sexual assault
- an unspecified amount to develop further guidance for judges and magistrates about how to better respond to the needs of victims in the courtroom.

The Victorian Government also announced that it would:

- extend the VLRC's current reference regarding the way that the Victims of Crime Assistance Tribunal (VOCAT) engages with family violence victims to consider how to improve the experience of all people who engage with VOCAT

- seek advice from the Sentencing Advisory Council about ways to improve court orders for compensation for victims
- release a discussion paper seeking stakeholder feedback on proposals to case manage strictly indictable matters in the Supreme Court rather than the Magistrates Court immediately post charge, rather than after committal, remove the limited committal hearing in sexual offence cases where the victim is a child or person with a cognitive impairment and restrict the grant of leave to cross-examine victims at committal hearings.

3.3.2 Overarching rights and entitlements

The VLRC identified five 'overarching rights and entitlements' that arise from the victim's inherent interest in the criminal proceedings. The victim must be:

- treated with respect and dignity
- provided with information and support
- able to participate in processes and decision-making without carrying the burden of prosecutorial decision-making
- protected from trauma, intimidation and unjustified interference with privacy during the criminal trial process
- able to seek reparation.[174]

Respect and dignity

The VLRC described respect for victims as multifaceted and connected with a number of their other rights. For example, victims feel respected when they receive timely information about the case, when their participation is enabled through consultation with prosecutors, and when their diverse (and often highly individual needs) are acknowledged and accommodated. When victims experience respect in the courtroom, they feel they are valued by the criminal justice system. Respect is shown through the actions of prosecutors and judges, as well as defence counsel, particularly in the way they conduct cross-examination.[175] These issues are further discussed in Chapter 30.

Information and support

The VLRC observed that victims' experiences largely depend on the quality of the support they receive and that victims receive information and support from many different sources. Victims are individuals, and they need different information and support at different times. Yet most of the obligations to provide information and support in connection with the trial process itself

rest with public prosecutors. Because of this, the skills and attitudes of the solicitor for the prosecution who is preparing the case for court, as well as the time the solicitor has available, are vital to ensuring victims are appropriately informed.[176]

Victims also have legal entitlements in connection with the trial process, such as:

- appearing in court in response to applications to subpoena, access and use their confidential counselling and medical records
- objecting to giving evidence when they are liable to a penalty for doing so
- providing a victim impact statement
- applying for compensation or restitution as an order ancillary to sentence.[177]

The VLRC noted that the prosecution is unable to assist victims in asserting substantive rights where to do so would conflict with their duty to act impartially. The VLRC identified that there is presently no designated legal service that victims can use to obtain their own legal representation. It recommended that such a legal service be established.[178]

Participation

The VLRC found that many victims seek greater interaction with criminal trial processes. It found that, where participation is meaningful for victims, it can be empowering. Also, it can enhance victims' sense that they have been heard and thereby enhance their ability to obtain justice.[179]

Participation by victims is often equated with victims having a voice in proceedings and being heard. It also involves some 'levelling of the field' so as to remove barriers to participation faced by many victims, such as children and those with disabilities.[180]

The VLRC supported expanding and clarifying the circumstances in which prosecutors should consult with victims. It also endorsed the establishment of an intermediary scheme for child victims and victims who have a disability which is likely to diminish the quality of their evidence.[181] We discuss prosecutors' consultation with victims in Chapter 20. We discuss support for witnesses and survivors who are giving evidence in Chapter 30.

With regard to arguments advanced in submissions that there should be enhanced victim participation in trial proceedings themselves (whether personally or by a legal representative), the VLRC distinguished between three different claims for participation, namely:

- participation in relation to personal interests
- participation for protection
- participation as prosecutor.[182]

The VLRC stated that defining when victims 'personal interests' are engaged is not straightforward.[183] The examples that proponents of enhanced participation rights most commonly gave involved evidentiary matters (such as prior sexual history or separate trials) in relation to which other public interests are also at stake. This makes delineation between the victim's personal interests and the public interest difficult.[184]

Where enhanced participation was sought for victim protection, it also involved a victim's advocate intervening in cross-examination – for example, to object to improper questions under section 41 of the *Evidence Act 2008* (Vic). The VLRC did not consider this could be accommodated in Victorian adversarial trials because this would introduce significant complexity into the trial process and possibly undermine the accused's fair trial by requiring the accused's lawyer to respond to objections, legal submissions and evidence introduced by both the prosecution and the victim's lawyer.[185]

Similarly, the VLRC did not support giving victims a participatory role that would involve them having power over prosecutorial decisions or a function as an adjunct or 'auxiliary' prosecutor (as is the role of the victim in inquisitorial systems and in the International Criminal Court, which we discuss in section 3.4.3). On the contrary, the VLRC found that:

> All forms of participation outlined above contemplate introducing another actor – the victim – into the adversarial criminal trial process, to varying degrees. This is difficult to manage, and in some circumstances impossible, without prejudicing a fair trial. Moreover, adding a victim participant to the court proceedings would mean more court dates and documents to file, creating more delay and complexity.[186]

The VLRC also noted concerns about victims making representations at sentencing hearings that risked contravening the principle that a sentencing court only take into account the harm caused by the offences for which the offender is being sentenced (and not, for example, past behaviour or behaviour that was not the subject of a conviction).[187] Further, the VLRC noted that:

> [Allowing victims to appear in sentencing and appeal proceedings] would require the offender to respond to two sets of evidence and legal argument, which may be unfair in a two-party adversarial process.
>
> In addition, victims may make submissions based on their personal interests, which could conflict with the prosecution's submissions. Taking the victim's submissions into account may mean that decisions about sentencing and appeal proceedings might be determined by reference to factors which are not independent, impartial and fair.[188]

The VLRC concluded that it is neither necessary nor appropriate to give victims standing throughout the criminal trial.[189]

The VLRC agreed that intervention on behalf of the victim may be necessary in exceptional circumstances. However, it found that this can already be accommodated under existing trial procedure. The courts ensure non-parties receive a fair hearing when they can demonstrate that they have an interest that is not already within the knowledge of the court.[190]

Finally, in relation to the right of victims to meaningful participation, the VLRC also considered restorative justice, which we discuss in Chapter 2, and the use of intermediaries to enable equal participation, which we discuss in Chapter 30.

Protection

The VLRC observed that victims are intimidated by giving evidence in court, and they are especially traumatised by cross-examination. The VLRC found that, while reforms have been introduced to reduce the number of times a victim needs to attend court and give evidence and to improve victims' safety in and around courthouses, these protective measures could be expanded. The VLRC recommended improvements to ensure consistency of approach. Further restrictions on access to the personal records of sexual assault victims were also recommended.[191] These issues are discussed in chapters, 20, 30 and 32.

Reparation

The VLRC found that, while ancillary orders for restitution and compensation can be made under the *Sentencing Act 1991* (Vic), the process for a victim to obtain an order is difficult without a lawyer, and these orders are rarely made. This means that state-funded redress through the VOCAT will often be the only form of financial redress a victim receives. In addition to recommending limits on access to and use of VOCAT records in criminal proceedings, the VLRC recommended that the Victorian Sentencing Advisory Council consider issues associated with criminal restitution orders.[192]

3.4 What we were told in submissions and Case Study 46

3.4.1 Introduction

A number of submissions in response to the Consultation Paper commented on the role of the victim in the criminal justice system. Some submissions focused on problems with current approaches, and some submissions made suggestions for reform. Some of the suggestions for reform were also raised in earlier submissions in response to *Issues Paper No 8 – Experiences of police and prosecution responses* (Issues Paper 8).

We discuss the main concerns expressed about the current approach.

We then discuss suggested reforms to adopt the following alternative approaches:

- an inquisitorial model – we briefly outlined inquisitorial systems in section 2.5.5
- a model based on the International Criminal Court
- providing formal legal representation or statutory victims' advocates
- providing victims with enforceable legal rights.

Where international models are cited, we also provide an outline of those models.

3.4.2 Dissatisfaction with the current approach

In its submission in response to the Consultation Paper, Micah Projects noted that changes to the law, policy, procedures and programs of government have been 'inadequate to deal with addressing the power imbalances that have prevented justice occurring for victims'.[193] In its previous submission in response to Issues Paper 8, Micah Projects stated that a number of survivors with whom they had worked 'noted that no-one advocates for the survivor as part of the criminal justice system and that support and a role in the process are both essential for survivors'.[194]

A number of confidential submissions in response to the Consultation Paper and Issues Paper 8 gave accounts of the authors' experiences as survivors and complainants in the criminal justice system. Some of these submissions expressed the opinion that it is not a 'level playing field' between the prosecution and defence counsel and that at trial there is inequity between the defence and the complainant.

In its submission in response to the Consultation Paper, the Victorian CASA Forum stated that it 'is often a shock to a person' who has 'experienced sexual abuse to learn that they will not actually be central to the criminal justice process but will simply be a *witness* for the state' (emphasis original).[195]

In its submission in response to the Consultation Paper, Protect All Children Today (PACT) noted that children are often told that the prosecution does not represent them. Children have reported finding this advice very confusing and unfair, and PACT volunteers have been asked 'Why do the accused get to have someone represent "them" but I don't?'.[196]

In their submission in response to the Consultation Paper, Dr Robyn Holder, a former victims' commissioner, and Ms Suzanne Whiting stated that:

> To understand the importance of inclusion and participation is to understand and acknowledge that people as victims of abuse and violence, whether adult or child, have interests that are different to the state in the form of the public prosecutor. Of course these overlap but they are different. Indeed, people who have been victims also have interests that are distinct from those of the community as a whole …

> … In our experience, it is realising that the prosecutor does not act for them and indeed may act in ways that they see as against their interests, that shocks people as victims. 'Who acts for me?' is a query that we have heard countless times over our public service careers.[197]

Two current victims' commissioners also made submissions about victims' dissatisfaction being connected to their role as complainants in the criminal justice system.

In his submission in response to Issues Paper 8, the South Australian Victims of Crime Commissioner, Mr Michael O'Connell PSM, described victims' experience of their role as follows:

> Although victims have suffered the injury or loss and the system would possibly collapse without their cooperation, they are often relegated, especially in adversarial criminal justice systems, to the status of a witness. Contrary [to this], victims 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. Consistent with these expectations, victims' rights instruments have been promulgated so that victims will get information, will be consulted and will participate in other ways, such as making victim impact statements.[198]

Similarly, in his submission in response to the Consultation Paper, the Victorian Victims of Crime Commissioner, Mr Greg Davies APM, described the role of the victim as at once central to the criminal justice system and on its periphery:

> Victims of crime are traditionally viewed as playing a confined role in the criminal justice system. However, their participation and confidence in the system is critical as it facilitates the reporting and detection of crime and allows courts to hold offenders to account for their conduct.
>
> This means a criminal justice system that supports and considers victims not only serves the personal interests of individual victims but also ensures the efficacy of the system that protects the welfare of the broader community. It is for this reason that I support the Royal Commission's view that all victims and survivors should be encouraged and supported to seek a criminal justice response. The criminal justice system should not discourage victims and survivors but actually encourage their participation in the legal process.
>
> At the outset, it is important to acknowledge the many recent procedural reforms governing sexual assault and family violence proceedings that protect the interests of victims. However, these are incremental reforms and do not go far enough to preserve victims' rights and increase their confidence in the system.
>
> In Victoria, the Victims Charter Act 2006 (the Charter) also aims to support victims of crime by setting out principles to represent minimum standards governing responses to victims of crime across government agencies and victim service providers. Despite their

> importance to the criminal justice system and the proclamation of principles within the Charter, victims remain on the periphery of the system and the principles and standards owed to them are all too frequently not realised.[199]

In Case Study 46, we heard evidence from three statutory commissioners for victims of crime: Mr Davies from Victoria, Mr O'Connell from South Australia and Mr John Hinchey from the Australian Capital Territory.

In discussing a perceived gap between statements of principle in victims' rights charters and the reality on the ground, Mr O'Connell said:

> The short answer is that there needs to be not only a stronger commitment to the implementation of victims' rights, but it's quite clear to me that there are too many victims for whom the promise of victims' rights still rests largely as rhetoric.[200]

In discussing the situation in the Australian Capital Territory, Mr Hinchey said:

> Even an apology means something to victims of crime, as we see so often through restorative justice, and yet our authorities are often so reluctant to take responsibility for some of their failings. That's a serious shortcoming in all of our guiding principles across this country, I think.[201]

3.4.3 Support for other approaches

Inquisitorial models

Submissions and evidence

Several submissions made to us advocated an inquisitorial approach to the prosecution of child sexual assault cases.

In his submission in response to the Consultation Paper, Mr Peter Gogarty, a survivor, referred to 'the lack of progress in our criminal justice system over many years' in 'calling to account those people who have abused children and those people and institutions which have enabled those abusers'.[202]

Mr Gogarty advocated a number of reforms, including dedicated sexual assault courts and specialist prosecutors, judges and victim advocates. He observed that these should be 'more closely aligned with an "inquisitorial" rather than adversarial approach'.[203] He submitted that the adversarial approach is process driven, competitive and confronting for victims. He said this is particularly problematic, as many child sexual assault matters are 'word against word' cases.[204] He submitted that 'adversarialism' seeks to identify a 'winner' rather than discovering

the 'truth' and is less even-handed to victims (as against defendants). He submitted that an 'inquisitorial system in these circumstances offers the potential for greater balance between the parties'.[205]

In his submission in response to the Consultation Paper, the South Australian Commissioner for Victims' Rights noted, in the context of discussing the challenges for children of the traditional adversarial approach, that 'it is little wonder that some claim, truth discovery in an adversarial criminal justice system is too often by accident'.[206]

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

> The time for modifications is over. We need to design a new legal system from the ground up for this type of crime … An adversarial system where survivors can be viciously cross examined by defence lawyers is completely inappropriate for traumatised child or adult victims of these crimes. A search for the truth is what is needed, not a legal boxing match, where the powerful further oppress and abuse the powerless. An inquisitorial system with a panel of judges, not a jury, will deliver better results.[207]

In her evidence in Case Study 46, Ms Biljana Milosevic, representing the Jannawi Family Centre (Jannawi), submitted that the current adversarial system should be replaced with an approach based on the European Union's 'Barnahus' model.[208] The 'Children's House' approach, known as Barnahus (Iceland) or Barnehus (Sweden), is increasingly common across Europe and Scandinavia. We outline the Children's House model below.

Ms Milosevic supported the inquisitorial Children's House process of putting a child development expert, rather than counsel, in charge of gathering evidence from the child (under the judge's supervision) from the very beginning. Ms Milosevic accepted that such a shift would represent a significant departure from the present system. However, she noted that, while it was 'extremely different', there was great benefit to be derived for victims and survivors from the system being built around the guiding principle of, and giving top priority to, the best interests of children.[209]

Ms Milosevic described the approach as flipping the operation of the justice system on its head by focusing on children's wellbeing and safety and by being child-friendly.[210] She said that this was in contrast to starting with the adversarial premise that there was no crime unless and until it is established to the requisite standard for charging or later proven and having the system oriented around legalistic concerns.[211] Ms Milosevic told the public hearing that ensuring that the system is not so detrimental to children is key to reform efforts, because more people will report only when the system improves itself.[212]

Children's House model

Children's Houses were pioneered in Iceland in 1998. They build on the Child Advocacy Centers in the United States, which focus on a multidisciplinary approach in an adversarial system. We discuss multidisciplinary approaches in Chapter 7.

The model is used, with some variation, in Iceland, Norway, Sweden and Denmark. The key aspects of the Children's House model are as follows:

- **A child-friendly, home-like setting:** The service is generally in an unmarked residential property designed to reduce anxiety for children and avoid the negative connotation that a police station or hospital may have for a child.[213]
- **Professional interviewing:** In Iceland, children are generally interviewed by psychotherapists trained in forensic interviewing to support children in making disclosures that may otherwise not be made to a police officer or other authority figure.[214] In Norway, children are interviewed by trained police officers, with a psychologist assessing the witness's psychological health as the interview progresses.[215]
- **Minimising the number of interviews:** While there may need for both an exploratory interview, if the child has not already made a disclosure, and an investigative interview once a disclosure is made, the aim is to minimise the number of times the child has to recount and describe the abuse.[216] In Norway, the child may be interviewed twice after a disclosure – once to assess whether there is evidence to charge; and again, once the alleged perpetrator has been interviewed, to test discrepancies and the quality of the evidence.[217]

  The police, prosecutor, defence solicitor, judge and child's legal representative all watch the investigative interview via video-link and can suggest lines of enquiry to the person conducting the interview. Therefore, the evidence obtained can function as the entirety of the child's evidence in any subsequent trial.[218] After the child's interview, the matter proceeds as it normally would in an inquisitorial system, with the judge and parties seeking the evidence of any other relevant witnesses before proceeding to trial where appropriate. The defence does not have a further opportunity to question the child.
- **Rapid access to therapy:** The model is designed to obtain all the evidence of the child as quickly as possible – for example, within one or two weeks. Once the investigative interview has taken place, the child and family can immediately be offered therapy to assist the child in recovering from the abuse.[219]

In 2016 the Children's Commissioner for England considered the Children's House model for adoption in England. The Children's Commissioner noted figures from the Icelandic Child Protection Service that showed that, in the first 16 years of operation of the model, the number of prosecutions almost tripled and the number of convictions doubled.[220] While this apparently represents a significant increase in reporting, prosecutions and the number of convictions, it would appear that the conviction rate declined over the period from 96 per cent to 70 per cent.

The Children's Commissioner also noted that an evaluation of the model in Norway suggested that children interviewed by police in the Children's House received better care than those interviewed at a police station.[221]

The Children's Commissioner noted that further work would need to be done to consider the threshold for triggering referral to a Children's House and the consequences for the participation of defence representatives. However, the Children's Commissioner for England concluded that:

> It is clear that the Barnahus represents a truly child-centred approach to child sexual abuse. Services are designed and administered in a manner consistent with the best possible criminal justice and therapeutic outcomes, and the results obtained are extremely impressive.[222]

International Criminal Court model

Submissions and evidence

In his evidence in the public hearing in Case Study 46, the South Australian Victims of Crime Commissioner, Mr O'Connell, expressed his support for the approach of the International Criminal Court. He told the public hearing:

> I think a wonderful model is the International Criminal Court where you have defence parties, victim advocates and others come together and construct a new form of court that hears the most heinous forms of crimes in the world.[223]

In his submission in response to Issues Paper 8, Mr O'Connell stated:

> I am particularly drawn towards the International Criminal Court model because it is a compromise between the adversarial and civil-inquisitorial approaches to criminal justice. It seems to me strange that many nations of the world [that] we share accept that victims of the most heinous crimes against humanity should have a genuine voice (through legal counsel) from pre-chamber to sentence in criminal proceedings, yet there is such opposition to giving victims of crime a similar voice.[224]

In her submission in response to the Consultation Paper, Dr Judy Courtin cited the approach of the International Criminal Court as evidence that 'comprehensive participation' of victims – including legal representation and extensive involvement throughout trial proceedings – was not inconsistent with safeguarding the rights and interests of the accused. Dr Courtin also submitted that the approach of the International Criminal Court may have 'transitional justice' potential, stating that:

> the concept of transitional justice could assist with not only the identification of past wrongs, but also with determining the reasons why institutions and the State failed to learn from those wrongs.[225]

International Criminal Court model

The International Criminal Court is largely an adversarial system. However, it gives victims the right to participate in proceedings in which their interests are implicated but only to the extent that this does not compromise the fairness of the trial. The prosecutor presents the case against the accused as an adversary. There is no investigative magistrate collecting and presenting evidence in a search for truth, as would occur in an inquisitorial system. There is also no jury – a panel of judges is the trier of fact.

The judges decide disputes between each side with the overriding obligation to ensure the fairness of the proceedings. While victims can make their views known and the charges brought by the prosecutor might later be authorised or denied by the court, investigations are commenced on the prosecutor's initiative, on a request from a State, or a referral from the United Nations Security Council.[226]

Defence counsel is appointed for and acts in the interests of the accused, who has the right to a fair and impartial hearing in public; the right to be informed promptly and in detail of the nature of any charges; the right to communicate freely with counsel of their choosing; the right to be tried without undue delay; and the right to be presumed innocent. The accused cannot be compelled to give evidence.[227] The prosecutor bears the onus of proving the accused's guilt.[228]

Victims are free to choose a representative. Where there are a number of victims, they may be asked to choose a common legal representative.[229] A victim is any person who can demonstrate (in a preliminary hearing) that they have suffered harm as a result of the commission of any crime within the jurisdiction of the court.[230] The *Rome Statute of the International Criminal Court* (the Rome Statute), a treaty that established the International Criminal Court in 1998, provides that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[231]

Victims must not only demonstrate harm as a result of the crime before the court but also show why their interests are affected by the evidence or issue arising in the case and the nature or extent of the participation they seek. The court has stated that victims should 'only participate actively if their intervention would make a relevant contribution to the determination of the truth and does not prejudice the principles of fairness and impartiality of the proceedings before the Court'.[232]

Due to some ambiguity in the drafting of the Rome Statute, the scope of victims' participation is largely at the discretion of the court.[233] Victims are not parties to the proceedings and do not have general standing to appear.[234] Representatives may attend and participate unless

intervention has been confined to written observations or submissions.[235] Victim participation may extend from accessing the record of documents in the case, attending hearings and giving evidence through to:

- being heard in relation to pre-trial hearings[236]
- making opening and closing statements to the court[237]
- questioning witnesses (subject to seeking and being granted permission in advance; the court may, if it considers it appropriate, put the victim's questions to witnesses on behalf of the victim's legal representative)[238]
- making oral and written applications and submissions[239]
- tendering evidence and calling witnesses.[240]

A former International Criminal Court presiding officer, Judge Bruno Cotte, commented:

> the participation of victims could greatly assist the Judges to better understand contentious issues in light of their knowledge of the locations and their socio-cultural background. In that regard, the LRV [legal representative for victims] for the main group of victims clearly had knowledge of the field that we did not yet have; he intervened on occasions to bring factual additions based on his own knowledge of the locations and of the people concerned.[241]

As part of its reference on the role of victims of crime in the criminal trial process, the VLRC released an information paper that examined the operation of the International Criminal Court. The paper noted criticisms of the model, which included the following:

- The addition of victim's representatives and their rights to ask questions had lengthened proceedings.[242]
- Victims are not subject to the same disclosure obligations as the prosecution. This can create risks to a fair trial, both from the potential for the defence to be 'ambushed' at trial by new evidence and from the fact that victims do not have an obligation to disclose exculpatory evidence.[243]

The International Criminal Court's website reports that, since the Rome Statute commenced in 2002, there have been 23 cases before the court. Six verdicts have been issued, with nine individuals convicted and one acquittal.[244]

Legal representation and statutory victims' advocates

Submissions and evidence

In their submissions in response to the Consultation Paper, a number of interested parties expressed support for providing victims with independent legal representation.

PACT submitted that prosecutors often tell children that they 'do not represent' them. Children report finding this very confusing and unfair. PACT's volunteers have been asked: 'Why do the accused get to have someone represent "them" but I don't?'[245]

Care Leavers Australasia Network (CLAN) submitted that the particular experiences and needs of care leavers are such that they would like to see a dedicated legal aid service for Australian care leavers based on the model of the Aboriginal Legal Service.[246]

knowmore submitted that many of its clients found the system lacked support for them, particularly 'independent' support. Its clients had unresolved concerns around procedural issues and prosecution decisions and had received no or little effective support during their participation in the prosecution. Some of their clients sensed that the trial process was inherently unfair: the victim is not independently represented, whereas the accused is entitled as of right to representation and often to legal aid too. knowmore submitted that some of its clients thought that victims should be entitled to their own state-funded legal representation, similar to the accused.[247]

In discussing why this would be important, knowmore identified that separate representation could:

- 'balance the scales' in that there would be someone to act in their interests, as the prosecutor represents the state
- mirror existing rights in some other systems – for example, in some European jurisdictions
- facilitate advocacy regarding prosecutorial decisions – such as discontinuing charges and leading or not leading certain evidence – and thereby meaningful participation for victims
- better protect the victim from unfair or offensive cross-examination
- assist the victim to adequately detail the impact of the crime on them for the purposes of sentencing or in seeking restitution.[248]

In her submission in response to the Consultation Paper, Dr Courtin advocated the separate legal representation of victims in the criminal trial process. She stated that:

> [T]he well-ensconced adversarial criminal trial roles, in which the victim's role remains primarily that of a tethered witness, must be reformed such that the victim becomes a more integral or central player, thereby, hopefully addressing more of their justice needs.
>
> Many have advocated for separate legal representation of victims during the criminal trial process, either for the entire process from the laying of charges all the way through to the appeal process, or for certain elements or stages of the process.

> There are already multiple support services available for victim-witnesses … It is argued, though, that these services, essential as they are, are ultimately no more than 'band aid' in their application as they merely assist the victim-witness to survive their journey on the very periphery of the trial process – that of a witness only.[249]

In their submission in response to the Consultation Paper, Dr Holder and Ms Whiting submitted that victims should have access to independent advocacy and representation for two reasons:

> First, no single agency has primary responsibility to inform, assist, guide, and manage a victim's journey through the entire criminal justice process. While some state and territories in Australia have organisations and processes to enable this for some victims some of the time, many if not most victims fall through the cracks between organisations. Each justice entity only has responsibility for informing, involving and assisting victims for the duration of its particular function …
>
> Second, advocating and assisting people as victims requires particular skills, experience, and focus. It is a *specialised justice function*. Assisting victims to engage meaningfully with criminal justice has *achieving justice* as its focus. Other victim-related goals for recovery, healing or rehabilitation may flow from the primary focus on justice, but are not the primary goals of victim advocacy.[250] [Emphasis original.]

They noted that under their proposal the purpose of representation would need to be differentiated. They distinguished between:

- evidentiary representation, which is usually the function of the prosecution
- direct interest representation – for example, regarding reparation or compensation
- rights representation, which would need to identify the human, civil or other legal right at issue – for example, the right to privacy and reputation.[251]

They also favoured the use of a statutory intervener that would facilitate the victim's participation in criminal proceedings. They submitted that:

> independent advocacy and representation should be established within an independent statutory authority. A body such as this, headed by an independent statutory appointment, may have case managing functions … It may also be able to intervene in a proceeding to represent a particular right or issue of significant concern. We do not necessarily argue for representation in every single case. Rather we envisage something similar to the powers of a Human Rights Commissioner or a Public Defender.[252]

In his submission in response to the Consultation Paper, Mr O'Connell stated that 'the appointment of a Commissioner for Victims' Rights in South Australia with authorities to intervene in certain criminal proceedings' was an example of a victims' rights reform that expands 'victims' participation without unduly impacting on the rights of accused people'.[253]

Mr O'Connell gave us a paper he had written on the topic in which he stated:

> Several of these functions are, as a politician stated, 'interesting developments' that have afforded me avenues to intervene in criminal proceedings in ways traditionally associated with civil (inquisitorial) criminal justice systems rather than common law systems. Victim participation is a central aspect of the Commissioner's role.[254]

He provided three further arguments in support of providing victims' representation:

- Fundamental justice requires that judicial officers hear from victims when their rights are likely to be affected by a decision of the court.
- Research suggests that giving victims a voice appears to contribute to victims' having higher levels of confidence in the system.[255]
- There is precedent for legal representation: victims in the United States are able to participate in criminal proceedings to assert their entitlements under the federal *Crime Victims' Rights Act 2004*.[256]

We outline the position in the United States under the *Crime Victims' Rights Act 2004* below.

Mr O'Connell stated that one of his 'primary endeavours' with regard to victim participation and providing discrete funding in particular cases has been to 'change the legal culture with respect to observance of victims' rights'.[257] Similarly, in his submission in response to Issues Paper 8, he stated:

> The presence of victims' lawyers has, in my view, increased attention to victims' rights by police officers, prosecutors, magistrates and judges – and defence counsel.[258]

In his submission in response to the Consultation Paper, the Victorian Victims of Crime Commissioner, Mr Davies, stated:

> given the complexities of the trial process and the nature of the relationship between the prosecution and the victim, the provision of legal advice/representation for victims is supported. Importantly, it was suggested that support of this nature should be limited to: *critical points in the trial process that demonstrably impact the interests of a victim and where those interests are in conflict with the prosecution.*[259][Emphasis original.]

Mr Davies gave evidence in the public hearing in Case Study 46. He expanded on his written submission, telling the public hearing that:

> there's not necessarily a need for victims to be legally represented in every trial, but certainly there are certain circumstances where the needs of the victim and that of the Crown or the prosecution diverge and it would be highly desirable for victims of crime to be afforded legal representation in those circumstances.[260]

Mr Davies gave the following examples of circumstances in which he considered a victim should be permitted to have their own legal representation:

- where the victim may themselves be accused of having committed a crime
- if a victim is asked to give evidence against a close family member
- applications are made in relation to confidential communications
- the prior sexual conduct of a sexual assault victim is being considered in a pre-trial hearing.[261]

Mr Davies told the public hearing that, under current Victorian law, a victim may not even be put on notice that an application in relation to their prior sexual conduct had been made.[262] More broadly, he said that there may be benefit in affording victims access to independent legal services where the victim genuinely believes that it would be beneficial and where preliminary discussions with a practitioner might allay fears and the ongoing need for independent representation.[263]

The Victims of Crime Commissioner for the Australian Capital Territory, Mr Hinchey, told the public hearing that there is no capacity for victims in the Australian Capital Territory to be granted representation in relation to issues such as sexual assault communications privilege.[264] He expressed support for anything that would add to the resources that the system sets aside for representation or otherwise upholding the rights and interests of victims, noting that victims are 'at the bottom end of the priority' list for allocation of scarce criminal justice system resources.[265]

Mr Hinchey told the public hearing that there was an argument to be made in relation to the representation of child witnesses and the setting of court dates, because very young children in particular are 'extremely vulnerable' to lengthy delays. While the DPP represents the whole community, Mr Hinchey said that the court should hear from an advocate of the child when making decisions about trial process of such importance to the child.[266]

United States – Crime Victims' Rights Act 2004

United States federal law has been used to have a court appoint counsel for victims in order to ensure that victims' rights are afforded. For example, the federal court in *United States v Stamper*[267] appointed counsel to represent the victim in a sexual assault matter. The defendant had sought permission to introduce evidence that in the past the complainant had schemed to accomplish certain personal goals by falsely accusing three older men of sexual abuse. The prosecution notified the court of the complainant's desire to have independent representation to protect her privacy interests in considering the admissibility of the evidence. The court appointed an attorney to represent her. The evidence was ultimately admitted.

The *Crime Victims' Rights Act 2004* also allows victims to use a writ of mandamus to obtain a stay of proceedings until the court is satisfied that the victim's charter rights have been accommodated. This means, for example, that, where a victim has not been adequately consulted with regard to the withdrawal of charges or a charge agreement, the case could be stopped until proper consultation has occurred. Alternatively, sentence proceedings might be put on hold until a victim has been given the opportunity to be heard.[268]

Private legal practitioners have taken up victims' cases in order to ensure that their interests are recognised in criminal proceedings. The National Crime Victims Law Institute (NCVLI) is a non-profit organisation based at the Lewis and Clark Law School in Portland, Oregon. It operates a national victims' advocacy clearing house and provides technical assistance and legal expertise to support advocates who are working to protect victims' rights in criminal trial and appellate courts. It does not provide legal services directly to victims but refers victims to support services in their area and finds legal representation from a pool of pro bono lawyers. NCVLI's partner practitioners, who take up victims' concerns before the courts, apply to intervene when victims' legal interests are in issue. NCVLI's mission is to 'actively promote balance and fairness in the justice system through crime victim centered legal advocacy, education, and resource sharing'.[269] Legal advocacy on behalf of victims 'is at the core of NCVLI's work'. NCVLI states:

> Through impact litigation, we aim to set favorable court rulings interpreting rights to help individual victims and set precedent for future victims. Two of our most critical efforts in this area are our amicus curiae participation in courts nationwide as well as our legal technical assistance. Through this work it is our hope that in the next 10 years victims are able to secure true participatory status in the criminal justice system.[270]

In the financial year 2015 to 2016, NCVLI provided research, writing and strategic case advice in 137 matters in 36 jurisdictions, assisting attorneys, advocates and allied professionals; and trained more than 3,000 victims service providers, victims and members of the public.[271]

The United States military adopted the NCVLI model in 2013.[272] 'Special Victim Counsel' assist sexual assault victims in military proceedings. Special Victim Counsel provide victims within the military who make complaints of sexual assault with information about the criminal process and the advantages and disadvantages of engaging with it.[273] Special Victim Counsel can represent the victim's interests throughout the investigation and trial, which takes the form of a court martial rather than a usual criminal trial outside the military.[274]

Garvin and Beloof have reported on the extremely high satisfaction ratings given by victims when surveyed about the Special Victim Counsel service. They also refer to early data suggesting that granting victims legal representation may have contributed to a jump in the proportion of victims who disclosed for the purpose of a prosecution.[275] Garvin and Beloof argue this relates to the separate representatives' ability to confer and foster 'genuine agency' in victims, over and above assisting them in mere 'participation'.[276]

Enforceable legal rights for victims

Submissions and evidence

In his submission in response to the Consultation Paper, the Victorian Victims of Crime Commissioner, Mr Davies, noted both the lack of any mechanism to ensure compliance with victims' charters and the gap between the actual and charter-assured level and quality of support for victims of crime. Mr Davies stated that this has been described as an 'implementation gap'. However, he submitted:

> The principles espoused within the Charter have existed for a decade. There must come a point where a so-called 'implementation gap' is recognised for what it actually is; a blatant refusal to comply with legislation. Organisations and individuals get away with non-compliance because there are no consequences attached to their refusal to comply … Currently the principles set out in the Charter are unenforceable and a breach does not create any legal right or give rise to a cause of action. Whilst this remains the case, the requisite standards of consideration and treatment of victims of crime by the criminal justice system will be merely aspirational. A failure to properly enforce minimum standards will make victims' rights illusory and exacerbate the implementation gap between the written law and practices and procedures.[277]

The alternative is to make victims' rights enforceable. Mr Davies submitted:

> Making victims' rights enforceable will create a sustainable culture of compliance where victims are respected, consequently translating into their increased participation and confidence in the system, resulting in a more effective criminal justice system.[278]

Mr Davies also expressed support for other measures that would enhance victims' participation in and experience of the criminal justice system. He submitted that the enforceability of victims' rights was a foundation on which a variety of other improvements might rest.[279] He recommended that we 'consider methods and strategies to elevate the status, rights and needs of victims of crime as participants in the criminal justice system', including:

- processes for obtaining a remedy under relevant victims' charters against key players in the criminal justice system that have acted incompatibly with victims' rights
- the creation of consequences for those who fail to comply with legislation governing victims' rights
- the establishment of agreed performance monitoring and targets in relation to compliance with minimum standards governing responses to victims of crime for key players in the criminal justice system.[280]

The South Australian Victims Rights Commissioner, Mr O'Connell, has also expressed support for the enforceability of victims' rights. In his submission in response to the Consultation Paper, he stated:

> I urge that the Royal Commission not only recommend guidelines in terms that clearly enunciate obligations but also are stated as mandatory guidance for action, rather than platitudes. Further that there be appropriate governance procedures, including monitoring implementation and evaluation, and commensurate grievance procedures. In addition, I urge a national approach, with the Commonwealth engaged, towards first the harmonisation of victims' rights law and second to the standardisation of such law.[281]

Mr O'Connell submitted that there should be additional rights for victims, stating:

> I suggest one 'amended' right and three 'new' victims' rights. Victims throughout Australia should have a right to confer and to be consulted before charge decisions are made; rather than merely the right to have such decision explained. Victims of serious offences should have the right to trial, albeit not a right to veto if the prosecutor decides not to proceed to trial. Further, prosecutors' decisions should be reviewable and for the purpose of review, the victim should be entitled to ask a court to stay proceedings until the review is complete. All victims in addition should have a legal right to an apology – from a public official, such as a prosecutor, who has failed to comply with their victims' rights obligations; and, from offenders who hurt them.[282]

In his submission in response to the Consultation Paper, the Victims of Crime Commissioner for the Australian Capital Territory, Mr Hinchey, also expressed support for making victims' rights enforceable, stating:

> Each state and territory has its own principles or charter of rights. However, these 'rights' are not rights that can be legally enforced.
>
> Re-framing these guiding principles into a rights framework could significantly improve victim experiences by focusing on the key aims of keeping victims informed and creating a sense of participation within the criminal justice system.
>
> A Victims' Charter of Rights would help to ensure that, wherever possible, victims' rights are respected consistently and reliably. To be effective and meaningful, victims' rights require mechanisms and procedures for the enforcement of those rights and some authority to have breaches of those rights investigated and remedied.[283]

In their submission in response to the Consultation Paper, Dr Holder and Ms Whiting stated:

> From our combined 30 years' experience working with victims 'rights' legislation in Australia, it is our submission that these are a deceit. They are not rights, not actionable, not enforceable. We argue that contemporary victims' legislation sets out service standards. In administrative law, these are described as the reasonable or legitimate expectations of members of the public with authorities.

> If we understand that victims have interests that are distinct to those of the state then we submit that it is vital to understand and clearly articulate what are the obligations on duty-bearers (police, prosecution, courts, corrections, and victim services); what are the rights they are responsible to protect and uphold, and how might these be given effect in a robust and consistent manner? We submit that our communities are yet to have a detailed debate on and [an] examination of what could actually be the rights of people as victims (and witnesses) in criminal justice. A degree of consensus on the scope and content of such rights needs to be reached.[284]

In its submission in response to the Consultation Paper, Legal Aid NSW submitted that there is widespread noncompliance with the legislative requirement to give notice to the parties and the complainant of an intention to issue a subpoena for therapeutic records which may be protected by the sexual assault communications privilege. We discuss this issue, and Legal Aid NSW's proposals for reforms, in Chapter 32.

3.5 Discussion and conclusions

We recognise that many victims and survivors have felt marginalised by or excluded from the criminal justice system.

As outlined in Chapter 2, we consider that the reforms we recommend in this report are necessary to ensure that:

- the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
- 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.

As discussed in this chapter, the role of victims in the criminal justice system has changed considerably over the last 50 years.

We recognise that the way that the criminal justice system responds to victims is vital for supporting victims and for encouraging them to come forward in the first place. There are very few cases of child sexual abuse in which the victim is not an essential participant in any criminal investigation and prosecution.

We acknowledge the experience and sincerity of those who have advocated that we should recommend inquisitorial models or legal representation for victims. However, we are not satisfied that we should do so.

As we stated in section 2.5.5, we do 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.

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.

We also consider that a number of the benefits of the Children's House model are achieved, wholly or in part, in at least some Australian states and territories. For example:

- In many specialist policing responses, which we discuss in chapters 7 and 8, children's investigative interviews are prerecorded and can be used as their evidence in chief, and effort is directing to minimising the number of occasions on which the child is required to give an account of the abuse.
- Some specialist policing responses involve joint police, child protection and health responses. We discuss this in Chapter 7.
- In some jurisdictions, investigative and other services are co-located. We discuss these in Chapter 7.
- There are special measures to assist complainants. We outlined these in section 3.2.2 and discuss them in more detail in Chapter 30. Most of these are available to children in most jurisdictions.
- Intermediaries have been introduced in two jurisdictions, and we make recommendations in relation to them in Chapter 30.

It is not clear to us how the informed participation of the defence – and, indeed, the judge – could be brought about at such an early stage of proceedings in Australian criminal justice systems as apparently occurs in the Children's House model. Having the relevant criminal justice professionals adequately prepared to usefully, and finally, participate in such an important evidence-gathering process would involve a significant change from our current system.

Removing the ability of the defence to directly cross-examine the witness (as opposed to suggesting questions that a psychologist or police officer might put in child-friendly language) and conducting such an examination without the accused being allowed to be present would also be significant departures from our current system of criminal justice.

We note that the inquisitorial model, the International Criminal Court and the United States courts martial do not involve juries. This is a significant difference between those systems and our criminal justice system. While child sexual abuse trials may be conducted without a jury in our system, including in magistrates' courts and children's courts, if tried on indictment, the accused has the right to a jury.

We also note that the conviction rate seems to have declined fairly significantly under the Children's House model in Iceland. It is not clear to us why this has occurred. We would have expected that a model designed to meet children's needs would encourage more children or their families to come forward. Whether this increased the number of prosecutions presumably would depend on whether prosecutions were considered to be in the interests of the particular children, although in Iceland prosecutions apparently trebled.

However, we would not have expected that the model would lead to a decline in the rate of successful prosecutions. It is unclear if this means that prosecutions are now being pursued in more marginal cases; the Children's House is attracting different sorts of cases or allegations; its methods are resulting is less reliable or credible evidence from the children; or there have been other developments in how matters are prosecuted or counted.

In relation to the International Criminal Court, we note that it appears to deal with a very low volume of cases – that is, fewer than two per year. It is not clear that experiences from that court would be readily translatable into the very busy trial courts in Australian jurisdictions, which deal with thousands of child sexual abuse cases each year.

We discuss some of our broader concerns with adopting specialist approaches in relation to prosecuting child sexual abuse in Chapter 32.

We consider it very important to improve compliance with the various charters and principles governing victims' rights and the relevant requirements in prosecution policies and guidelines. We make recommendations in relation to DPP complaints and oversight mechanisms in Chapter 21.

We agree with the VLRC that the victim's role should be that of a participant but not a party. We agree with the VLRC's finding that greater direct participation by victims risks undermining the accused's right to a fair trial and the impartial and independent conduct of prosecutions. We agree with the VLRC's conclusion that it is neither necessary nor appropriate to give victims standing throughout the criminal trial.

The VLRC stated that proponents of enhanced participation rights for victims commonly gave examples that involved evidentiary matters, such as prior sexual history, the use of protective procedures when giving evidence, or separate trials.[285] We make recommendations in relation to special measures for witnesses in Chapter 30 and in relation to tendency and coincidence evidence and joint trials in Chapter 28.

Issues of the complainant's prior sexual history may be less likely to arise in child sexual abuse prosecutions than in prosecutions relating to adult sexual assault. However, this may be the area in which a victim's personal interests are most likely to benefit from separate legal representation. We discuss this issue in the context of delays and case management in Chapter 32.

We note that South Australia's Commissioner for Victims Rights funds independent legal representation for victims in some circumstances. We also note that Legal Aid NSW provides a publicly funded service to represent victims in relation to the sexual assault communications privilege and that the VLRC has recommended a similar service be established in Victoria.

As we stated in Chapter 2, we remain of the view that we should recommend reforms to the existing – and adversarial – criminal justice system that are intended to make it as effective as possible for responding to child sexual abuse cases.

We appreciate that some interested parties would prefer us to recommend a replacement of, or at least encroachments on, the adversarial system.

However, we are satisfied that our recommendations, if implemented, will significantly improve the criminal justice system's response to victims and survivors of child sexual abuse.

4 Child sexual abuse, memory and criminal justice

4.1 Introduction

In preparing the Consultation Paper, it became apparent that there was no clear, readily available guidance material summarising the contemporary psychological understanding of memory relevant to our work in relation to criminal justice issues in child sexual abuse, including institutional child sexual abuse.[286]

Understanding how human memory works generally, and how memory might be affected for child and adult complainants of child sexual abuse, is likely to be important in informing issues such as:

- how police should interview child and adult complainants of child sexual abuse
- what particulars child and adult complainants of child sexual abuse should reasonably be expected to provide about the alleged abuse
- whether particular features, such as inconsistencies in accounts given by a complainant over time, are a good indicator of unreliability
- what assistance juries should be given in relation to a complainant's evidence.

In the past, judges have relied on their own observations and assumptions about human behaviour, including in relation to how complainants behave and how memory works. The law has resisted applying research in psychology, instead acting on the basis that human behaviour is directly observable. In particular, judges may draw on their own knowledge of 'ordinary human behaviour' without reference to research. However, 'ordinary human behaviour' will be a matter of subjective opinion if it is not informed by available scientific research.[287]

In September 2016, the Royal Commission engaged Professor Jane Goodman-Delahunty and Associate Professor Mark Nolan to undertake a research project in relation to memory and the law. On 31 March 2017 we convened a public roundtable on complainants' memory of child sexual abuse and the law. This roundtable was held in conjunction with finalising the research report. It involved a number of invited academics and clinicians with research and practice expertise in this area, and it discussed a draft of the research report. The transcript of the roundtable is published on the Royal Commission's website.

Professor Goodman-Delahunty, Associate Professor Nolan and Dr Evianne van Gijn-Grosvenor's report *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Memory Research)[288] is available on the Royal Commission's website.

The aim of the Memory Research is described as follows:

> The aim of this report is to inform readers outside of the discipline of psychology about contemporary psychological scientific research on memory relevant to the work of the Royal Commission. It will do this by addressing three key questions:

1. What is known about what victims of child sexual abuse can be expected to remember about experiences of such abuse?

2. How do victims optimally remember experiences of child sexual abuse?

3. How does this affect their reporting to police and the evidence they should be expected to be able to give in the criminal justice system?

...

The report does not provide an exhaustive review of the scientific literature on the above topics, as in-depth scholarly reviews on those topics have been compiled by memory researchers in those fields. The purpose of this report was to collate scientific findings from different research domains relevant to memories of child sexual abuse, based on issues arising in legal settings, and to draw out their implications for police, legal practitioners and courts.[289]

In this chapter, we outline the Memory Research and other related material and some of the discussion at the roundtable. We also draw on the Memory Research in later chapters in relation to particular issues in criminal justice responses to child sexual abuse.

4.2 Existing guidance

4.2.1 British guidance

In 2008, the British Psychological Society published *Guidelines on memory and the law: Recommendations from the scientific study of human memory* (British Guidelines).[290] The British Guidelines were republished in 2010 in the same terms as the 2008 edition, except for one amendment in relation to the description of who is a 'memory expert'.[291]

The British Guidelines 'are derived from a review of the scientific study of human memory and a detailed consideration of the relevant legal issues including the role of expert evidence'.[292] Their purpose is 'to provide those involved in legal work (criminal and civil) with an accessible and scientifically accurate basis from which to consider issues relating to memory as these arise in legal settings'.[293]

The executive summary in the British Guidelines explains how they should be used:

> The study of human memory has made considerable advances in recent decades and we now have a much stronger and empirically informed understanding of memory. Current theoretical thinking is at a stage that supports probabilistic but not absolute statements.

> The guidelines and key points should then be taken as they are intended – as guidelines and not absolute statements. Because they are based on widely agreed and acknowledged scientific findings they provide a far more rigorously informed understanding of human memory than that available from commonly held beliefs. In this respect they give courts a much firmer basis for accurate decision-making.[294]

The British Guidelines dealt with memory in general rather than the effect of child sexual abuse on memory.[295] A number of key properties of human memory are identified in the British Guidelines:

- memory is distinct from reality
- memory is a sampling process, not a complete record of past events
- memory is constructive in nature
- memory is context dependent.[296]

The Memory Research identified the following discrete research topics about general memory processes that were distinguished in the British Guidelines:

- autobiographical memory and memory for childhood events
- repeated events
- the effects of delay on memory
- reality monitoring
- visual–spatial memory
- trauma/stress and memory
- memory of vulnerable groups, including children and the elderly
- witness interviews.[297]

The Memory Research noted that the scope of the British Guidelines limits their application to the issues of interest to the Royal Commission. The Memory Research stated that, for example, the British Guidelines do not address the effects on children's memory of cases of persistent sexual abuse, delay or trauma.[298]

The Memory Research also noted that the British Guidelines are based on research current as at 2007 and referred to more recent changes in the understanding of children's memory, particularly in relation to the suggestibility of young children.[299]

4.2.2 Australian guidance

Bench book for children giving evidence in Australian courts

The Australasian Institute of Judicial Administration's *Bench book for children giving evidence in Australian courts* (the Bench Book) addresses some issues relevant to memory. It states:

> This Bench Book is intended primarily for judicial officers who deal with children giving evidence in criminal proceedings as complainants or witnesses, not as accused. It is not limited to child sexual abuse, although this forms a substantial proportion of criminal proceedings involving children.[300]

Its objectives are stated to be:

i. To promote accurate knowledge and understanding of children and their ability to give evidence.

ii. To assist judicial officers to realise the goal of a fair trial for both the accused and the child complainant.

iii. To assist judicial officers to create an environment that allows children to give the best evidence in the courtroom.[301]

It provides some guidance on relevant issues in relation to:

- the reliability of children in giving evidence (section 2.4)
- whether children lie more or less than adults (section 2.5)
- the difference between errors of commission and errors of omission (section 2.6)
- children's cognitive development (section 2.7)
- factors affecting children's memory, including memory of traumatic events (section 2.8)
- whether children are suggestible (section 2.9).

Although the Bench Book has been updated and the law is stated as at December 2012,[302] it appears to draw mainly on psychological research that was available in 2009.

The Bench Book illustrates how psychological research and case law can be presented and discussed in a format that is useful for judges and other legal practitioners.

Other Australian guidance

The Memory Research noted some other sources for guidance on memory in Australia:

- The Migration and Refugee Division of the Administrative Appeals Tribunal has guidelines for the assessment of credibility[303] and in relation to vulnerable persons.[304]
- The Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission provided some guidance in their *Uniform Evidence Law* report in relation to hearsay evidence and when delayed reports could be considered to be 'fresh in the memory' of the complainant.[305]

4.3 Memory Research

4.3.1 Guidance on memory in cases of child sexual abuse

The Memory Research provides a detailed survey of the current psychological literature relevant to memory issues in relation to child sexual abuse reports and prosecutions.

It also provides a succinct stand-alone summary of guidance on memory in cases of child sexual abuse. The summary presents the main findings derived from the detailed report.[306]

The guidance is provided by outlining:

- issues in relation to memory in general
- memory for reporting experiences of child sexual abuse
- factors associated with the nature of the event recalled
- factors associated with the circumstances of the victim
- factors associated with the circumstances of reporting child sexual abuse
- the different methods used in the research and their respective strengths and limitations.

We discuss a number of these issues in sections 4.3.3 and 4.3.4.

The guidance provides a useful summary of what is clearly a complex field of research. It may serve as a starting point for further work by policymakers and others in relation to guidance for the legal profession, judges and juries and in relation to jury directions. We discuss this in Chapter 31.

4.3.2 Misconceptions about memory

The Memory Research reported on a number of studies that have identified misconceptions that laypeople hold about memory. A recent research study identified two distinct memory belief systems:

- 'common sense' memory belief systems – which are common among police, members of the legal profession, judges, jury members and laypeople
- scientific memory belief systems – which is the understanding that psychologists have, based on empirical research and a scientific understanding of how memory works.[307]

The Memory Research stated that '[c]ommon-sense memory beliefs do not correspond with scientific knowledge about memory'.[308]

Misconceptions about memory can include:

- misconceptions about the nature of human memory and how it operates, leading to assumptions that memories will be complete, unchanging and 'photographic'[309]
- wrong assumptions about a connection between accuracy of a memory (on the one hand) and the amount of specific details recalled or the vividness of the memory (on the other hand)[310]
- misconceptions about the accuracy of people's memory generally, such that wrong assumptions may be made about:
    - a connection between accuracy of a memory and consistency of accounts given by a witness, where inconsistencies or gaps may be assumed to demonstrate inaccuracy in the witness's account as a whole[311]
    - a witness recalling additional information over time as they give further accounts of the event, where this may be regarded with suspicion or as indicating unreliability[312]
- misconceptions about the reliability of children's memories, which may result in wrong assumptions that either older children are more reliable than younger children or that older children have a greater propensity to lie about sexual abuse than younger children[313]
- misconceptions about the relationship between memory and the passage of time, which may result in wrong assumptions about how memory fades[314]
- misconceptions about whether adults can accurately recall early childhood events – which may overstate the capacity of many adults to recall such events – and whether memories of child sexual abuse can be repressed or recovered[315]
- misconceptions about the greater durability of memory for traumatic events[316]
- misconceptions about the display of emotion while giving evidence being an indicator of accuracy of the memory retrieved[317]
- misconceptions about children's ability to recall temporal details, such as exactly when an event occurred or how often it occurred.[318]

4.3.3 The nature of human memory

In order to understand the impact of child sexual abuse on memory, it is necessary to have some understanding of the processes and development of human memory generally.

Memory in general

The Memory Research identified three cognitive processes that will affect what complainants are able to remember and report when they give evidence:

- **Encoding:** This is the 'process whereby physical sensory information is converted into a representation suitable for storage in memory and subsequent retrieval'[319] (reference omitted). The only information that can be encoded is information that is noticed or attended to during an event – that is, actions, objects or features that are not noticed or attended to cannot be encoded into memory.[320] Shortly after an event, people experience a rapid decline in memory for the event, and many aspects of the event that were attended to during encoding will be forgotten soon after the event if they are not consolidated into long-term memory.[321]
- **Retention or consolidation:**

  > During consolidation, a memory that is resting in a sensitive state (in which it is susceptible to change) or in short-term memory is converted into a long-term memory, free from disruption. The conversion is influenced by an individual's understanding and knowledge at the time and the personal significance of the event.[322] [Reference omitted.]

  Memories can go through consolidation processes repeatedly – where less memorable details may be modified and weakened or strengthened – before they are reconsolidated as long-term memories.323
- **Retrieval or recall:** This process 'entails actively constructing information about the past that was encoded and can be remembered'.[324] Retrieval will be affected by the person's current knowledge and language abilities; and their emotions and motivations at the time of retrieval.[325]

  Rehearsing a memory by thinking or talking about it can help the memory to be retained and retrieved. People often remember more information each time they recall an event or experience.[326]

When a victim of crime makes a report to police and when they give evidence as a complainant, they will be retrieving or recalling information about the crime. What they can retrieve will depend upon what they encoded at the time of the crime, how that memory was consolidated and reconsolidated over time, and circumstances applying at the time of retrieval.

Memory is complex, even without focusing on particular complexities arising in relation to memory of child sexual abuse. The Memory Research identified that memory generally is dynamic, reconstructive and subject to many influences, so no memory is an exact replica of an experience or event. People shape their memories of events into cohesive and coherent personal narratives; memories change over time; and minor contradictions are expected. People tend to be especially poor at reconstructing the time frame of an event.[327]

Children's memories and memories for childhood events

While child sexual abuse will always involve events that happened when the victim was a child, a complainant of child sexual abuse may be a child or an adult at the time they report the abuse to police and at the time they give evidence about the abuse. This means that both children's memories and the memories of adults for events in childhood need to be considered.

Children's memories

The Memory Research concludes that the literature shows that children are competent at remembering from an early age.[328]

Their ability to tell a coherent narrative about an experience increases with age and varies depending on individual cognitive and social factors, both at the time of encoding and at the time of retrieval.[329]

Infants can remember events, but they may not report the event using words. The Memory Research suggests that younger children may:

- need longer to encode events than older children
- forget things more quickly
- store memories as images or movements and may not report the event using words.[330]

Research suggests that children as young as two years of age can provide behavioural re-enactments of one-off novel events, even if they are unable to provide a verbal account of the event.[331]

Professor Brett Hayes from the School of Psychology at the University of New South Wales told the roundtable:

> below two and a half, three years of age the vocabulary of kids is quite limited, so as they're encoding memory, they're not necessarily going to re-code that in terms of language as most of us do when we experience things, we think about it in terms of how we might describe it.
>
> That means that a lot of the early memories they're there, but they exist, essentially,in terms of images, of kinds of motor interactions with the rest of the world with the things that the kids are doing, which … makes it a little bit harder for those memories to be retrieved later on, they might be there but they're just harder to access …[332]

Dr Katie Seidler, a clinical and forensic psychologist, gave an example of a client who was sexually assaulted under the age of four and whose memories of the abuse were physical, in that she would describe the pressing weight on her chest, which was only years later understood as the perpetrator leaning on her.[333]

In relation to early childhood, the Memory Research states that:

> Young children encode fewer episodic details and process conceptual information more slowly than older children. Episodic memory is developed in childhood, with the ability to link events to a context forming the foundation for autobiographical memory. At the age of two, children can provide accounts of recent events in their lives, particularly when supported by adults who can structure their narratives. From then onwards, children's autobiographical narrative and independent memory strategy skills develop rapidly. After the age of three to four, memories of events increase and form the basis of autobiographical memories. By the age of six to seven, children can provide complete accounts of personal events, without adult narrative structuring.[334] [References omitted.]

There is less research available in relation to middle childhood, but the Memory Research suggests that the ability to link events to conventional timescales is likely to improve; and older children's accounts of sexual abuse are likely to include more perceptual and contextual information, including descriptions of thoughts or emotions, than younger children's accounts.[335]

Children may be particularly poor at providing temporal information about events, such as identifying days of the week or months of the year. Dr Penny van Bergen, a senior lecturer in educational psychology at Macquarie University, told the roundtable that it is important to know that children are not necessarily able to think in terms of these temporal details so that scantness of temporal detail is not wrongly taken to be a sign that the memory is inaccurate.[336] Dr van Bergen said:

> I think the risk would be for someone that didn't know that work [that is, research] to think that if you are unable to temporally date something or say exactly when it occurred, that must mean that it's not a good memory, but the research would suggest that that inability is actually related to conceptual development rather than the quality of the memory itself. So children may emerge first with times of the day that they can relate, in terms of context to things like around breakfast time or when they go to sport, rather than specific time periods that adults would use. That ability develops later.[337]

Professor Martine Powell from the School of Psychology at Deakin University also identified an issue with children's ability to use words relating to time, which may precede their ability to understand the meaning of the words. Professor Powell told the roundtable:

> the ability to use time words in a child can precede their understanding of these. So a very young child could say, 'It was 100 minutes' and then be surprised by a laugh, a reaction. It's an important point. If we force them to utilise adult terminology, it's going to create more errors. Oftentimes people describe time, or young children will describe time in terms of the feeling or the impact or events that occurred rather than the time.[338]

Professor Powell suggested that children may be able to define time more accurately in qualitative rather than quantitative terms. She gave examples of 'it was about as long as it takes me to walk home from school' or 'about as long as the Simpsons show' and suggested that such responses are likely to be more reliable than a quantitative response.[339]

In relation to adolescence, the Memory Research suggests that adolescents develop abilities to link and arrange autobiographical memories into a chronological story; they will provide more information about events than children but less than adults.[340]

Adults can influence how children and adolescents remember events – for example, by 'scaffolding' younger children to remember key features of events and by helping adolescents to reflect on the meaning of events.[341] If adults encourage children to rehearse or reminisce about their memories, those memories may be reinforced.[342] However, Dr van Bergen told the roundtable that adults are not necessarily reminiscing with children about events of child sexual abuse, so the children are not being scaffolded in relation to those events.[343] The Memory Research reports that, while rehearsal or reminiscence can increase the quantity and accuracy of details reported, memories can also be susceptible to changes during rehearsal or reminiscence.[344]

In relation to delay between encoding and retrieval, the Memory Research suggests that children under six years of age are likely to show rapid rates of forgetting.[345] However, studies have shown that children can provide accurate accounts of events after long periods of delay, although they are likely to provide less information over time.[346] The Memory Research suggests that, with delay, children were more likely to make intrusion errors – reporting actions or objects that were not part of the event – than memory distortions – incorrectly reporting core actions or objects involved in the event.[347]

The Memory Research suggests that children report fewer spontaneous false memories than adults, but, like adults, they are susceptible to misreporting if asked leading questions.[348]

In section 2.4.3 we noted that one of the myths and misconceptions that has been particularly prominent in child sexual abuse cases is that children are easily manipulated into making up stories of sexual abuse. In relation to the suggestibility of children, the Memory Research stated:

> A common misconception is that children, and especially younger children, are unreliable witnesses because they are highly susceptible to suggestion and false reporting. Many studies of children's suggestibility have not involved memory for real events children participated in. In some studies in which children's participation in a real-world event was the basis for memory, no age differences emerged in the number of memory errors reported. However, other studies found age differences in children's suggestibility.
>
> More recently, leading researchers on child suggestibility have endorsed the contemporary view that children's event memory is not significantly related to suggestibility. They have advised caution in associating the demographic characteristics of witnesses or victims, such as their age or gender, with suggestibility.

> In the past decade, a number of studies have confirmed what are called 'developmental reversal effects', showing that older adolescents and adults are more susceptible to erroneous or false memories than children … Compared to adolescents and young adults, young children have been found to produce fewer false memory reports, particularly for negative events. As a consequence, the view that children are more suggestible than adults is regarded by many contemporary memory researchers as 'outdated'.[349] [References omitted.]

Memories for events during childhood

As discussed above, very young children can remember events. Studies suggest that there is a period of their childhood for which most adults will not have memories of events that they experienced – known as 'childhood amnesia' or 'infantile amnesia'. Childhood or infantile amnesia generally affects the early years of life up to about four years of age, and autobiographical memories are relatively scarce and fragmented for adults for the period below five to seven years of age.[350] However, children and adolescents may be able to recall events that occurred before three and a half years of age.[351]

Associate Professor Karen Salmon from the School of Psychology at Victoria University of Wellington in New Zealand told the roundtable:

> The notion of infantile amnesia is a longstanding and quite strongly empirically supported finding that as adults it's very rare for us to remember experiences occurring under about the age of three and a half, approximately, and memories, in fact, up to five, six or even seven, from that period, still tend to be relatively less coherent or more fragmented than other memories. …
>
> There is relatively recent research looking at the fact that has found that children can remember experiences from before the age of three and a half. If a child, for example, was asked, or at the age of four or five, perhaps, was able to discuss or demonstrate even behaviourally and put into language an experience that happened before that time, that may be a reliable memory.[352]

Dr van Bergen told the roundtable that there are cultural and individual differences in relation to the age of infantile amnesia. Adults from some cultures can remember at a slightly younger age and adults from other cultures are more likely to remember at a slightly older age. She gave the example of Maori adults, who are able to remember at a slightly younger age than Pakeha or white New Zealanders. This is because of their oral tradition, which encourages sharing of memory stories. Another example was that of members of eastern collectivist cultures, for whom conversations about the past may have a less individualistic purpose – adults in those cultures may remember at slightly older ages.[353]

Adults' memories for child sexual abuse are likely to reflect their current understanding of the event on the basis of two factors identified by the Memory Research:

- people shape their memories of past events into cohesive and coherent personal narratives
- people usually unconsciously update and modify their memories, filling in memory gaps regarding details that were not encoded or that have been forgotten.[354]

Memories of child sexual abuse are subject to normal forgetting. Although most people who were sexually abused when they were children will have continuous memories of the abuse, it is possible to temporarily forget the experience of child sexual abuse.[355]

Research on false memories has examined the conditions under which adults will adopt a false autobiographical memory about an event they experienced in childhood. The research aimed to do this by seeking to implant false memories in research participants.[356] The studies suggest that most people – between 70 and 85 per cent of people – were not susceptible to false memories.[357]

Other research has examined whether people who report spontaneously recovered memories of child sexual abuse also report poor autobiographical memories more generally for non-abusive events. The Memory Research reported:

> The researchers concluded that people with recovered memories, in general, do not have more difficulty retrieving autobiographical memories than people with continuous memories of child sexual abuse. However, all sexually abused victims generally had more difficulty with their autobiographical memories compared to the control group who had never experienced sexual abuse. The authors speculated that sexual abuse victims may have deliberately avoided thinking about the abuse and that as a result, their autobiographical memories for non-traumatic events were reduced.[358] [References omitted.]

4.3.4 Memory and child sexual abuse

Some features of memory are particularly relevant in relation to reports of child sexual abuse. These are:

- autobiographical and event memory
- memory for repeated or recurring events
- the effect of trauma at the time of encoding
- the effect of mental disorders
- the impact of circumstances at retrieval.

Autobiographical and event memory

Reporting child sexual abuse involves recalling one or a series of personal life events using both autobiographical and event memory.[359]

In relation to autobiographical memories, the Memory Research stated:

> Autobiographical memories are recollections of one's personal history, comprised of personally experienced episodes from our past. These memories are fundamental to our sense of self, goals and motivations, and interpersonal relationships, and also allow us to make sense of the present and anticipate the future.[360] [References omitted.]

The Memory Research stated:

> A person's knowledge of their personal life is more stable and less error-prone than memory for one-off episodic events. In other words, according to the British Psychological Society Research Board: 'memories of the knowledge of a person's life are more likely to be accurate than memories for specific events'[361] and stronger than episodic recall for event locations, times and dates.[362]

Gaps in memory are normal, but central, distinctive and personally significant aspects of events are likely to be encoded and retained. Distinctiveness may involve novelty, stress, trauma or pain.[363] The Memory Research suggests that the subjective significance of events can make them more distinctive and enduring.[364]

Memory for repeated or recurring events

A child may suffer repeated occasions of sexual abuse in similar circumstances by the same perpetrator. We have heard many accounts of children being sexually abused in an institutional context on multiple occasions by single perpetrators.

The Memory Research suggests that repeated or recurring events are likely to be remembered differently from single events.[365] In relation to memory for recurring events generally – and not just for child sexual abuse – the Memory Research reported:

> For repeated or familiar events, people generally develop a schema or 'script' for the core or gist features of that type of experience in their long-term memory. These memory templates spare a person from detailed encoding of redundant information.[366]

The Memory Research identified that, for recurring events:

- once a schema exists, the specific details of every instance of a recurring event may not be encoded or consolidated and thus cannot be recalled
- people tend to report the gist of what happened in similar and recurring events but do not clearly remember details particular to one of the events
- people's memory for the gist of an event tends to be accurate and long-lasting, but all memories fade over time
- even reliable memory reports of core features of the recurring events will often be accompanied by minor inconsistencies related to the core features of the event.[367]

Studies with children who were exposed to repeated events have identified that even children as young as three to five years of age were able to provide accurate descriptions of the invariant features of the repeated events – that is, the features that occurred on each occasion.[368] The Memory Research reported that:

> As these types of features [the invariant features] produce stable memory traces, they are typically strengthened and less susceptible to suggestion and decay, compared to the features of one-off incidents. The invariant features become part of an individual's knowledge repertoire, script or schema or gist.[369] [References omitted.]

Studies have shown that, while children report accurately most of the invariant features that occurred in all events, they also commonly incorrectly attributed variable features to a particular event.[370] However, in relation to reporting details that did not occur in the events at all, they made fewer errors than children in the study who experienced only a single event.[371] The Memory Research concluded in relation to these studies:

> Overall, details about recurring events will often be remembered, but may be unrelated to particular moments in time, while recall of specific details about a particular recurring event in a series may not be possible or may be prone to error.[372]

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

> What we know from this research is that children are able to remember details from these particular events, but they often have trouble determining which particular event those memories are from. So they have difficulties with the temporal sense of where that information came from.
>
> If they experience more than, say, four events, they experience a number of events, even if we ask them to report on the frequency of those events, they often have difficulty. They can say they have done it once, that's really easy, but if they have done it more than once, then they often have trouble estimating how many times they participated in those events.

> Usually they'll say they have done it a number of times, but they can't actually tell you specifically what number that was.[373]

Professor Powell told the roundtable:

> With a repeated event, memory for detail that occurred consistently in the same way, there are very few errors, and that's because there's no real need to make a source judgment [that is, identify which particular event the detail relates to] because it's reflecting more a general knowledge of what usually occurred. Also, there are other reasons why these memories are more stable.
>
> A few of the things that affect the likelihood of error is that the more times you experience an event and the more times those experiences change from time to time, the harder it is to remember what happened at a particular time.[374]

Some studies also suggest that, while older children may be better able to distinguish between repeated events, after a period of delay, even of several weeks, they may be no better than younger children at distinguishing between repeated events.[375]

Different studies have investigated children's and adults' capacity to provide temporal information about a series of recurring events and to estimate the frequency and duration of recurring events.[376]

In relation to memory for the first and last events in a series of recurring events, the Memory Research reported that studies suggest that:

> Researchers have found that adults' memory for repeated events can be represented with a U shape. Adults have good memories of the first event (referred to as 'the primacy effect') and the most recent event (referred to as 'the recency effect') in a series of repeated events, although the latter is more susceptible to memory loss than the former.[377]

Research is more limited in relation to children's memory for first and last events.[378]

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

> Identifying the time and the contextual details around that [repeated events] is very different from remembering one episode of an event. In that, in a narrative form, you are going to have some aspects where there are going to be gaps and you are going to fill in those gaps. Adults do this as well.
>
> What they do, when they fill in the gaps, most people don't make an error of comission [sic – commission], which is something that never occurred. They fill in the gap, even if they are conscious of this or not, with a detail that was likely to have occurred. So it may have occurred, if it's an error, it's something that occurred in close proximity, or it was something that occurred frequently, or it was something that could logically have occurred.

> If it's proven that that didn't occur in a particular time, people often make the assumption that everything else must have been wrong, that [sic – but] this is just a normal memory process. It's very rare, we are seeing in research, for a detail to be provided that didn't happen at all. When you have a repeated event, you have a fairly good idea of the sorts of things that have happened and the content details can be quite stable, even though you might insert the wrong detail from another time into that occurrence.[379]

The effect of trauma at the time of encoding

Not all victims will experience instances of child sexual abuse as traumatic at the time of the abuse. The Memory Research stated:

> some victims may not have realised that they were being abused at the time of the abuse. The objective reality that abuse occurred does not imply that subjective trauma will inevitably be experienced, nor does it predict a uniform memory outcome for different victims.
>
> Moreover, events that adults presume will be traumatic for children are not necessarily so, though when children do subjectively experience events as traumatic, psychopathology may result. For example, a review of 45 studies on the responses of children to experiences of child sexual abuse revealed that a third of the victims did not experience any of the symptoms that were common among the other two-thirds of the victims, including fear, behavioural problems, sexualised behaviours, poor self-esteem and PTSD [post-traumatic stress disorder].[380] [References omitted.]

Some survivors have told us that they did not realise they were being sexually abused at the time, particularly when they were too young or naïve to understand sexual behaviour or when they had not been given any sex education. Other survivors have told us that they felt uncomfortable with the abuse but did not really understand what was happening. We have also heard accounts from survivors who, as a result of being groomed by the perpetrator, accepted the sexual abuse as normal and, for older children, consensual. Of course, we have also heard many accounts of abuse that was clearly very traumatic for the victim at the time of the abuse.

In Case Study 57, we examined the nature, cause and impact of child sexual abuse. We heard evidence from Dr Bruce Perry – a child and adolescent psychiatrist practising in the United States who has worked for more than 30 years with children, youth and adults affected by various forms of trauma, abuse and maltreatment.[381] Dr Perry gave examples of abuse experienced as traumatic and abuse that was not experienced as traumatic.[382]

In relation to the variability of survivors' responses to abuse, Dr Chris Lennings OAM told our memory roundtable:

> I think it is complicated because of the fact that for some children they don't necessarily recognise they're being abused at the time. Secondly, in some cases the abuse may even appear to be pleasurable to them, or the abuse may in fact be associated with threat or trauma, and so the variability in reactions to abuse is going to be a function of age, understanding of what's actually happening to them and the context in which the abuse is taking place.
>
> There is enormous variability and that has implications then for how the children remember and how they report and how they talk to others about that abuse over time after the events have occurred.[383]

The Memory Research reported that some studies have shown that stress or trauma can have a positive impact in the sense of strengthening memory, while other studies have shown that stress and trauma can have a negative impact in the sense of impairing memory.[384] The Memory Research identified that the impact of stress and trauma on memory will depend on the individual circumstances, reaction and resilience of the victim and concluded that the 'stressful or traumatic nature of an event is not a good predictor of memory, however, as some studies suggest that individual responses to high stress can reduce the quality and quantity of recall'.[385]

If the abuse is experienced as subjectively traumatic at the time of the abuse, the trauma may disrupt the process of encoding memory. This may lead to sparsely encoded information and fragmentary memories about the event. The Memory Research identified that sparsely encoded information will not be recalled as well as more densely encoded information, and memory of an event that was experienced as traumatic is likely to be more fragmentary.[386]

In the public hearing in Case Study 57, in answer to a question about traumatic memory and the criminal justice system, Dr Perry discussed fragmentary memory. He told the public hearing:

> Traumatic memory is an area that has been difficult for the legal system and actually the mental health system to understand well. The nature of a traumatic experience is such that while you are in the midst of a traumatic experience, there will be moments when your cortex, the part of your brain that creates linear narrative memory, that will be accessible and then there will be moments in that experience when that part of your brain is shut down, and then there will be moments when it will be reopened, and so what happens is when you have a traumatic experience, you tend to have linear narrative memory fragments, with gaps, but the fragments that are there are accurate and generally you are very able to tell what happened, but you may get some linear narrative things wrong, like you say, the specific day or details that you would remember if you'd watched a videotape of that event. You are going to remember something very differently by watching the event happen. You will create linear narrative memory of this terrible thing happening.

> If you are the person that this thing is happening to, because of the nature of the way your brain is trying to cope with the experience, you will shut down your cortex, you will dissociate or disengage for a while, then you will re-engage and disengage, and that leads to this very confusing linear narrative memory, that made it easy – at least in the US – in the past for people to just dismiss or impeach children who may have disclosed about things where they couldn't give details. Over time we've learned more about this and we've learned that in general the recall of traumatic experiences will have – the core elements tend to be very, very accurately recalled, but there are other parts of traumatic memory that get filled in. Your brain hits a vacuum and so if you have sort of a shard of memory here and then a gap and then a shard of memory here, the more times you tell that story, your brain will fill in and create space; something that happened between this and this, that is plausible, but it may not be accurate.[387]

Experiencing the abuse as traumatic at the time may also affect the victim's perception of time in terms of the duration of acts during the event and the duration of the event. Professor Richard Bryant AC from the School of Psychology at the University of New South Wales told the roundtable that there has not been much research in relation to this issue with children, but research with adults suggests that experiencing greater arousal – in the sense of fear – at the time will affect the person's perception of time. He said:

> There are different models, but essentially if it's aversive, what I'm going through, to put it simply, the more I'm waiting for the bad thing to finish, that can impact on how long I think it's happening. So it certainly can moderate how we estimate time.[388]

Professor Bryant referred to a number of different models that might explain this effect and concluded that decision-makers who are assessing a person's judgment of time 'should take into account the fact that we do know that the threat a person is experiencing and the psychological state of that person at that time will impact on their perception of time quite markedly, and also the memory thereafter'.[389]

Professor Neil Brewer from the School of Psychology at Flinders University noted that, even in eyewitness research with adults, the variability in time estimates are 'staggeringly big', in terms of both overestimations and underestimations, such that you would conclude that adults' estimation of the time of events is really unreliable information generally.[390]

In Case Study 57, Dr Perry told the public hearing that 'the impacts of sexual abuse during development can be incredibly heterogeneous'.[391] In answer to a question about child sexual abuse causing physical changes in the brain, Dr Perry said:

> Again, one of the big issues … is everybody's experience is different. You know, the specific nature of the abuse, who was the abuser, what was the pattern of the abuse, but in general, if you can create a sample of individuals who have comparable types of sexual abuse and then look at the physiological make-up of their body and their brain,it will be different than people who have not had that kind of abuse, and it is an emerging area, but there is no doubt everybody who looks at this from any angle, basically, finds that there are physical and physiological changes that take place in the body and brain of people who have had histories of sexual abuse.[392]

The Memory Research referred to studies examining brain images of victims of abuse. It stated:

> Research that used technologies to track changes in neural structure flowing from experiences of abuse found that the age at the onset of abuse, not the severity of the abuse *per se*, was associated with severe cortical thinning in brain areas associated with autobiographical memory. A review of this research concluded that a neuroanatomical basis exists for the poor recollection of specific features of child sexual abuse events. More extreme neuroanatomical changes have been noted in cases of persistent child sexual abuse. Evidence of a physiological basis for the absence of memories about specific details also comes from fMRI [functional magnetic resonance imaging] studies involving adult and child victims; these studies found that cortical adaptations in the brain prevent a child from engaging in relevant sensory processing.[393] [References omitted.]

The effect of mental disorders

Mental disorders include abnormal psychological symptoms or mental illness – for example, post-traumatic stress disorder and acute stress disorder.[394]

Persons who develop mental illness may experience impaired memory in relation to both their autobiographical memory and their event memory. The Memory Research reported that '[t]rauma that results in mental disorders, whether caused by child sexual abuse or some other source, can impair autobiographical and event memory'.[395] However, the Memory Research also reported that:

> In the absence of mental disorders, children and adults generally can accurately recall traumatic and negatively stressful personal life events. However, ASD [acute stress disorder] or PTSD [post-traumatic stress disorder] following child sexual abuse can cause deficits in autobiographical memory, depending on the severity of the symptoms [396] [Reference omitted.]

Mental disorders may inhibit the consolidation of emotional or traumatic memories.[397] However, the impact of mental disorders on individuals can vary. For example, the Memory Research reported the following memory impairments:

- autobiographical memory dysfunction, such as overly general and short memories, and poor event memory retrieval in adolescents who experienced child sexual abuse
- more memory fragmentation and superficial recall for personal life events in people who adopt avoidant coping styles after subjectively traumatic experiences.[398]

However, the Memory Research also reported memory enhancements:

> Some studies found that adolescents and adults who had PTSD [post-traumatic stress disorder] symptoms and a history of child sexual abuse displayed heightened memory specificity. This again highlights the need for case-by-case and individual-level assessments of complainants who have been diagnosed with trauma conditions after experiencing abuse.[399] [Reference omitted.]

The Memory Research discussed the impact of 'betrayal trauma' on memory. Betrayal trauma is the response to child sexual abuse perpetrated by family, friends or authority figures such as members of the clergy, teachers and coaches. Betrayal trauma theory suggests that abuse perpetrated within these relationships is more harmful because of the violation of trust within the relationship. It suggests that betrayal trauma may require the victim to be 'blind' to the betrayal.[400]

The Memory Research stated:

> Researchers report that betrayal trauma leads to higher rates of PTSD [post-traumatic stress disorder], dissociation, anxiety, depression and borderline personality disorder compared to interpersonal trauma perpetrated by strangers.[401] [Reference omitted.]

Victims of child sexual abuse who adopt avoidant or distance coping strategies during the period in which they retain and consolidate memory of the abuse may have less specific autobiographical memory in adolescence and as adults.[402] The Memory Research stated:

> There are a number of understandable personal motives for adopting avoidant coping styles, including protecting oneself from traumatic intrusive memories by deliberately 'crowding out' painful negative memories and focusing instead on more positive ones. This phenomenon is relevant to memories of child sexual abuse, especially in cases where the perpetrator is a close family member – such as a parent or relative or family friend – and/or the abuse involves the betrayal of trust and the misuse of a position of authority.[403]

Professor Bryant told our roundtable that betrayal trauma may not result in different effects on memory than trauma per se and that the research suggests that what matters the most is when the trauma occurs and for long it occurs. He said:

> Where the field is at the moment, it's about when does the abuse occur and for how long. What we are now learning is that if abuse occurs before certain ages of neural development, it can have life-long, long-term impacts on one's brain and that impacts on my emotional state, my cognitive state, on how I can remember things and how I deal with that information.
>
> That's really a critical difference in terms of the post trauma psychopathology, the duration and onset of it, as distinct from was it in an institution or not in an institution, because a lot of the common factors occur in both.[404]

The impact of circumstances at retrieval

Mental disorders can also affect memory at the time of retrieval – for example, when making a report to police. The Memory Research reported:

> PTSD research has also shown that the presence of additional and acute stress during periods of retrieval plays a central role in reactivating intrusive memories that block individuals' ability to deliberately recall the desired aspects of autobiographical memory in free-recall tasks. …
>
> People diagnosed with stress disorders and betrayal anger often experience negative intrusive memories that may block access to memories of personal life events and verbal memory, even when asked free-recall questions. Some studies have shown that the presence of anger, which often results from perceived betrayal within a trauma narrative, can decrease the specificity of contextual autobiographical memory detail retrieved. One explanation was that rumination behaviours prevent cognitive access to memory detail.[405] [References omitted.]

Even without a mental disorder, stress experienced at the time of retrieval can affect the ability to retrieve memories. The Memory Research concluded that '[e]motional distress, shame and fear experienced at the time of an interview or in court can overwhelm a witness and impair their ability to retrieve relevant memories'.[406]

We discussed the effect of trauma at the time of encoding above. However, even if the victim did not subjectively experience the abuse as traumatic at the time of the abuse, the victim can later come to understand it as traumatic and this may affect how they retrieve the memory. Dr Greg Dear, senior lecturer in the School of Arts and Humanities at Edith Cowan University, told the roundtable that people may put a new meaning or interpretation on memories at some point after the memory is encoded.[407] Dr Suzanne Blackwell from the School of Psychology at the University of Auckland in New Zealand told the roundtable that a memory that was not necessarily traumatic at the time of encoding may become associated with a lot of emotional trauma when it is reported.[408]

The Memory Research identified a number of ways in which police interviewing methods can affect a person's ability to retrieve an accurate memory of child sexual abuse:

- 'In general, using open-ended questions and narratives, and avoiding closed questions produce more complete and accurate accounts of the information recalled'.[409]
- By conducting supplementary interviews with children, they can be assisted to give more accurate and complete memory reports, including by helping them to rehearse and remember original details. Also, giving children reminder cues can enable them to remember additional information, provided that appropriate questioning techniques are used.[410]
- In relation to recurring events:

  > In one study, children who were asked to describe what happened generally before they were asked about a specific occurrence within a series of recurring events provided more information and were better able to distinguish one event from another than children who were asked the questions in the reverse order.[411] [Reference omitted.]

In relation to how children are interviewed, Professor Powell told the roundtable that the onus should be on the interviewer to avoid question types that make children more prone to error. She said:

> if you're looking at accuracy, which is paramount in these types of interviews, individual differences due to vulnerabilities, cognitive reasons, language reasons, have negligible differences when asked open-ended questions. …
>
> When you are asked more narrowly focused questions or questions that focus on specific details, error rates are compounded, the individual differences are compounded in response to those questions. I think while there is a lot of discussion around limitations of various individuals, I think there should be more onus put on the interviewer.[412]

Associate Professor Kay Bussey from the Department of Psychology at Macquarie University suggested that, particularly with young children of four or five years of age, open-ended questions may not provide sufficient information or scaffolding to help the child to structure their answer.[413]

Professor Susan Hayes AO from Sydney Medical School at the University of Sydney told the roundtable that different interviewing techniques and question types might be needed when interviewing children with development disabilities, particularly if they have very limited language or are non-verbal or use a communication board, and that they may be unlikely to be able to present a narrative account.[414] However, Professor Powell and Dr Deidre Brown, senior lecturer in the School of Psychology at Victoria University of Wellington in New Zealand, referred to research that has found that it is only a very small group of people for whom open-ended questions will not be useful in eliciting detail.[415]

The duration of an interview may also be relevant. Professor Bryant told our roundtable that survivors with psychopathology may have more difficulty retrieving specific details of abuse. He said:

> it's not that they can't do it, they are just slower at doing it. They don't do it as spontaneously. If you give them more time or you give them prompts, they often can do it. I think we just have to keep that in mind. Often it's a simplistic notion relative to healthy people they do have that relative deficit, but it's not that they can't do it.
>
> …
>
> In terms of the fragmentation, we know that in most cases of trauma, that is how that memory will get encoded, because of the very high arousal. It won't be in a neat narrative. We'll have a bit of this, a bit of this and a bit of this. The greater the arousal, the more likely it's going to get encoded that way.
>
> When I put it together, repeatedly over time, it tends to get created into a coherent narrative.[416]

The Memory Research reported that the issue of multiple interviews is controversial.[417] However, in relation to autobiographical memory generally, it also reported that '[r]epeatedly recalling the same information tends to increase the amount remembered with each attempt, an effect known as hypermnesia' (reference omitted).[418]

The Memory Research also identified that questioning in court can affect memory at retrieval. As noted above, emotional distress, shame and fear can impair memory retrieval.[419] The Memory Research stated '[c]ross-examination style questions that do not include free-recall prompts tend to impair the memory reports of victims at the time of retrieval, particularly of pre-schoolers, primary school children and distressed witnesses'.[420]

We also recognise that a victim or survivor may not give the fullest possible account of abuse at the time they report for reasons unrelated to memory – that is, they may not give an account of all that they remember. For example, Mr Dale Tolliday OAM, clinical advisor at New Street Adolescent Services in the Children's Hospital at Westmead, told the memory roundtable about circumstances that may cause children not to give a full account when they first report abuse, particularly if the child 'is not secure and able to be safe in telling the story'.[421]

Dr Lennings also referred to the child anticipating and internalising the possible consequence of disclosure, which may be negative for others around the child, including the perpetrator.[422] Dr Lennings said:

> there's a difference between memory performance and reporting performance. What may take place in terms of relationship stuff, and particularly the sense of guilt and shame that may impact on the person, may not actually impact so much upon what they remember as what they're prepared to report.[423]

4.4 Implications for the criminal justice system

As we noted in section 4.1, understanding how human memory works generally, and how memory might be affected for child and adult complainants of child sexual abuse, is likely to be important in informing a number of issues that are important to the criminal justice system's response to child sexual abuse.

Some of these issues should be within the control of participants in the criminal justice system. For example:

- police can be trained to interview child and adult complainants of child sexual abuse in a way that is most likely to assist them to provide more accurate and complete accounts of the abuse – we discuss this in Chapter 8
- persistent child sexual abuse offences can be framed to take account of what particulars child and adult complainants of child sexual abuse can reasonably be expected to provide about the alleged abuse – we discuss this in Chapter 11
- legal practitioners can be assisted to take into account up-to-date research relevant to memory for child sexual abuse in relation to questioning techniques that assist complainants to retrieve reliable memories and questioning techniques that impair memory retrieval – we discuss this in chapters 30 and 31
- fact-finders, whether magistrates, judges or juries, can be assisted to take into account up-to-date research relevant to memory for child sexual abuse, such as whether inconsistencies in accounts given by a complainant over time are a good indicator of unreliability or likely features of memory for recurrent events – we discuss this in Chapter 31.

In commissioning the Memory Research, we considered that it would be useful to make available a set of guidelines comparable to the British Guidelines but reflecting the position in Australia and with a specific focus on complainants of child sexual abuse rather than on memory in general. The Memory Research could help to inform the development of such guidelines.

The Memory Research is intended to contribute to the development of guidance for fact-finders and the legal profession, whether through bench books, judicial directions, expert evidence or legal education.

However, it remains the case that a person must not be convicted of a crime unless the crime is proved beyond reasonable doubt. Understanding why child sexual abuse may be remembered in particular ways or why memory of child sexual abuse might be impaired does not detract from the requirements of the criminal justice system for proof of the charged offence beyond reasonable doubt. As discussed in Chapter 2, in prosecutions for child sexual abuse offences, often the only direct evidence of the alleged abuse will be the complainant's evidence, which will be the product of the memory the complainant has been able to retrieve.

PART II
POLICE RESPONSES

5 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) and to the Consultation Paper 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 charges are laid and whether matters are referred to the prosecution agency for possible prosecution.

In our private sessions, public hearings and submissions to Issues Paper 8 and the Consultation Paper, 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 Jonathan Lord, also examined the police investigation of 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, 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 this part, we discuss the following aspects of police responses:

- In Chapter 6, we discuss police responses to institutional child sexual abuse in the past, particularly from the 1950s onwards. We provide an overview of what we have heard in public hearings, private sessions and submissions and more detailed examples from our case studies.
- In Chapter 7, we discuss current police responses to child sexual abuse, including child sexual abuse in an institutional context, and we make a recommendation in relation to regular reporting of data. We focus on:
    - what child sexual abuse matters are currently being reported to police and how police are dealing with these matters

- current features of police responses, including responses to historical and current child sexual abuse and specialist and multidisciplinary responses, and how police responses are structured in each jurisdiction.

- In Chapter 8, we discuss and make recommendations in relation to the following topics. We consider these topics 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
  - police investigations
  - police investigative interviewing
  - police charging decisions
  - police responses to reports of historical child sexual abuse
  - police responses to reports of child sexual abuse made by people with disability.
- In Chapter 9, we discuss and make recommendations in relation to the following two issues, which arise particularly in relation to child sexual abuse in an institutional context:
  - police communication and advice to institutions, children, families and the community
  - blind reporting to police.

6 Police responses since the 1950s

6.1 Introduction

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

In the Consultation Paper, we referred to the accounts we have heard from survivors in private sessions 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.

We have also heard accounts in private sessions, case studies and personal submissions in response to Issues Paper 8 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.

It is clear that police have responded to allegations of child sexual abuse for many decades. One of our case studies, Case Study 11 in relation to the Congregation of Christian Brothers in Western Australia, revealed evidence of a conviction for child sexual abuse offences as early as 1919.[424] We reported:

> The first reference to one of the four [Christian Brothers] institutions appears in a letter from the Under Secretary of the Colonial Secretary's Office dated 21 February 1919. It refers to 'grave allegations of misconduct' that had been made against a teacher at [St Vincent's Orphanage] Clontarf. Investigations revealed that the misconduct extended over a period of at least 18 months and it was reported that 'a number of innocent boys have been corrupted'. The teacher involved, Brother Carmody, was arrested and charged for indecent dealings with minors. He pleaded guilty to the charges and received a jail sentence of three years.[425] [References omitted.]

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 police, 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.

While the focus of our policy work in relation to police responses to institutional child sexual abuse must be on understanding the contemporary response of police and identifying how it can be made more effective, in the Consultation Paper we indicated that we would give a fuller account of the experiences of survivors with police responses in the past as well as more recent improvements.[426]

We focus on experiences that have been the subject of evidence in our case studies because more detail of them is publicly available. We also take account of what we have heard in private sessions and personal submissions in response to Issue Paper 8.

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.

However, as we stated in Chapter 2, 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. This remains the case even with improved police responses.

We note media reports that the Australian and New Zealand Police Commissioners Forum is considering whether Australian police agencies should make a formal apology to victims and survivors of institutional child sexual abuse who did not receive appropriate responses from police when they reported or attempted to report child sexual abuse.[427] The experiences of police responses that we outline in this chapter may help to inform the Forum's consideration of this issue.

6.2 Police responses in the 1950s

6.2.1 Overview

Many survivors of institutional child sexual abuse that was committed before or during the 1950s told us of their inability to disclose the abuse, either within the institution or to authorities, including police. Some told us that they did disclose abuse within the institutions and were punished or disbelieved or both, so they did not report to anyone else, including police.

However, we heard evidence in some of our case studies from survivors of their experiences of reporting abuse to police in the 1950s, and we also heard accounts in private sessions. Some accounts suggest that, while police did not necessarily disbelieve the victims or survivors, they did not take steps to investigate the allegations. Other accounts suggest that police responded with disbelief and violence.

Each of the four examples from case studies outlined in section 6.2.2 relate to interactions with police while the victim or survivor was still a child and in most cases still in the institution. All four institutions were residential institutions. Police responses to children in these institutions in the 1950s are likely to reflect broader social attitudes in favour of these institutions and those who ran them and against the children living in them.

In our *Redress and civil litigation report*, we stated that a picture was emerging for us that there was a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused.[428] The societal norm that 'children should be seen but not heard', which prevailed for unknown decades, provided the opportunity for some adults to abuse the power that their relationship with the child gave them. When the required silence of the child was accompanied by an unquestioning belief by adults in the integrity of the carer for the child – whether they were a youth worker, teacher, residential supervisor or cleric – the power imbalance was entrenched to the inevitable detriment of many children.[429]

It is clear to us that the police were no less affected by these attitudes than other members of society, and that these attitudes were likely to have affected police responses from before the 1950s through to at least the 1980s. In some cases, those attitudes continued into later decades.

In our final report we will examine survivors' experiences of child sexual abuse in children's residential institutions. We will also examine common institutional failures to identify, report and respond to child sexual abuse and outline the implications for contemporary residential institutional contexts.

Dr Antonia Quadara wrote a report for the Royal Commission, *Framework for historical influences on institutional child sexual abuse: 1950–2014,*[430] in which she created a framework to analyse and present information about historical influences on child sexual abuse for the period 1950 to 2014. She considered a number of elements, including socio-cultural factors and criminal justice policies and laws.

One of the socio-cultural factors Dr Quadara noted in the 1950s was that '[a]ttitudes towards children and their social position was that they be "seen, but not heard". Physical discipline and corporal punishment of children were seen as having a moral and educative role'.[431]

In relation to attitudes in criminal justice in the 1950s – and 1960s[432] – Dr Quadara stated:

> More broadly, the literature suggests a reluctant legal system reflected in, for example, the judicial wisdom that children have a tendency to lie. Police who became aware of sexual abuse allegations have been described as either unwilling to follow up reports made by children because of the political and reputational repercussions for organisations that in the 1950s were regarded as the community's social and moral conscience,or as disbelieving of the allegation or the harm it caused.[433]

6.2.2 Examples from case studies

In Case Study 3, in relation to the response of the Anglican Diocese of Grafton to claims of child sexual abuse at the North Coast Children's Home in Lismore, New South Wales,[434] we heard evidence from Mr Richard 'Tommy' Campion, who lived at the home between 1949 and 1962.[435] Mr Campion gave evidence that he had made general complaints about physical and sexual abuse to police, school teachers and various friends, but 'The attitude was "ho-hum". You'll be right. There's no bother'.[436] Mr Campion gave the following evidence in relation to particular interactions with police:

> I recall one particular time when I'd run away from the Home with some girls, and the police picked us up and were taking us back to the Home. They asked us why we'd run away. We told them 'Because of the beltings in the Home. And because we don't like the staff in the Home, the Matron. We are fearful of them.'
>
> When the police delivered us back to the Home, they said to the people running the place, 'They're right. Just leave them alone. They've learned their lesson.' I understood this to mean 'don't touch them'.[437]

Mr Campion formally reported the abuse to police in August 2007.[438]

In Case Study 7, in relation to the experiences of women who were sexually abused as children at the Parramatta Training School for Girls (Parramatta Girls) and the Institution for Girls in Hay (Hay Institution) in New South Wales,[439] we heard evidence from OA, who was 13 years old when she was sent to Parramatta Girls in around 1952.[440] She reported the abuse to police when she was 16 years old. OA said that that the officers were sympathetic but ultimately said 'We can't do anything. It's called a hot potato. It's a government institution and you have been made a ward of the state and they are supposed to be the ones [who look after you]'. The police then took her back to Parramatta Girls.[441]

OA gave evidence that she went to the police again after she had left Parramatta Girls when she was in her late teens. She said they laughed and said, 'Oh, yes, we have heard about him [the alleged perpetrator]. He's working in Adelaide now'. She said they did nothing.[442]

In Case Study 26, in relation to the responses of the Sisters of Mercy, the Catholic Diocese of Rockhampton and the Queensland Government to sexual abuse at St Joseph's Orphanage, Neerkol, in Queensland,[443] we heard evidence from Mr Thomas Murnane, who was placed in Neerkol in 1950 at the age of 10 and left in 1954, aged 14.[444] He gave evidence that he ran away twice and that each time he tried to disclose to Kabra police that he was being physically abused, but he was not believed. He gave evidence that, in response to disclosing the abuse, police told him that the nuns would not do that to him and that they were nice people.[445] He said he was also not believed by his father. Mr Murnane said that his response to not being believed was to feel helpless, and he eventually gave up trying to stop the abuse from happening to him.[446]

In Case Study 28 in relation to the Catholic Church authorities in Ballarat, 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.[447]

6.3 Police responses in the 1960s

6.3.1 Overview

Many survivors of institutional child sexual abuse that was committed during the 1960s told us of similar barriers to disclosing the abuse – either within the institution or to authorities, including police – that they had experienced in earlier periods.

We have heard accounts of children reporting abuse they suffered at the time and being either disbelieved by police or being told that the word of a child would not be believed. In Chapter 31, we discuss the attitude that the law has taken in the past to the evidence of children and the attitude it now takes. There is no doubt that the law's understanding and acceptance of children's ability to give reliable evidence has improved significantly.

We have also heard accounts of parents reporting the abuse of their children but police taking no action, apparently because of the status or profession of the alleged perpetrator. For example, we have heard that allegations relating to priests or medical practitioners were not investigated.

In some of our case studies we heard evidence from survivors and police about police responses in the 1960s. In Case Study 30, we heard evidence from Victoria Police Assistant Commissioner Stephen Fontana about the lack of understanding that police had in the 1960s about the impact of child sexual abuse, which we quote in section 6.3.2. This lack of understanding appears to have been widespread, not only among police but also in the broader community. However, the example of the Retta Dixon Home in Darwin, which we examined in Case Study 17, shows that some complaints were taken seriously and in some cases charges were laid.

6.3.2 Examples from case studies

Ms Margaret Campbell (referred to as AYL during the public hearing) was another survivor of sexual abuse at St Joseph's Orphanage, Neerkol, in Queensland, which we considered in Case Study 26.[448] Ms Campbell was placed at Neerkol with her six siblings in 1961, when she was 10 years old.[449] After disclosing her abuse to her mother in 1963, she was taken to the police station, where she reported the abuse. Ms Campbell gave evidence she was told by a police office to 'put it behind her'.[450]

In Case Study 30, we examined the response of the Turana Youth Training Centre, Winlaton Youth Training Centre, Baltara Youth Training Centre, the Victoria Police and the Department of Health and Human Services Victoria (and its relevant predecessors) to allegations of child sexual abuse.[451] Three survivors gave evidence about their interactions with police in the 1960s. We also heard evidence from Victoria Police Assistant Commissioner Fontana about one of the police responses in the 1960s and about police attitudes towards victims at the time he started policing in 1975.

Mr Norman Latham gave evidence that he was raped nine times by a senior officer at Turana, Mr Douglas Wilkie, and 10 times by another senior officer, Mr Eric Horne. Mr Latham gave evidence that the abuse stopped once he left Turana in 1963 at the age of 16. Mr Wilkie was represented at the public hearing, and he denied the allegations of abuse made against him.[452]

Mr Latham gave evidence that he absconded from Turana twice after he was repeatedly raped by Mr Wilkie and Mr Horne. He said that the first time he ran away he was picked up by police and returned to Turana. The police did not ask him why he had absconded.

Mr Latham gave evidence that the second time he ran away he was again picked up by police. However, on this occasion, he was interviewed by a detective. The detective told him that he had 'better things to do than rounding up absconders from Turana'. Mr Latham responded

by telling the detective, 'Well if you stop the mongrels Wilkie and Horne from raping us inside, we wouldn't have to abscond'.[453] Mr Latham said that, in response, the detective hit him on the side of the face with a Bakelite phone. Mr Latham hit the detective back. He was then handcuffed to his chair and told that he would be charged with assault. No investigation of his report occurred and Mr Latham was returned to Turana.[454]

Mr Latham also gave evidence of an occasion when, after reporting the abuse to police, he was returned to Turana. That night, Mr Horne abused Mr Latham and told him words to the effect of 'I told you not to say anything'. Mr Latham took this to mean that it was not worth reporting the sexual abuse to the police or to anyone else and that no-one would believe him.[455]

On one occasion Mr Latham 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.[456]

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 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.[457]

Mr Joseph Marijancevic also gave evidence in Case Study 30. He was placed in Turana briefly in 1961, when he was 11 years old, before being transferred to various boys' homes. In 1965, when he was 15 years old, Mr Marijancevic was transferred back to Turana. Mr Marijancevic gave evidence that, when he was 15, he was abused by two officers at Turana.[458] Mr Marijancevic absconded from Turana to escape further punishment and abuse. He told us that on one occasion he was picked up by police and asked why he was running away. He responded 'because they hurt me'. He said that the police officer 'bashed' him and returned him to Turana.[459]

BDC was taken to Winlaton in 1963, when she was 14 years old. BDC told us that she was sexually abused by three older residents at Winlaton and that it was part of the culture of Winlaton for girls to abuse each other.[460] BDC told us that she ran away from Winlaton many times and that each time she escaped she was picked up by the police, charged and returned to the care of the department. She told us that the police never asked why she absconded.[461]

In Case Study 11, we examined the experiences of 11 men who lived at four residential institutions run by the Congregation of Christian Brothers (Christian Brothers) in Western Australia. The institutions were Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School.[462]

Mr Raphael Ellul was at Tardun from 1960 to 1966, from the ages of 10 to 16. He was sexually abused by Brother Synan and by other boys at Tardun.[463] Mr Ellul tried to run away from Tardun to escape the abuse, but he was picked up by a motorist and taken to Mullewa Police Station. When he told the police he was being abused by Brother Synan, he was slapped in the face by the police officer, and told 'don't tell lies about these good Christian men'.[464]

Mr Edward Delaney gave evidence that he was first abused at Bindoon at the age of 12 by Father William. He was then abused by Brother Parker when he was 13, in the early 1960s.[465] Mr Delaney gave evidence that he first reported the abuse to police at the age of 18. The police told him that if he continued talking to the police then he would be charged, as they did not believe him.[466] Mr Delaney also gave evidence that he had recently contacted Victoria Police and had given a statement in relation to the abuse.[467]

In Case Study 33, we examined the response of The Salvation Army (Southern Territory) to allegations of child sexual abuse at children's homes that it operated, including Box Hill Boys' Home in Victoria.[468] Mr David Reece was 61 years old at the time of the hearing. At the age of nine he was placed in a juvenile detention centre and was made a ward of the state. He was then transferred with his brothers to Box Hill. At Box Hill, Mr Reece was sexually abused by Salvation Army Sergeant Willemson.[469] Mr Reece also gave evidence that Sergeant David Ferguson would sit in the showers and watch him and the other boys, and that he was sexually abused by Mr Morton at Box Hill.

Mr Reece said that he tried to report his abuse at the time within the Salvation Army. He gave evidence that the man in charge of the home, Major Charles Hewitson, did not listen to him and just told him to go back to his dormitory. When he reported the abuse to Captain Frank Swift, he was punched in the head. Mr Reece also told us he did not trust Major Hewitson or Captain Swift. He stopped reporting to them because they would tell other officers, who would in turn beat him, telling him that he should not have opened his mouth. His duties were also increased.[470] As no-one within Box Hill took action in response to allegations of abuse, Mr Reece was of the view that the police would respond to any allegations in the same way.[471] Mr Reece said that he has recently reported his abuse to police, and he understood that they were investigating the offenders.[472]

In Case Study 17 we examined the experiences of residents of the Retta Dixon Home in Darwin in the Northern Territory.[473] In 1966 a house parent, Reginald Powell, was prosecuted and pleaded guilty to sexual offences against children at the home.[474] He was convicted of three counts of indecent assault on children at the home that occurred between 1 January 1966 and 23 February 1966. Mr Mervyn Pattemore was the superintendent of the home at the time.

He told police that two of the children had told him Powell had played with their penis while they were in bed at the home. Powell made admissions to the police. He pleaded guilty in the Supreme Court in Darwin. Powell was released on 23 May 1966 after entering into a recognisance for three years.[475]

6.4 Police responses in the 1970s

6.4.1 Overview

Many survivors of institutional child sexual abuse that was committed during the 1970s told us of similar barriers to disclosing the abuse – either within the institution or to authorities, including police – that they had experienced in earlier periods. However, we also heard accounts that suggested more victims were attempting to disclose, and in some cases to report to police, at that time.

We heard more accounts of children reporting abuse they suffered at the time and being disbelieved by police, and there is considerable evidence of continuing attitudes of disbelief towards children and of accepting the word of adults over that of children. This is supported by the evidence given by Victoria Police Assistant Commissioner Fontana in Case Study 30 about police attitudes towards victims when he started policing in 1975, including disbelief, particularly in relation to children who were viewed as 'troublemakers'. We quote this evidence in section 6.4.2.

However, there are examples where police took complaints seriously and pursued alleged perpetrators. The Retta Dixon Home in Darwin, which we examined in Case Study 17, again provides an example: an alleged perpetrator was charged in the 1970s and committed for trial on one count, although the prosecution was discontinued before trial. Another example is the Hutchins School in Tasmania, which we examined in Case Study 20. In that case, police investigated the complaint and were close to arresting the alleged perpetrator, who had made admissions in relation to the abuse, when he left Tasmania.

6.4.2 Examples from case studies

Another survivor of abuse at the North Coast Children's Home, Lismore, in New South Wales, gave evidence in Case Study 3 about his experience of reporting to police in the 1970s. CB said:

> I recall reporting the abuse to local police in or around 1977. I ran away with another boy from the Home, and we went to the police. My recollection is that the police didn't do anything about what we'd said, they just took us back to the Home. I was severely beaten after that.[476]

Following the successful prosecution of Reginald Powell in the 1960s, there was another police and prosecution response to abuse at the Retta Dixon Home in Darwin in the 1970s. In Case Study 17, in addition to examining the experiences of residents of the Retta Dixon Home in Darwin in the Northern Territory, we also examined the response of the Northern Territory Police and the Office of the Director of Public Prosecutions in 1975 and 2002 to allegations raised by residents of the home against Mr Donald Henderson.[477] Mr Henderson was never convicted of any offence alleged to have occurred against former residents of the Retta Dixon Home.[478]

In 1975, older boys related to children at the home told a house parent, AKR, that Mr Henderson was sexually abusing children.[479] The allegations were reported to police in September 1975. Mr Henderson was charged with seven sexual offences against five children living at the home. Mr Henderson resigned from the home on or about 12 September 1975. Committal proceedings took place on 1 and 2 December 1975. The magistrate decided that the charges were to be heard separately. The prosecution proceeded on one count involving one child, upon which Mr Henderson was committed for trial. The other charges were dismissed. The charge that was committed for trial was later discontinued by the prosecution on 3 February 1976.[480]

AJW was placed at the Retta Dixon Home when she was two years old and left the home at age 12 in 1980, when it closed down. She gave evidence that she was subjected to physical beatings at the Retta Dixon Home, but she did not recall being the victim of sexual abuse until she encountered a document while she was in hospital as an adult. The document indicated that she was sexually abused, and she now has memories of two incidents of alleged sexual contact with Mr Henderson.[481]

AJW went to court to give evidence against Mr Henderson in 1975 or 1976. She remembered being very frightened. She said she was unable to give her evidence because she was petrified. She thought it would have helped her if she did not have to see Mr Henderson at court and if she had some kind of family figure or parental support with her.[482]

In Case Study 5, we examined the response of The Salvation Army (Eastern Territory) to child sexual abuse in four boys' homes:

- Gill Memorial Home, Goulburn, New South Wales (Gill)
- Bexley Boys' Home, Bexley, New South Wales (Bexley)
- Riverview Training Farm (also known as Endeavour Training Farm), Riverview, Queensland (Riverview)
- Alkira Salvation Army Home for Boys, Indooroopilly, Queensland (Indooroopilly).[483]

The allegations of abuse were made against five Salvation Army officers and in relation to other boys at the homes.[484]

ET lived at Bexley from February 1965, when he was five years old, until December 1975. ET gave evidence that he was abused by Mr Lawrence Wilson and by older boys at Bexley. ET said that in 1972, when he ran away from Bexley, he was picked up by the police and taken to Hurstville Police Station. ET told the police about the abuse at the home, but, as far as he knew, nothing happened.[485]

FO lived at Indooroopilly from 1969 to 1973. He alleged that he was sexually abused on several occasions by a man. FO ran away from Indooroopilly and was brought back by a police officer, who informed Mr Victor Bennett, the manager of Indooroopilly, of the allegations of sexual abuse. Mr Bennett then severely beat FO for 'lying'.[486]

ES was born in 1958. In 1974 he went to Riverview for about a year. ES gave evidence that Mr Bennett, by then the manager at Riverview, physically and sexually abused him. Once, after absconding from Riverview, ES was caught by the police. He told officers about what was happening at Riverview. The police rang Mr Bennett to ask whether the allegations were true. When Mr Bennett denied the allegations, ES said the police took no further action.[487]

Mr Mark Stiles was admitted to Gill at the age of 12 in 1971 and stayed for about a year.[488] Mr Stiles gave evidence that within four to six weeks of arriving at Gill a Salvation Army officer, 'X17', started to sexually abuse him. The abuse occurred at least four days a week and continued until two weeks before he left Gill in December 1972.[489] Mr Stiles said that, during the period of time in which X17 was sexually abusing him, he and another boy escaped from Gill. The police later picked them up. Mr Stiles told the police officers that Mr Wilson, the manager at Gill, had been physically abusing the boys and that X17 had been sexually abusing him. Mr Stiles said the police officer hit Mr Stiles across the neck and side of the head and took Mr Stiles and the other boy back to the home. When he returned, Mr Wilson hit Mr Stiles on the head, chest and upper body with his open palm for 'telling lies'. Mr Stiles absconded for a second time and was picked up by the police. He did not tell the police anything about the abuse because of the severe beating he had received previously.[490]

In Case Study 20, we investigated the response of The Hutchins School and the Anglican Diocese of Tasmania to allegations of child sexual abuse at the school.

A former Commissioner of Police in Tasmania, Mr Richard McCreadie, who was at the time a junior officer working as an investigator in the Criminal Investigations Branch, Sexual Crimes Unit, gave evidence in the public hearing.[491]

At some point in 1970, a young man came into the police station and reported to Mr McCreadie that he had been sexually abused by Mr David Lawrence (the then headmaster) while he was a student at the school. Mr McCreadie said that the young man reported that he had sex with Mr Lawrence on a brown chaise lounge in his office at the school. The young man also disclosed having been abused by Mr Ronald Thomas, who was then a music teacher at the school.[492]

Mr McCreadie gave evidence that he was a very young detective at that time and was very conscious of the fact that very serious allegations had been made against the headmaster and a music teacher at the school. Mr McCreadie said that, before he took any further steps, he spoke with Detective Senior Sergeant Keith Viney about his proposed investigation of the allegations. He said that Detective Senior Sergeant Viney told him to proceed with the investigations but to be discreet.[493]

Mr McCreadie investigated the allegations against Mr Thomas and Mr Lawrence. As a part of the investigation, Mr McCreadie and one of his colleagues attended at the school to interview Mr Lawrence. He said that the interview took place shortly after he consulted with Detective Senior Sergeant Viney and 'towards the end of 1970'.[494]

When Mr McCreadie walked into Mr Lawrence's office he immediately noticed a brown chaise lounge. Mr McCreadie said that he put to Mr Lawrence that he had received information that Mr Lawrence had sexual intercourse with one of his former students while he was a student at the school and after that student had left the school. Mr McCreadie gave evidence that Mr Lawrence immediately admitted that that had occurred, and he was somewhat surprised that Mr Lawrence was so candid about it.[495]

Mr McCreadie proceeded to take a confessional statement from Mr Lawrence and informed him that he was likely to be arrested at some time in the future.[496]

Mr McCreadie explained he did not arrest Mr Lawrence immediately because he needed to obtain a warrant and he thought that he needed to discuss the next steps with Detective Senior Sergeant Viney. Mr McCreadie said that he had every expectation that Mr Lawrence would still be at the school when he returned and it did not occur to him that Mr Lawrence might be a flight risk.[497]

When Mr McCreadie returned to the police station, he spoke with Detective Senior Sergeant Viney about Mr Lawrence's confession. Detective Senior Sergeant Viney informed him that he would advise Tasmania Police Detective Senior Inspector Harvey Smith, who was responsible for the Criminal Investigation Branch, that Mr McCreadie would be taking out a warrant to arrest Mr Lawrence.[498]

Within a 'relatively short period of time' and 'likely a matter of weeks', Mr McCreadie returned to the school to make arrangements for Mr Lawrence to present himself at the police station so that Mr McCreadie could formally arrest him. When Mr McCreadie arrived at the school, the secretary told him that Mr Lawrence had moved back to England.[499]

Because of the passage of time, the disposal of documents under the *Archives Act 1983* (Tas) and the fact that other relevant witnesses are now deceased, the evidence before the Royal Commission about the Tasmania Police's investigation was limited to Mr McCreadie's witness statement and oral evidence, and our findings were limited to matters within the knowledge of Mr McCreadie.[500]

We were satisfied that:

- In 1970, the Tasmania Police were investigating and close to arresting Mr Lawrence on offences involving sexual activity with a former student when he was a student at the school and after he had left the school.
- Mr Lawrence was not charged for those offences because when the Tasmania Police sought to arrest him they were told that he had left the school and Tasmania. As a result, they conducted no further investigation.[501]

In Case Study 30, in relation to the response of the Turana Youth Training Centre, Winlaton Youth Training Centre, Baltara Youth Training Centre, the Victoria Police and the Department of Health and Human Services Victoria (and its relevant predecessors) to allegations of child sexual abuse,[502] Victoria Police Assistant Commissioner Fontana gave evidence about police 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.[503]

6.5 Police responses in the 1980s

6.5.1 Overview

Many survivors of institutional child sexual abuse that was committed during the 1980s told us of barriers to disclosing the abuse that were similar to those survivors experienced in the 1970s. However, we also heard accounts that suggested more victims were attempting to disclose, and in some cases to report to police, at that time.

In some of our case studies we heard evidence from survivors and police about police responses in the 1980s. We heard evidence of the investigation and prosecution of Swami Akhandananda Saraswati, which we examined in Case Study 21 in relation to child sexual abuse at or connected with the Satyananda Yoga Ashram in New South Wales. In Case Study 13, we heard evidence of the investigation and prosecution of Brother Gregory Sutton in relation to abuse at Saint Thomas More Primary School in Campbelltown in New South Wales.

In some matters we investigated arising from accounts in private sessions, we saw evidence that police in New South Wales took seriously complaints made by boys who had run away from a children's home run by a Catholic religious order. Documents we obtained under notice identified that the police laid charges against a priest in relation to the abuse of two boys, but a magistrate dismissed the charges in 1989 and costs were awarded against police. The priest was ultimately convicted in 2008 on 18 counts in respect of seven boys who he abused over the period from 1977 to 1988, and he was sentenced to 15 years imprisonment, with a non-parole period of nine years and six months.[504]

It seems that, by the 1980s, in many cases police were responding to reports of institutional child sexual abuse and were investigating and in some cases laying charges. In some cases, prosecutions were successful, but in other cases issues arose in the prosecution process, including because of legal requirements and because of the attitudes of some judicial officers.

We also heard of some cases where police did take steps in response to reports, but the police responses were flawed. In Case Study 19, in relation to Bethcar Children's Home (Bethcar) in Brewarrina in New South Wales, we heard evidence of a police response to reports of abuse in 1980 and in 1983 and 1984. Detective Inspector Peter Yeomans from the NSW Police Force Child Abuse Squad gave evidence that there were failures in relation to the investigation in 1980 and failures in the police response in 1983 and 1984.[505]

6.5.2 Examples from case studies

In Case Study 30,[506] we heard from another survivor who gave evidence about being abused in Winlaton and about why she did not report the abuse to police. BDF was taken to Winlaton in 1987, when she was 14 years old. BDF gave evidence that she was sexually abused by older residents at Winlaton.[507] BDF told us she never reported any of the abuse she suffered at Winlaton because she thought the abuse was just part and parcel of living at Winlaton. She was also concerned about what would happen if she 'made waves'.[508] She said she did not report any of the abuse to the police because she did not trust them.[509]

Victoria Police Assistant Commissioner Fontana also gave evidence in Case Study 30 about a rape investigation and evaluation group that he was part of in the 1980s. He said:

> 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.[510]

In Case Study 19 we examined the response to allegations of child sexual abuse of a number of former residents of Bethcar in Brewarrina. Between 1974 and 1984, Bethcar was run by Mr Burt Gordon and Mrs Edith Gordon. Their daughter, AIT, and AIT's husband, Colin Gibson, also resided at Bethcar and were involved in running the home.[511]

In March 1980, a number of Bethcar residents complained to the Brewarrina police about Gibson's behaviour towards them. About seven or eight days later, the residents attended the Brewarrina Police Station and told the police that Gibson had made a pass at one resident, was seen peeping at some of the residents through bedroom windows and had touched the breasts of another resident, Ms Amelia Moore.

Ms Jodie Moore was a resident at Bethcar between the ages of six and 16 years. She gave evidence that she was sexually abused on average once a week by Gibson, including digital and penile penetration, and that she was sexually abused by Mr Gordon.[512] Ms Jodie Moore said:

> I also recall when I was sixteen or seventeen reporting the events to the police, but it took about 20 years for Colin Gibson to be charged. I went to the police most recently about Colin because I just couldn't handle it anymore and everything that had happened to me at Bethcar was like a jigsaw puzzle in my mind.[513]

Ms Amelia Moore was a resident at Bethcar between the ages of six and 16 years. In 1980, she told a number of people about a sexual assault by Mr Gibson, including a welfare officer with the Department of Community Services (DoCS). She remembers the welfare officer taking her and three other girls to the police station. Mr Gordon was called to the station, was present at the meeting with police and drove the girls back to Bethcar. Ms Amelia Moore does not recall any police action after that.[514] Ms Amelia Moore said:

> I did not have a lot of trust in the police growing up, as they were known to be physically abusive and violent towards Aboriginal people in the community. After this experience, I never told anyone about anything that happened at Bethcar, not even my sisters. I was too scared.[515]

Once the residents who had made the complaints had been returned to Bethcar, they were contacted by police detectives. The detectives interviewed the residents to determine whether charges should be laid against Gibson. However, by the time the detectives interviewed the residents, the residents said they had no complaints about Gibson, were happy to stay at Bethcar and had no problems. In light of the residents withdrawing their complaints about Gibson, the police took no further action.[516]

We heard evidence from Detective Inspector Yeomans from the NSW Police Force Child Abuse Squad. Detective Inspector Yeomans reviewed the available police documents from the 1980 investigation. He identified a number of issues with the 1980 investigation, including a delay between the original report to police and the interviewing of residents by detectives, conducting interviews with a number of relevant witnesses with Mr Gordon present, and returning the residents to Bethcar with Mr Gordon.[517]

We were satisfied that failures by the police seriously undermined the effective investigation of the children's complaints.[518]

Allegations of abuse at Bethcar were also made in 1983. Ms Leonie Knight told Mr Ian Robinson, a Resident District Officer with DoCS (who conducted inspections at Bethcar), that she had been sexually abused by Mr Gordon.[519] The police were notified but the matter did not progress, evidently because Ms Knight's parents did not wish to pursue the allegations against Mr Gordon.[520] The police said that, in the absence of a complaint that 'would substantiate court action', they believed that any further action would be unsuccessful and 'would only result in undermining the relationship that currently exists between Police and the Aboriginal community in this area'.[521]

Ms Knight gave evidence that in 1983 she went to the police station in Bourke to make a statement about the abuse but that no action was taken at that time.[522]

Detective Inspector Yeomans gave evidence that there were failures to comply with procedures in the police response of 1983 and 1984,[523] and we accepted that evidence.

In Case Study 21, we examined the experiences of 11 survivors of child sexual abuse at or connected with the Satyananda Yoga Ashram, New South Wales, and the response of the ashram to that child sexual abuse alleged to have been committed by Swami Akhandananda Saraswati.[524]

APL reported alleged abuse by Akhandananda to Gosford police in March 1987. APL made an initial statement then and a further statement in October 1987.[525]

APA gave evidence that she lived at the ashram from 1980 to 1986, when she was aged between 11 and 17. APA gave evidence that Akhandananda began sexually abusing her in 1983, when she was around 13 or 14.[526] APA disclosed the sexual abuse to her father (APD) after leaving the ashram. APD subsequently made a report to police. A police investigation then commenced, resulting in Akhandananda's arrest in June 1987.[527] Akhandananda was charged in relation to APA's allegations of sexual abuse. He pleaded not guilty and disputed APA's evidence.[528]

Ms Alecia Buchanan gave evidence that she was sexually abused by Akhandananda on multiple occasions between 1982 and 1986.[529] Ms Buchanan reported the abuse to Newtown police in August 1987, which resulted in charges being laid against Akhandananda in relation to the abuse of Ms Buchanan.

Akhandananda was charged with counts in relation to APL, APA and Ms Buchanan, as well as another victim, APH.

APH gave evidence that Akhandananda first demonstrated a sexual interest in her when she was nine. His advances progressed to indecent touching and by the time she was 13 there was more intrusive sexual abuse.[530] APH said:

> In early 1990 I was contacted by Newcastle police, and on 29 April 1990 I made a statement about Akhandananda's sexual abuse of me when I lived at the ashram. Again, I don't know what prompted the police to contact me. Akhandananda was tried on one count of indecent assault against me, but he was found not guilty ...[531]

The trials in relation to APL, APA, Ms Buchanan, APH and another victim, APB were run separately. The trial of the charges in relation to APL proceeded first, in April 1989.[532]

Akhandananda was found guilty of three counts of committing an act of indecency with a child under the age of 16 years in relation to APL. He was sentenced to two years and four months imprisonment with a non-parole period of 12 months. He appealed his conviction to the New South Wales Court of Criminal Appeal and subsequently to the High Court.[533]

Akhandananda's trial on the counts relating to Ms Buchanan commenced in October 1990. He was found guilty on one count of inciting an act of indecency and was due to be sentenced on 29 August 1991 after the High Court matter concerning APL had been finalised.

Akhandananda's appeal to the High Court was successful, and the court ordered verdicts of acquittal in relation to the charges relating to APL. His conviction on the count relating to Ms Buchanan was also quashed. As a result of the High Court's decision, the prosecution decided not to continue proceedings in relation to the alleged offences against APB and APA.[534]

In Case Study 13, we examined the responses of the Marist Brothers, including schools operated by it, to allegations of child sexual abuse regarding Brother John Chute (also known as Brother Kostka) and former Brother Sutton.[535]

ADQ was abused by Sutton at Saint Thomas More Primary School in Campbelltown in 1984, when he was her teacher in year 5.[536] Sutton was convicted of two counts of sexual intercourse with a child under 16 and two acts of indecency.[537]

In 1989, when she was 15, ADQ told her boyfriend and a friend about what Sutton had done to her. Her friend then told ADQ's parents. ADQ's parents took her to Camden Police Station in Sydney, where she reported the sexual abuse by Sutton at the school and gave police a statement.[538] ADQ explained her recollection of giving a statement to the police:

> I can't remember much about the police process because I was so young. I just did what I had to do. I remember telling the police what happened and feeling paranoid. I didn't trust anyone at that stage. I knew the police were there to help, but so was Brother Greg, supposedly.[539]

ADM was abused by Sutton at the same school and same time as ADQ.[540] After the police attended her home following the disclosure by ADQ, ADM confirmed to her father that Sutton had abused her, and she went to Campbelltown Police Station the following day.[541] She described her experience of reporting the abuse to police:

> I remember feeling so embarrassed reporting the matter to police. I remember feeling red faced and blushed having to say those sorts of things in front of my parents. I was mortified. I never wanted to report the matter to police to start with and as a teenager, I had the view I would never report it or tell anyone at all. I may have changed my view now that everything's coming out, but at that point in time I was never going to tell anyone.[542]

ADM said that after she gave her statement, her parents would make calls to the police for updates on progress of the investigation. ADM gave evidence that she recalls later the police losing her file and the Child Protection Unit being disbanded.[543]

In 1995, the police again contacted ADM, as they intended to extradite Sutton to Australia after other victims had come forward. ADM gave another statement which she understood led to him being charged for the abuse against her.[544]

She gave the following evidence in relation to her experience of the trial:

> The police were supportive and very good in relation to the criminal trial against Brother Greg. I was always kept in the loop and informed of what occurred at court and invited to attend court if I wanted to.[545]

Sutton was convicted of two counts of sexual intercourse with a child under 16, four counts of indecent assault and one count of an act of indecency in relation to ADM.[546]

6.6 Police responses in the 1990s

6.6.1 Overview

We have heard many contrasting accounts from survivors who reported to police in the 1990s.

Some survivors 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.

We heard examples of failures in police responses, such as in relation to the Retta Dixon Home, which we considered in Case Study 17, and St Ann's Special School, which we considered in Case Study 9. We also heard examples where investigations did not result in charges being laid, such as in relation to allegations against Shmuel David Cyprys in relation to abuse at Yeshivah College Melbourne, which we considered in Case Study 22; and in relation to allegations against Steven Larkins, which we considered in Case Study 1.

We have seen that a number of matters that did not result in charges being laid in the 1990s have been prosecuted – successfully in a number of cases – since 2000.

However, we have also heard many accounts of police responses in the 1990s that were much more positive. In some cases, survivors reported positive attitudes from police, the relief they experienced in being believed and their appreciation of the efforts police made in investigating their complaints.

In a number of our case studies, we heard evidence about police responses that resulted in investigations being conducted and charges being laid. For example:

- in Case Study 26, in relation to St Joseph's Orphanage, Neerkol:
  - Mr Kevin Baker was charged and prosecuted, although the trials were separated and he was not convicted on any counts
  - Father Reginald Durham was charged and convicted on some counts before he was found unfit to stand trial
- in Case Study 15, in relation to the response of Swimming Australia Ltd to allegations of child sexual abuse by various coaches, Stephen Roser was charged and convicted
- in Case Study 4, in relation to *Towards Healing*, it was arranged to extradite Brother Raymond Foster to face charges for abuse allegedly committed at a Marist Brothers college, but he committed suicide on the morning of his extradition
- in Case Study 33, in relation to The Salvation Area (Southern Territory), Sergeant Willemson was charged and convicted in relation to abuse committed at Box Hill Boys' Home
- in Case Study 10, in relation to The Salvation Army (Eastern Territory), John Lane was charged and convicted on two counts in relation to abuse at the Fortitude Valley Salvation Army Corps.

It is also clear that legal requirements continued to prevent prosecutions being brought, particularly in relation to historical child sexual abuse. For example, we examined some of these requirements in Case Study 11 in relation to Christian Brothers institutions in Western Australia. Requirements for separate trials also arose in Case Study 26 in relation to St Joseph's Orphanage, Neerkol, and in Case Study 10, in relation to The Salvation Army (Eastern Territory).

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. One of the major inquiries which was particularly significant in leading to changes in police responses to child sexual abuse in New South Wales, the Royal Commission into the New South Wales Police Service (Wood Royal Commission), was conducted in the 1990s, and we discuss it briefly in section 6.6.2.

In *Framework for historical influences on institutional child sexual abuse: 1950–2014*, Dr Quadara also referred to:

- the growing recognition in the 1990s that sexual offence investigations are complex and that complexity increased when a case involved historical child sexual abuse
- a number of reviews in the 1990s that brought further reforms to sexual offences legislation and criminal justice practice.[547]

She stated:

> Together these facilitated better investigation techniques, improved police practices in responding to survivors of sexual abuse, changes to the nature of evidence that could be led to discredit victims and complainants, and more options for physically providing evidence (for example, via remote closed-circuit television). Joint and/or specialised police investigation responses were developed (for example, NSW's Joint Investigation Response Teams); however, such work was not necessarily resourced or viewed as a priority, compromising its effectiveness. The Royal Commission into the NSW Police Service (the Wood Royal Commission) noted these issues and made many recommendations to improve responses from police, and child protection and health professionals in dealing with allegations of child sexual abuse, including strengthening the joint response to allegations of child sexual abuse (for example, through the Joint Investigative Response Teams).[548]

6.6.2 Royal Commission into the New South Wales Police Service

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.[549] 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 statewide interagency

conference. The then NSW Police Service developed an action plan to address issues that the NSW Police Service and 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.[550]

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 Service, 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.[551] We discuss the multidisciplinary approach in New South Wales in section 7.9.3.

6.6.3 Examples from case studies

In Case Study 7, we heard evidence from another survivor of abuse at Parramatta Girls in New South Wales.[552] Ms Dianne Graham reported Mr Gordon's abuse of her to police in 1998, but she was told that Mr Gordon had died and so there was nothing they could do.[553]

In Case Study 11, we heard about police responses in the 1990s to allegations of abuse in the four residential institutions we examined which were run by the Christian Brothers in Western Australia.

In the early 1990s, Brother Dick was charged and ultimately pleaded guilty to having unlawfully and indecently dealt with a number of unknown boys under the age of 14 years at Castledare between 1960 and 1965. Dick received sentences that amounted to three years and six months imprisonment. His appeal was dismissed in November 1994 and the sentences were upheld.[554]

VI had been abused by Dick at Castledare during the 1960s. He reported the abuse to police in 1994. While he described the time making the statement as 'probably the most humiliating few hours since leaving Christian Brothers',[555] he said:

> Despite this feeling, by the time I arrived home I felt a different person. I felt positive and empowered because I had finally been able to release some of the pain which I had experienced as a kid.[556]

However, Dick had already been sentenced for child sex offences at Castledare in relation to the abuse of five children, none of whom had actually been identified. As a result, the police told VI they would not be able to charge Dick in relation to the abuse of VI in case he was one

of the five children, on the grounds that this would fall under double jeopardy. VI considered this outcome a 'bit of a kick in the teeth', but he gave evidence that he understood the police had no alternative and that reporting to police did give him some satisfaction for 'actually trying to do something'.[557]

Mr Oliver Cosgrove arrived in Australia from England on 12 February 1953.[558] In 1956 he was transferred to Castledare, where he was abused by Brother Murray.[559] He was subsequently sent to Clontarf at the age of 10, where he was again abused – this time by Brother Angus.[560] In July 1993, he made a complaint to police about Brother Murray at Castledare. Mr Cosgrove made a statement but could not recall signing it. In July 1994, he was notified by the Police Child Abuse Unit that the South Australia Police had interviewed Brother Murray, who had declined to answer any questions. Due to the lack of corroborating evidence, no further action was taken.[561]

VG gave evidence that police contacted him after a parliamentary inquiry into the experiences of child migrants. They asked him whether he wanted to report what happened to him. VG told the police that he knew Brother Simon was dead. The police told him that in that case there was nothing they could do, and the police would take VG off their system.[562]

A number of other former residents of Christian Brothers institutions in Western Australia made complaints to the police in the early 1990s about sexual and physical abuse committed by Christian Brothers some 50 years earlier. 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 institute prosecutions in response to the allegations. More former residents made complaints to the police and the DPP again recommended against instituting prosecutions in 1995.[563] These complaints were not prosecuted.

In Case Study 17, we heard from survivors of abuse at the Retta Dixon Home in Darwin about their experiences of reporting to police in the 1990s and into the early 2000s.

AKU reported allegations of sexual abuse to police in 1999.[564] AKU gave the following evidence about her initial interactions with police:

> About 10 years ago [1998] I was approached by Roger Newman from the Northern Territory Police. He turned up at my house and asked me if I knew Don Henderson. He told me that one of the boys who was at Retta Dixon with me was dying of cancer and wanted to tell the authorities about what had happened to him at Retta Dixon. Roger was conducting an investigation and wanted to know if I would be prepared to go to court.[565]

During the investigation, Detective Newman took statements from AJE, AJC, AKU and AJD. AJE, AKU and AJD alleged that they had been sexually abused by Mr Henderson and AJC had seen Mr Henderson behave sexually inappropriately towards another child. During the investigation, Detective Newman became aware of the previous prosecution of Mr Henderson in 1975. The complainants in 1975 were AJT, AKN, AJS, AJW and AKP.

AKV also alleged Mr Henderson had abused him while he was at Retta Dixon Home. He gave evidence that a police officer contacted him in around 2002. He later met with the police officer, whose name he could not recall, in a coffee shop. He was working at Jabiru in the Northern Territory at the time. There was a phone call and they then met in Darwin at the invitation of the police officer. After the meeting, AKV said he was expecting to hear from the police officer again, but he did not hear from him. AKV said that he would have given evidence at any trial of Mr Henderson.[566]

Detective Newman said he did not take a statement from AKV either over the phone or by typing up his case note into statement form and asking him to sign it. He did not follow up the conversation with a further phone call to AKV or AKV's sister, AKT. He said he was waiting for AKV to contact him. He said that, if AKV was in a position to make a statement at the time, he would have taken one. He agreed that it would have been of assistance to the prosecution if he had he obtained a statement from AKV.[567]

In Case Study 17, we found that, no matter what understanding existed between Detective Newman and AKV, the preferable course was that Detective Newman contact AKV (directly or through his sister) to see if he wished to provide a signed statement to the police and proceed against Mr Henderson. We found that, during the investigation, Detective Newman did not:

- reinterview the complainants from the 1975 charges
- take further statements from AJE and AKU to particularise the charges
- take statements from houseparents or obtain the names of any other houseparents who may have assisted
- take a signed statement from AKV, who alleged that Mr Henderson had also sexually assaulted him at the home.[568]

The investigation was difficult because of the reticence of the witnesses, their shame in recounting sexual abuse and the historical nature of the allegations. Police had limited resources. Also, before 2003, there were no policies, guidelines or general orders that specifically dealt with the investigation of sexual offences and there were no courses or training on how to most effectively liaise with Indigenous witnesses.[569]

Mr Henderson was charged and committed for trial on 15 counts.[570] We discuss the DPP's decision to discontinue the prosecution in section 21.2.2. Mr Henderson was never convicted of any offence alleged to have occurred against former residents of the Retta Dixon Home.[571]

In Case Study 26, in relation to St Joseph's Orphanage, Neerkol, in Queensland, we heard from a number of survivors about their experiences of reporting to police in the 1990s.

In section 6.3, we outlined Ms Campbell's experiences of reporting Mr Baker's abuse of her to the police in the 1960s. Ms Campbell reported the abuse to police again in the 1990s. Other former residents of the orphanage also came forward with allegations of sexual abuse by Mr Baker.

In April 1997, Mr Baker was arrested and charged with sexual offences against Ms Campbell. Mr Baker was committed for trial on 69 offences relating to 12 complainants. The trials were conducted separately.[572] Mr Baker was not convicted of any offence relating to any of the former residents of the orphanage, and he denies the allegations against him.[573]

AYE was placed in Neerkol in 1938, around a year after he was born.[574] From the age of about nine or 10 years of age, he was sexually abused by the resident priest at the presbytery at Neerkol, Father John Anderson.[575] The abuse continued until Father Anderson was replaced by Father Reginald Durham. Durham also sexually abused AYE.[576]

AYE first disclosed the abuse to his wife on or around 21 September 1996 after reading a newspaper article about a friend of his who was also abused at Neerkol.[577] After reading the response to the allegation by the Bishop of Rockhampton and Sisters of Mercy, in which they denied that any abuse occurred, AYE contacted his friend from the article, who in turn reported the abuse to Rockhampton police. AYE told us that he was shocked when the police contacted him.[578] AYE gave a statement to police on 17 October 1996. He described the experience of giving the statement as 'the sorriest thing that I had ever done. It brought back too much. I had pushed it down and it all came back up again'.[579]

On 6 February 1997, Durham was charged with 40 sexual offences in relation to six complainants. On 2 February 1998, two separate indictments were presented to the District Court in Rockhampton – one charging Durham with 22 counts of sexual offences in relation to five complainants; and a separate indictment of 18 counts of sexual offences in relation to AYB, who had not been a resident of Neerkol.

Durham had been the parish priest of AYB. From the age of 11, in 1959, AYB was groomed and sexually abused by Durham on a regular basis at the Neerkol presbytery and at other locations.[580] AYB gave a number of statements to police in 1996 and 1997. Durham was indicted in relation to 18 offences against AYB. However, after an initial committal hearing in June 1997, a new indictment was presented charging Durham with six counts of indecent dealing in relation to AYB.[581]

In 1999, Durham pleaded guilty to the charges relating to AYB and was sentenced to 18 months imprisonment with a non-parole period of four months.[582]

In 1999, the DPP decided to conduct separate trials in relation to the remaining 22 counts relating to five complainants.[583] In the first trial, the jury was unable to reach a verdict, but in the retrial Durham was found guilty. However, in March 2000, the Supreme Court allowed an appeal against his conviction and ordered a retrial. In February 2001, the Mental Health Tribunal found that Durham was not presently fit to stand trial. In February 2002, a periodic review of Durham's condition found that he was fit for trial. However, he successfully appealed the decision. In June 2002, it was held that he was permanently unfit to stand trial and all proceedings were discontinued.[584] AYE's complaints against Durham did not proceed for this reason.[585]

In Case Study 9, we reported on the responses of Catholic Archdiocese of Adelaide and the South Australia Police to allegations of child sexual abuse at St Ann's Special School (St Ann's) by Brian Perkins, who worked at St Ann's as a bus driver from around 1986. Perkins had a number of prior convictions dating back to 1952.[586]

We made a number of findings in relation to the response by South Australia Police to the alleged abuse. These included:

- South Australia Police did not have all relevant information when they attended Perkins' home to facilitate his arrest in 1991.
- South Australia Police did not issue a warrant for Perkins' arrest in 1991, despite having information about Perkins' prior convictions, the nature of the sexual allegations against him and the risk he posed of committing further sexual offences against children.
- After the apprehension of Perkins and other suspects in 1993, Operation Deny, which was established to investigate photographs of naked boys obtained by South Australia Police, was discontinued. Pornographic photographs located in Perkins' possession were not examined. The photographs strengthened the case against Perkins in relation to LH and revealed another offence against LB, a former St Ann's student who had been in Perkins' care.
- The failure by South Australia Police to fully investigate material seized from Perkins in 1993 contributed to the years of delay in bringing Perkins to trial.[587]

In August 2003, Perkins pleaded guilty to five sexual offences in relation to three students – LH, LB and MR. During the prosecution of Perkins in 2003, the DPP relied on naked photographs of LH seized in 1991 and naked photos of LH and LB found in Perkins' possession in 1993. This material supported four of the five charges to which Perkins pleaded guilty. On 12 September 2003, Perkins was sentence to 10 years and six months imprisonment with a non-parole period of six years. He died in custody.[588]

LH attended St Ann's from when he was five in 1981 to when he was 21. LH gave evidence that Perkins abused him at the woodwork shed at St Ann's; on the school bus; at Perkins' house, where he was also abused by another man (Mr Hawkes); and at the house of a man LH could only identify as 'Ted'.[589]

LH was contacted by the police to give a statement in 1991. LH had not told anyone before this, as Perkins had told him they would both be in trouble if he told anyone.[590] LH also told us that he remembers going to court for Perkins' court case, but he did not tell his story in court. LH gave evidence that he did not know why he did not tell his story and that he would have spoken in court had he been asked to.[591] In his statement he told us:

> From the beginning, when I first told the lady what happened to me, I felt that I would go to court and speak about it. Since then I have always been willing to say that Perkins did these things to me.[592]

LK is the mother of LB. LB commenced at St Ann's in 1983, when he was five years old, and continued there until 1992. LK told us that up until 1991 LB was a happy, friendly boy, but during 1991 his demeanour changed. LB gave evidence that she came to learn that, in the years leading up to 1991, LB was sexually abused by Perkins.[593]

In August 1991, the principal of St Ann's, Mr Claude Hamam, contacted LK to arrange a meeting. In the meeting, LK and her husband were told that there had been a complaint or allegation of sexual abuse against Perkins and that LB may have been a victim of the abuse. LK and her husband were told that, in order to avoid compromising the police investigation, they were to keep the allegations confidential, and questions in relation to the complaint were not answered by the police or Mr Hamam. She also told us that she and her husband were not informed whether Perkins had been charged, and neither they nor LB were interviewed by police.[594]

LK gave evidence that she attempted to get updates about the investigation after the meeting but did not receive any information from the school or from the police. LK said:

> When I spoke to the police on the telephone, I was told the investigating officer was not there or if he was there he would say words to the effect: 'the investigation is still ongoing. The investigation is continuing'.
>
> Eventually, we gave up trying to pursue information about the status of the investigation as we were never told anything, or informed of any outcomes of the investigation. We were not told in 1993 that charges had been laid against Mr Perkins, or that he then skipped bail or that a warrant had been issued for his arrest.[595]

In Case Study 15, we examined the response of Swimming Australia Ltd and other institutions to allegations of child sexual abuse by various coaches.[596] AEB gave evidence that she was abused by Stephen Roser, who was her swimming coach, during the summer of 1985–1986. AEB was 13 years old at the time the abuse started.[597] AEB disclosed the abuse to a counsellor in 1992. After counselling throughout 1993, she decided to report the abuse to police.[598] AEB reported to police in August 1993. She remembers that giving the statement took an entire day, and she suffered from stress and violent nightmares in the weeks after making the statement.[599] Roser was charged in July 1994 and he pleaded guilty. Roser was sentenced to 200 hours of community service.

In Case Study 27, we examined the experiences of a number of patients in healthcare services in New South Wales and Victoria.[600] Mr Terence Kirkpatrick gave evidence about the abuse he suffered at the hands of Mr Frank Simpson, a psychologist, between 1967 and 1968.[601] When attending counselling between September 1992 and March 1993, Mr Kirkpatrick was advised to report his abuse to the NSW Police Force, but he chose not to do so at the time. In September 1993, Mr Kirkpatrick called the police about the abuse, but he said that as the call progressed he grew increasingly anxious, felt ashamed and embarrassed and did not want to lose the protection of his privacy. Mr Kirkpatrick said that, in hindsight, a discussion with police about his options in relation to making a report would have assisted him and may have made him less anxious about proceeding.[602]

In Case Study 4, we reported on the *Towards Healing* protocol, which is a set of principles and procedures for a person who wishes to complain of having been, relevantly for the Royal Commission, sexually abused by a priest, religious or other Catholic Church personnel.[603]

Mrs Joan Isaacs was sexually abused by a Catholic priest, Father Francis Edward Derriman, from 1967 to 1968. She was 14 to 15 years of age at the time and a student of the Sacred Heart Convent at Sandgate in Brisbane, Queensland.[604] Mrs Isaacs reported her abuse by Derriman to police nearly 30 years after the sexual abuse occurred. Derriman was prosecuted and convicted of two counts of indecent dealing against Mrs Isaacs.[605]

DG was abused by Brother Raymond Foster in the 1970s at a Marist Brothers college.[606] DG made a statement to police in 1994. He gave the following evidence regarding his decision to come forward:

> I know it took me a long time to make the complaint, but until that time, I don't think I was stable or strong enough to and in a strong enough relationship to be able to put myself forward to do it. My parents didn't even know that Brother Foster had sexually abused me until I made a statement to the police. I think the hardest thing I had to do was walk through the door of a police station and stand at a desk with people around and say why I was there.
>
> I think one of my main motivations for approaching the police was to try to prevent Brother Foster from sexually abusing other children, but to this day, I don't know if Brother Foster was stood aside from teaching, and I was never given any assurance that steps were being taken to prevent further abuse by Brother Foster.[607]

After DG made his statement in 1994, Brother Foster was interviewed by police in 1995. The matter remained with police until 1999, when a decision was made to proceed. DG recalls that in that time he remembered he was moving on with his life, but the police were calling him regularly.[608] DG told us:

> I didn't know if that was something that I needed at that stage. But there was one particular detective who kept phoning me. I was working shiftwork and weekends and I was expected to drop everything and attend to him there and then. I told him that I wanted to speak to a counsellor and my wife before deciding whether or not I was up to proceeding with the complaint. Eventually I told him to go ahead with the case.[609]

Arrangements to extradite Brother Foster from New South Wales were made in 1999. On the morning of his extradition, he committed suicide. DG was notified of his suicide by police, and they told him there was no further action the police could take. He did not hear from police after that.[610]

In Case Study 33, we examined the response of The Salvation Army (Southern Territory) to allegations of child sexual abuse at children's homes that it operated, including Box Hill Boys' Home, in Victoria.[611] Mr Ross Rogers was aged 61 years at the time of the public hearing.

At the age of 11, Mr Rogers was placed at Box Hill Boys' Home by his adoptive father. Mr Rogers gave evidence that while he lived at Box Hill he was sexually abused by Salvation Army Sergeant Willemsen. The first instance of abuse occurred between six and 10 months after he arrived at Box Hill.[612]

Mr Rogers reported his abuse to police in April 1994. As a result of his complaint, Willemsen was charged with a number of offences relating to his offending against Mr Rogers. Willemsen admitted to these charges and was subsequently convicted of his offending against Mr Rogers at Box Hill.[613] Mr Rogers gave evidence that he found the experience of reporting the abuse to police to be quite embarrassing, especially having to describe Willemsen's smell and feel and what he did to Mr Rogers. However, he said that the detective was supportive and helpful throughout the process.[614]

In Case Study 10, we examined the response of The Salvation Army (Eastern Territory) to claims of child sexual abuse by officers and employees.[615]

JG gave evidence to the Royal Commission that she was first abused by Envoy John Lane in 1975, at the Fortitude Valley Salvation Army Corps, when she was eight years old, during a Sunday School class and that he continued to abuse her until she turned 10.[616] JD also attended the Fortitude Valley Salvation Army Corps. She remembers first being abused by Lane in 1977, when she was four.[617]

JG made a statement to police about her abuse by Lane in April 1996, while JD made a statement in June 1996. JD gave evidence that she reported to police in response to an advertisement in the newspaper calling for victims of child sexual abuse to come forward as part of Task Force Argos.[618]

Lane was charged with five separate counts against three complainants: in relation to JG, indecent dealing with a girl under the age of 12 years, rape and indecent assault; and, in relation to JD and another complainant, indecent dealing with a girl under the age of 14 years. Separate trials were ordered for JG, and for JD and the third complainant.[619]

On 29 September 1997, Lane was found guilty of the indecent dealing charge in relation to JG. The jury could not agree on a verdict on the rape charge and he was acquitted of the indecent assault charge. Lane was sentenced to 12 months imprisonment. The second trial took place in 1998. On 18 August 1998 Lane was convicted of indecent dealing in relation to JD but was discharged (on a nolle prosequi) with regard to the second charge. He was sentenced to a further 16 months imprisonment.[620]

In Case Study 22, we examined two Jewish institutions in New South Wales and Victoria and their responses to allegations of child sexual abuse within their communities.[621]

Mr Menahem (Manny) Leib Waks gave evidence that he was abused by AVP (who he described as the adult son of a senior Yeshivah Melbourne rabbi) in or about 1988 and by Shmuel David Cyprys for approximately two years, ending in or about 1990. Mr Waks reported the abuse

to police in 1996 when, while visiting Australia for his sister's wedding, he heard a radio broadcast for Operation Paradox, which was a community awareness campaign concerning child sexual abuse. Mr Waks disclosed the abuse to his father, and together they met with Victoria Police.[622]

He gave the following evidence in relation to his experiences of the police response:

> The police told me that they would interview Cyprys. By this time [AVP] was living in the United States, where I understand he still lives. The police later told me that they had interviewed Cyprys and he had denied everything. They told me that it was a case of my word against his and that they were not closing the case but would wait to see if more evidence came to light. I believed at the time that more should have been done about it and I still feel quite upset that it wasn't.[623]

Mr Waks said:

> In 1996 when I first went to the police and to Rabbi Groner, I was left feeling despondent and disillusioned that no charges were laid and no action was taken against Cyprys. I lost faith in the police, the judicial system, the religion I was brought up in and its leaders – my own powerlessness was reinforced. From my perspective I had done everything that I could do to obtain justice for Cyprys's crimes and to protect our community from the possibility of Cyprys committing future crimes. However, my efforts had been to no avail. This was not easy to accept for a 20-year-old who was trying to do the right thing. This resulted in a period of heavy substance abuse while absent without leave from the IDF [Israel Defence Forces].[624]

We discuss the later police response to Mr Waks' report in section 6.7.3.

In Case Study 1, we investigated the response of institutions to the conduct of Steven Larkins, who occupied positions of responsibility in Scouts Australia NSW and in the Hunter Aboriginal Children's Service.[625] AC, who had been abused by Larkins, provided a statement to the Royal Commission.

In August 1997, AC was interviewed by police at Newcastle Police Station some months after the initial abuse and shortly after he disclosed it to his mother, AB. AC's evidence was that it felt good telling the police, as he thought something was going to be done. But, after leaving the police station, he heard nothing more from police in Newcastle.[626]

In December 1997, the investigating officer took a statement from the Regional Commander of Scouts NSW in relation to rumours about the behaviour of Larkins. AB was interviewed in early 1998, and Larkins was interviewed shortly after. In May 1998, police requested advice from the Newcastle Office of the DPP on whether Larkins should be charged.[627]

We heard evidence of conflicting information being exchanged between the NSW Police Service and the DPP as to whether charges should proceed.[628] As of November 1998, Larkins had still not been charged. We found that the prosecution was effectively on hold until Detective Nathan

Abbott started a further investigation in 2011 after a manager at the Hunter Aboriginal Children's Service, where Larkins had been working since 2000, discovered a USB drive containing images of child pornography.[629]

6.7 Police responses since 2000

6.7.1 Overview

We have heard many accounts from survivors who reported to police after 2000, and we have heard of police responses after 2000 to reports made in earlier periods. Generally, survivors have given accounts of much better police responses. Many survivors have spoken in very positive terms of the support they received from police, including being treated with dignity and respect and being kept informed of the police investigation and any subsequent prosecution.

Some survivors told us that they were pleased to be contacted by police as potential witnesses or complainants. They felt that the abuse they had suffered mattered to police and that something was now being done about it.

Some survivors also gave accounts of negative experiences, including feeling that police did not believe them or were unsympathetic or uninterested. Some survivors told us they felt uncomfortable being contacted by police without prior warning. Some survivors also expressed concern about a lack of continuity in police staffing, with multiple officers in charge over the course of the investigation. Some survivors were disappointed to find that, while police responses had improved, it was too late for them to pursue criminal justice for the abuse they had suffered because the perpetrator was dead or too old and frail for a prosecution to proceed.

We have heard a number of accounts of police responses after 2000 to reports of abuse made while the victim was still a child – in some cases, in relation to quite young children. We have also heard accounts of police responses after 2000 to reports of abuse in relation to victims and survivors with disability. We discuss a number of the cases that we examined in Case Study 38 in Chapter 30.

While the Wood Royal Commission, which we discussed briefly in section 6.6.2, contributed to improvements in police responses in the 1990s and 2000 in New South Wales, the major inquiry which was particularly significant in leading to changes in police responses to child sexual abuse in Victoria was conducted in the 2000s. We briefly outline the Victorian Law Reform Commission (VLRC) inquiry into sexual offences in section 6.7.2.

In their submissions in response to the Consultation Paper, and in evidence in Case Study 46, some interested parties commented on changes in police responses over time. Both the In Good Faith Foundation (IGFF) and the Alliance for Forgotten Australians (AFA) particularly commented on improvements in Victoria Police's responses.

IGFF described difficulties in the past and more recent improvements in police responses in Victoria as follows:

> Historically, victim/survivors have reported being treated with suspicion and distrust by police when reporting. This is particularly true for our clients who are reporting childhood sexual assaults as adult men. The doubt and suspicion with which these reports have been treated and as already recognised by the Royal Commission have previously influenced the proceeding of cases and police conduct.
>
> However, IGFF is aware that a number of changes have been made in recent times to modify the more traditional police cultures and understandings of sexual assault reporting. These changes are particularly evident within the State of Victoria where a Code of Practice for the Investigation of Sexual Crimes was first introduced in 1992 and has been updated as recently as this year [2016]. This emphasises the care for an individual victim/survivor approaching the police to make a complaint and has led to an increased understanding of the trauma associated both with the initial assault and then latterly with the reporting and potential criminal justice processes.
>
> … IGFF clients have had mixed experiences in their dealings with both SOCAUs [Sexual Offences and Child Abuse Units] and SOCITs [Sexual Offences and Child Abuse Investigation Teams] with some client's experiences being very positive whilst others have reported a very negative reception to their complaints.
>
> … Since the establishment of specialist Task Force SANO to coincide with the work of the Victorian Parliamentary Inquiry, IGFF has established a working relationship with SANO referring many clients to them. Their specialist focus on childhood sexual assault within religious contexts and communication has fostered a positive attitude towards reporting within many of our clients.[630] [References omitted.]

Ms Clare Leaney, representing IGFF, told the public hearing in Case Study 46:

> Particularly we have seen this with the responses of Task Force SANO, their willingness to engage with our community group, which is Melbourne Victims Collective, their willingness to engage with us as an independent advocacy service but also their commitment to survivors and ensuring that they are cared for in the appropriate manner.
>
> Now, it's never going to be a perfect process, and we admit that there are still things that can be improved, but those steps of making the survivor the centre of that process, the person in control of that process, have been absolutely a step forward.[631]

In its submission in response to the Consultation Paper, AFA also referred to the approach of the SANO Task Force in Victoria:

> Reports from survivors suggest that in many cases the police response has improved significantly. In Victoria the creation of the SANO task force (coming from the Parliamentary Inquiry which led to the Betrayal of Trust report) and its work has gained increasing credibility in survivor circles. Their willingness to deal directly with groups and to explain their processes is commendable.[632]

Ms Caroline Carroll, representing AFA, told the public hearing in Case Study 46:

> we get very positive reports from the SANO Task Force, that they meet people where they are; they don't necessarily have to go into a police station to make a statement. They will meet them in a coffee shop or they will meet them at their own home, regional as well as in the city, and they are very respectful and take it very slowly. You know, a lot of Forgotten Australians have huge issues with the police, because police were the ones that often took them away or brought them back to the institution when they absconded, even though they tried to tell the police in those days what was happening, so they didn't hear. So it's good to see that they have really put this effort in to making people comfortable and to build the trust between them.[633]

In contrast, Ms Karyn Walsh, representing Micah Projects, told the public hearing in Case Study 46 that, while there have been improvements in police responses to historical child sexual assault in Queensland, there are still concerns to address:

> For many people, that has been something that is a moving feast in Queensland, because it has had waves of where there has been attention to it and then it has lost some ground. But certainly after the Forde Inquiry we were funded to support people who were going through the civil or criminal or church complaints processes, and during that time, there was initially – you know, people really struggled with being understood; no-one believed them; there was a lot of false memory evidence being given. But over the time, to today, you know, that has shifted and changed, although we would say now it probably isn't as good for people with historic abuse as what it was probably back after Forde [the Forde Inquiry] when a lot of attention was on that. Police had training from Ray Wyre in England. People were given skills about how to question and quite a few court cases started – some succeeded, some didn't. You know, people were very distressed by the process. There was a victim support process, but it wasn't as effective as it could be.
>
> I think today, you know, it's still struggling to meet the needs of victims, and particularly around the historic nature and the amount of evidence, whether there's enough evidence to re-open cases now or not.[634]

These submissions, and the observations made in evidence in Case Study 46, highlight some improvements over time. However, they also suggest that it is important to ensure that improvements in police responses brought about by particular inquiries are maintained on an ongoing basis and that it cannot be assumed that this will occur.

In section 6.7.3, we outline many examples from our case studies of police responses since 2000. In many of these cases, charges were laid and offenders were convicted. However, some of these examples also revealed issues in relation to police responses, and they have particularly informed our discussion of current issues in police responses and our recommendations in chapters 8 and 9.

As we stated in Chapter 2 and noted in section 6.1, the criminal justice system is unlikely ever to provide an easy or straightforward experience for a complainant of institutional child sexual abuse. This remains the case even with improved police responses.

6.7.2 Victorian Law Reform Commission inquiry and report

The VLRC sexual offences inquiry and *Sexual offences: Law and procedure final report*[635] 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.[636]

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 7.9.4.

In Case Study 30, Victoria Police Assistant Commissioner Fontana gave evidence 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.[637] He agreed that the VLRC inquiry and report had resulted in a significant change in the attitudes amongst police as an institution, particularly '[i]n terms of police and others, in terms of how we approach investigations and provide support for victims in these matters particularly'.[638]

6.7.3 Examples from case studies

In section 6.5.2, we outlined the experiences that survivors from Bethcar had in reporting abuse in the 1980s and evidence given about the police response at that time. Other survivors reported abuse in 1999 and into the 2000s.

In 1999, Ms Jodie Moore made a complaint to the police that she was abused by Colin Gibson while she was living in Bethcar. The police investigated the complaint, although it is unclear what came of the investigation.[639] The police also interviewed Mr Terry Madden, the community services officer who was present at the police interview with the Bethcar residents in March 1980. Four other survivors (AIE, AII, AIO and AIH) subsequently made complaints about Gibson, who was charged in relation to offences against Ms Moore and the four other complainants.[640]

AIH gave the following evidence in relation to her report to police:

> About February 2001, I had an interview with Detective Freer in relation to criminal charges against Colin [Gibson]. I did not understand the purpose of the interview or that Colin was being charged for having assaulted me at Bethcar.
>
> About December 2002, I made a statement at Brewarrina Police Station about Colin. It has been hard for me in Brewarrina since I made the statement. I have experienced people giving me a hard time for reporting the incident, and they call me a liar. I am not a liar. I know what happened to me.[641]

In October 2006, separate criminal trials were commenced against Gibson concerning the charges in relation to AIO and the charges in relation to Ms Moore. At the conclusion of each trial, Gibson was found guilty. For offences against AIO, Gibson was sentenced to 12 years imprisonment. For the offences against Ms Moore, Gibson was sentenced to a total of 18 years imprisonment.[642]

A third criminal trial was listed in April 2007 concerning the charges in relation to AII. Gibson pleaded guilty to the charges in relation to AII in April 2007. In light of the plea in the AII trial, AIH and AIE indicated that they did not wish to proceed with their complaints. They had given evidence in the earlier trials. As a consequence, the complaints of AIH and AIE were 'no-billed'.[643]

Ms Kathleen Biles made a complaint to the police about Mr Gordon's abuse of her while she was a resident at Bethcar. Ms Biles gave the following evidence about reporting to police:

> One day in around about 2000, my father's girlfriend told me that a police officer from Nyngan had called looking to speak to me. When she mentioned Nyngan, I knew it had to do with Bethcar. A few days later, Detective Peter Freer turned up at Wee Waa. Some of the other girls in foster care reported the abuse to the police, which is why he contacted me. I went to the police station with my father's girlfriend to make a statement at the police station in Wee Waa. I gave two statements to Peter Freer – one about the abuse that I suffered from Bert Gordon and one about the abuse that I witnessed against the other girls by Colin Gibson and Bert Gordon. I believe that my sister, [AIL], didn't make a statement about what Bert did to me.[644]

The police decided not to charge Mr Gordon in relation to the complaint by Ms Biles because of a lack of corroboration and because Mr Gordon was elderly, in poor health and unlikely to live to see the matters progress to trial. Mr Gordon died in 2006.[645]

In Case Study 29, we examined the experiences of survivors of child sexual abuse within the Jehovah's Witness Church in Australia and the response of the organisation to those survivors' complaints.[646]

We heard evidence from BCG, who was sexually abused in 1988 by her father, BCH, who was a ministerial servant in the Mareeba Congregation in Far North Queensland. BCG gave evidence that she attempted to report the abuse to two elders in 1989 but was told that she could not discuss the abuse without her father present.[647] After BCH left the family home, BCG disclosed the abuse to her friend (later to become her husband) BCJ and then to an elder.[648] Again the response of the Jehovah's Witnesses was to investigate the matter internally and make no report to police.[649]

After leaving the Jehovah's Witnesses in the late 1990s, BCG reported her abuse to police.[650] BCG described her experience of coming forward:

> The very first thing I did after I left the Church was call the police. I was initially scared of the police because I had grown up being taught that everyone outside of the Jehovah's Witness Church was to be feared. But the officer in charge of my case, Natalie Bennett, had an awesome manner and she was very supportive. Throughout the court cases, my only support was from the police and a support person assigned by the court.[651]

BCH's first trial resulted in a hung jury. His second trial was declared a mistrial. After a third trial, which concluded in December 2004, BCH was convicted for the unlawful and indecent assault and attempted rape of BCG and was sentenced to three years imprisonment.[652]

BCG went on to say that the only time she felt her feelings were heard was when she went to the police. She said, '[n]obody else, up until that point, had acknowledged that what my father did to me was wrong and that he should be made to answer for it'.[653]

In Case Study 39, we examined the responses of certain sporting organisations to allegations of child sexual abuse.[654]

BXA gave evidence that she was sexually abused by her soccer coach, BXK, in 1996 when she was eight years old. In November 1999, when BXA was 12 years old, she wrote a note to her school friend stating that she 'was raped in year 3 but no one knows'. This note was intercepted by her teacher and passed on to the deputy principal. The deputy principal reported the matter to the Liverpool office of the New South Wales DoCS.[655]

The NSW Police Joint Investigation Response Team (JIRT) at Liverpool was notified later the same day. BXA came home from school and found a note from DoCS on the door. She destroyed the note because she feared being in trouble with her mother. On 3 February 2000, NSW Police officers visited BXA at her home and took the first of three statements from her.[656]

BXA was interviewed on two further occasions that year, on both times by the same police officer. BXA recalls the police officer focusing on the importance of telling the truth, which gave BXA the impression that the police officer was not sure she was being honest. BXA also explained she felt her mother's engagement with the police suggested her mother downplayed what had happened and that her mother just wanted the police to leave them alone.[657]

BXA gave evidence that she found the process very intimidating. She said it was difficult for her to give the precise details of the abuse because of the confronting nature of having to describe what had happened and also because she could not remember specific dates and times the abuse occurred. Also, the abuse had often occurred in the dark, making it more difficult to explain things.[658] BXA also gave evidence that she felt things had moved so quickly from telling her friend she had been raped to having to tell her family and the police. She did not want to disclose the abuse and did not want to go to court. She felt she was just being 'dragged along', and it was difficult to tell people when she was not ready to do so.[659]

BXA was 13 years old when she gave evidence in the trial in the District Court in 2001. She went with her mother and her niece and had no other support from police or DoCS.[660] On 30 May 2001, a jury acquitted BXK of all charges.[661] BXA said:

> The trial lasted a day but mum wanted to leave after we had all given our evidence.
>
> I think the policewoman who interviewed me told us that the Coach had been found not guilty. We might have been given a letter.
>
> I remember something about there not being enough evidence and that I had not reported it in time. Also my niece's evidence didn't match mine.
>
> I felt like it was his story against the evidence of an eight-year-old who didn't tell their mum, didn't tell anyone, who's a liar, basically. I just couldn't understand how they could say it didn't happen. I was really upset. I felt the whole process had been rushed and that I had been given no choice. I felt like the police should have known there was not enough evidence so that I didn't have to go through the whole process.[662]

BXA told the public hearing:

> In relation to all the things that have happened to me, I feel I have not been offered enough support.

> … During the criminal process everything went through mum. If I had been separated from that situation, treated as an individual and given my own support person, it would have been better.
>
> I didn't really understand how important it was to provide dates and times and I don't believe the police really tried to make sure they had the full story.
>
> On the one hand, mum was telling me to just say this or that and get it over with. On the other hand, the police were saying this is really important and you must tell the truth and wanted me to tell them everything. I was really confused.[663]

BXA said that no-one should be made to go to court unless the police are pretty sure about the outcome. She said that she would like another opportunity to take the coach to court, because this time it would be her choice and she would have more control.[664]

In Case Study 39, we also examined the response of Tennis NSW to allegations of abuse of BXJ against Mr Noel Callaghan between 1997 and 1998. Between 2000 and 2002, Mr Callaghan was charged with sex offences against three females. However, none of those charges resulted in convictions, and Mr Callaghan has always denied the allegations.[665]

At the public hearing we heard evidence from BXB, who is BXJ's mother. She gave evidence that, in April 2001, after an initial investigation by Tennis NSW, BXJ reported her allegation to the NSW Police Force. On 17 October 2001, Mr Callaghan was charged with three counts of indecent assault of BXJ. The matter came to court in March 2004. BXB said that, by that time, BXJ was too ill to proceed with the matter and the charges were withdrawn.[666]

In section 6.6.3, we outlined the experiences of AC in reporting abuse by Steven Larkins, which we in examined in Case Study 1 in relation to the response of institutions to the conduct of Larkins. Larkins occupied positions of responsibility in Scouts Australia NSW and in the Hunter Aboriginal Children's Service.[667]

Another survivor came forward in 2000. AA decided not to disclose the abuse at the time it occurred in 1992. In 2000, AA first disclosed his abuse to his ex-partner after he discovered that Larkins was working as a residential support worker at a youth centre.[668] AA also saw Larkins at a Scout camp. After informing a group leader about Larkins, he disclosed his abuse to the scout leader, and subsequent engagement with representatives from the Scouts led to AA reporting the matter to police. AA does not recall the outcome of reporting to police, although he did recall wanting the matter to end, and he considered it likely that he did not want to make a formal statement or go through with a prosecution.[669]

AA described how disclosing his abuse affected him:

> After disclosing the matter to my partner, Scouts and police, I didn't feel that a weight had been lifted at all. Instead, going over the matter again and again brought back bad memories of the event and made me a crankier person. I became quite angry at time, taking things out on the people closest to me, which impacted my relationships with them.[670]

In April 2011, AC (who had reported in 1997) was told by his mother that Larkins had been charged with offences relating to child pornography. In May 2011, AC was contacted by Detective Nathan Abbott from the NSW Police Force, and he made a statement later that month. AC said he 'felt great relief that finally someone was doing something about Steven Larkins'.[671]

AA was also contacted by Detective Abbott in September 2011. AA described being contacted by the police after not hearing from them for so long:

> I felt it was incredulous that I was being contacted again so long after the event by the police. I thought nothing more was going to happen with the matter, so when I was rung out of the blue, I felt a bit anxious. It was not as bad as before, but it took me a while and some time speaking with Detective Abbott before I decided to go ahead with it.
>
> I told Detective Abbott that I wanted the matter investigated and started providing a statement to Detective Abbott of the incident with Steven Larkins when I was 12 years old. I made a statement dated 20 October 2011 outlining the full details of the incident. I was told by Detective Abbott that someone else had come forward to report abuse by Steven Larkins and that he was looking for any other cases.
>
> He had then come across my matter reported to police in 2000. I got the distinct impression that something was now happening. I was also prepared to attend court and give evidence in relation to this matter. However, I was contacted by Detective Abbott in 2012 and advised that Steven Larkins had pleaded guilty in relation to a number of matters.
>
> When I was told that he had pleaded, I had mixed feelings. On one hand, I was relieved the matter was now dealt with. On the other, I still had to live with what had happened to me and try and get on with my life as best as I could.[672]

In 2012, Larkins pleaded guilty to charges relating to aggravated indecent assault, possessing child abuse material and dishonesty offences. Larkins was sentenced to an overall effective sentence of 22 months imprisonment with a non-parole period of 19 months. Following an appeal by Larkins, the non-parole period for possessing child abuse material was reduced by four months.[673]

In Case Study 18, among other matters, we examined allegations of child sexual abuse against Kenneth Sandilands, a teacher at Northside Christian College in Melbourne from 1983 to 1992, and the response of the college, the Encompass Church and the Assemblies of God in Australia to allegations of abuse in that period.[674]

In 2000 Sandilands was convicted of 12 counts of indecent assault against eight students at the college: three counts of indecent assault against Ms Emma Fretton and nine counts of indecent assault against seven other students at the college. He was sentenced to two years imprisonment with a non-parole period of 12 months.

In 2014, Sandilands was convicted of a further seven counts of indecent assault which occurred during his time as a teacher at St Paul's Anglican Primary School in Frankston, Victoria, between 1970 to 1974: six counts concerning a girl and one count of indecent assault against a boy. He was sentenced to 26 months imprisonment with a non-parole period of 10 months.[675]

Ms Fretton gave evidence to the Royal Commission about Sandilands' abuse. Ms Fretton was six when she started at the college in 1986. She said that she made complaints about the abuse in 1987 and 1988 to members of staff.[676]

Ms Fretton gave a statement to police in January 2000. Sandilands was convicted of indecent assault of Ms Fretton and a number other students.[677] Ms Fretton said of her experience of reporting to the police:

> The criminal justice process was a negative experience for me. The police officer who took my statement was unemotional and blunt. I was by myself when she took the statement and it took about five hours. The officer told me that we were in private, but being in a glass room I felt like there were people watching me and waiting to take questions. I did not feel at that time that I was believed and did not feel giving the statement lifted the burden as I expected it to. The experience was negative for me and made me feel heavier.[678]

In Case Study 18 we also examined the response to abuse by Jonathan Baldwin at the Sunshine Coast Church located in Queensland. ALA was abused by Baldwin for a period of approximately 18 months between early 2004 and October 2006. In 2009 Baldwin was convicted of 10 sexual offences against ALA, which included eight offences that occurred while he was the youth pastor of the Sunshine Coast Church.[679] On 4 April 2007, ALA disclosed his abuse to the senior pastor (Pastor John Pearce) at a different church after leaving Sunshine Coast Church in 2006, but he did not identify the offender. Pastor Pearce made arrangements for ALA to seek counselling. On 16 May 2007, ALA disclosed to Pastor Pearce that Baldwin was the offender. Six days later, ALA and Pastor Pearce disclosed the sexual abuse to ALA's parents. The following day, ALA reported the sexual abuse to the police.[680]

ALA's father, ALD, gave evidence at the public hearing. He gave evidence that he recalled thinking the police officer who took ALA's statement was 'fantastic'. He also gave evidence that the police put ALA in touch with a counsellor, who was very good and saw ALA for a number of years, with costs met by the state.[681] ALD gave further evidence that Baldwin was not charged until almost two years later. Baldwin was convicted in 2009.

In section 6.6.3, we outlined the experiences of victims, survivors and their families arising from the initial investigation of abuse by Brian Perkins, the bus driver at St Ann's Special School, which we examined in Case Study 9.

In mid-2001, a parent made contact with Mr Allan Dooley, the then director of the Catholic Education Office, about the allegations of abuse by Perkins and the lack of information that had been disclosed to parents about Perkins.[682] LK gave evidence that, arising from the Catholic Education Office's disclosure of information to parents, several parents, including LK and her husband, gave statements to the Catholic Education Office. In response to these statements, Mr Dooley encouraged LK's husband to report LB's abuse to the police.[683]

LK gave evidence that police attended a meeting of a support group of parents in July 2001, where they gave an outline of the sequence of the investigation – that they had discovered pornographic photographs of St Ann's students, that Perkins was arrested in 1993 but had fled to Queensland, that Perkins' whereabouts were known and that he was being monitored. LK gave evidence that it was only then that she and her husband were informed that, during their investigation of Perkins, the police had discovered pornographic photographs of children, including photographs of LB.[684]

LK told us that, when police asked her to look at the photographs in order to identify LB, she could not bring herself to look at them. LK told us that her husband identified LB in the photographs in December 2001, and in August 2003 he provided a statement to police. LK told us she was shocked and angry that the existence of photographs had been revealed to them only 10 years after the incidents. She gave evidence that she questioned how, in 1991, the police knew to contact her husband in relation to the abuse. She believed that the police must have had some photographic evidence at the time in order to identify LB, but LK and LB were only informed of the photographs some 10 years later. LK also told us that her husband was offered no counselling or support after having to identify LB.[685]

Ms Helen Gitsham's son David attended St Ann's from 1975 to 1988.[686] Ms Gitsham first became aware of the allegations of abuse against Perkins in August 2001 through LO, another parent of a St Ann's student. Ms Gitsham and her husband attended the meeting with police on 31 October 2001 and formed the view that their son had been abused.[687]

Ms Gitsham gave evidence that, at a meeting of parents in February 2002, Ms Gitsham and other parents asked police officers whether the South Australia Police could give the church approval to provide information to families about the alleged abuse. The response was that they would make further inquiries, but nothing further was heard.[688]

Ms Gitsham gave evidence that in relation to the response of the South Australia Police:

> my husband and I feel that police showed a lack of concern for the children affected and for continuing the investigation and admitted that numerous mistakes were made. They appeared to follow only one line of inquiry – that of photographs found in Mr Perkins' possession. We have not been provided with evidence of changes which have been made to ensure that these mistakes will not happen again.[689]

Parents and carers LM, LO, LQ, LJ and LN all described the distress they experienced at learning of the allegations in 2001. They said that the delay in being informed of the allegations of sexual abuse by Perkins exacerbated their distress. They said that, if they had known of the allegations earlier, they would have been better equipped to understand the changes in their children's behaviour and provide their children with the appropriate care. They said that the impact of the abuse has been made worse by the failure of St Ann's, the Catholic Church and South Australia Police to inform them of the allegations and respond promptly to the allegations.[690]

We discuss the response of South Australia Police and its more recent approaches to communicating with parents in Chapter 9.

In sections 6.5.2 and 6.6.3, we discussed survivors' experiences of reporting to police in the 1980s and 1990s in relation to abuse they suffered in Marist Brothers institutions, which we examined in Case Study 13. More survivors of abuse in Marist Brothers institutions reported to police in the 2000s.

Mr Damian De Marco was a student at Marist College Canberra from 1981 to 1986. He gave evidence that in 1981, while he was in year 7, Brother Kostka sexually abused him in a storeroom off his office.[691] In 2001, after hearing that Kostka was again working with young people in Mittagong, Mr De Marco contacted the police in Canberra to report his allegations. Mr De Marco was contacted a few days later and was told that Kostka could not be found. Mr De Marco said 'I just could not believe it, as I knew he was there, so I left it at that'.[692]

In 2008, following media reports about Kostka, Mr De Marco again contacted Canberra police, where he was told his original statement had been lost. Kostka pleaded guilty in relation to offences against some of his victims, but the police explained to Mr De Marco that, because of the statute of limitations in relation to the offences against him, they would not proceed with his matter. Mr De Marco gave evidence that he felt Kostka got away with the abuse against him simply because of a technical point.[693]

AAP attended Marist College in Canberra from 1984 to 1987.[694] AAP reached a settlement with Marist Brothers and Catholic Church Insurance in relation to the allegations of sexual abuse by Kostka.[695] After the settlement in September 2009, AAP contacted Canberra police about the abuse. AAP gave evidence that ACT Policing told him that, because Kostka had already been convicted in an earlier trial for other offences, criminal proceedings would need to wait until Kostka had served his sentence.[696]

In Case Study 27 we examined the experiences of a number of patients in healthcare services in New South Wales and Victoria.[697] AWI gave evidence about the abuse she suffered by a volunteer, Mr Harry Peuschel – who she only knew as 'Harry' – and a male youth worker while she was admitted to the Royal Children's Hospital Melbourne (RCHM) in 1981, when she was 12 years old.[698] AWI first reported the abuse to the CEO of the RCHM in late 1997.[699] AWI said that she thought pressing charges would be difficult given that 16 years had passed.[700]

In 2002, AWI contacted police to make sure that there was a record of abuse at RCHM and to make sure that 'Harry' and the other volunteer were no longer at RCHM.[701] The police then advised AWI that a volunteer had been dismissed after AWI's initial complaint in 1987. AWI had not been informed of that at the time. The police officer liaising with AWI was confident that the dismissed volunteer and 'Harry' were the same person. Police had a photograph which they asked AWI to view and identify. However, AWI chose not to view the photograph for her own welfare. AWI told us it made her angry that RCHM had discovered Mr Peuschel's identity but had simply stood him down rather than reporting him to police. As Mr Peuschel had died and there was no evidence that the other volunteer had offended, the police notified AWI they would close the case.[702]

One of the matters we examined in Case Study 15 was the prosecution of Mr Scott Volkers. We discuss aspects of this prosecution in some detail in Chapter 21. The three complainants, Ms Kylie Rogers, Ms Simone Boyce and Ms Julie Gilbert, alleged that Mr Volkers abused them in the 1980s. They reported the abuse to police in 2001.

Ms Rogers was coached by Mr Volkers from about 1981 to 1988. Ms Rogers told us that she was sexually abused by Mr Volkers on a number of occasions. The abuse started in 1985, when she was around 13 or 14 years old, and continued until towards the end of 1987 or the start of 1988, when she turned 16.[703] Ms Boyce was coached by Mr Volkers from 1985 until 1989. Ms Boyce told us that she was sexually abused by Mr Volkers on one occasion in the summer of 1987–1988, when she was 12 years old.[704] Ms Gilbert was coached by Mr Volkers from about 1982 to 1986. Ms Gilbert gave evidence that she was sexually abused by Mr Volkers on a number of occasions between the ages of 13 and 14.[705]

In 1997, Ms Rogers and Ms Boyce disclosed to each other that Mr Volkers had interfered with them.[706] In November 2001, Ms Rogers made a statement to the Queensland Police regarding the abuse. She participated in a number of telephone conversations with Mr Volkers, which were recorded by police. Ms Rogers also wore a listening device and met with Mr Volkers. Ms Rogers said that she found this process overwhelming and was anxious, nervous and uncomfortable during it.[707] Ms Boyce was contacted by the Queensland Police in November 2001. She provided a statement to the same officer who had contacted Ms Rogers.[708] Ms Gilbert was approached by the Queensland Police in 2002, and she provided two statements.[709]

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 Ms Rogers and Ms 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 Ms Gilbert.

Ms Boyce said that she was able to contact Queensland police for updates on the investigation and was happy with the way the matter was handled by the Queensland Police Service; however, she felt less support from the Office of the DPP. Ms Boyce told us it was difficult for her to get information from either the prosecutor in charge of the case or the victim liaison officer and that she would seek updates from the police instead, as they were more available, including out of hours.[710]

In Case Study 15, we also examined the response to allegations by AEA that he was sexually abused by Mr Terence Buck at the Clovelly Surf Club between 1960 and 1965, where they both trained.[711] AEA reported the abuse to police in 2000, and he made a statement over several days in November and early December 2000.[712] In late December 2000, he was contacted by telephone by the NSW Police and told that they would be discontinuing the investigations. AEA was told there was insufficient evidence to charge Mr Buck due to the age of the evidence, inconsistencies in the evidence and the failure of other victims to come forward.[713]

In Case Study 22, we examined the response to allegations of sexual abuse by Shmuel David Cyprys at Yeshivah College Melbourne. AVA was a student at Yeshivah College Melbourne. In 1986, AVA was sexually abused by Cyprys.[714]

AVA reported his abuse by Cyprys to police in April 2003. He gave the following evidence in relation to his experiences of reporting to police in 2003, when charges were not pursued:

> In April 2003 I provided a statement to the police reporting the sexual abuse by David. The police were friendly and supportive and did their best to make me feel comfortable. After contacting the police I stopped smoking marijuana and I have not touched it since.
>
> In 2003 or 2004 the police told me that charges against David could not be pursued, largely because I could not remember specific dates or times. I was devastated. I had spent a long time trying to forget the events and was also coming off an addiction to marijuana. At the time I made the initial statement to the police I was so emotionally and physically disturbed that I was unable to recall precise details surrounding the abuse that had occurred.
>
> I now know that David had been charged with indecent exposure or assault in the early 1990s. I find it upsetting that nothing further was done when I made my first statement to the police in 2003, considering that at the time of my contact with the police David had a criminal history.[715]

AVA went back to the police in 2011. He said:

> Sometime in 2011 I saw articles in the newspapers about child sexual abuse within the Yeshivah community. I also found out that David was still working within and around the Yeshivah College. This discovery physically sickened me – I literally felt like vomiting. I felt a sense of responsibility that maybe I should have done more in 2003 so that he could not be around children.
>
> Realising that there had been other victims of Cyprys motivated me to go back to the police. Because I was mentally more stable, I felt better able to recall and present the events as they happened. In July 2011 I assisted police with further investigations and the subsequent prosecution of David for child sexual abuse. As part of this I provided two additional

> statements to police to clarify my initial statement from 2003. Detective Lisa Metcher assisted me in preparing these statements and she put the charges before the court. Lisa was great. She was particularly supportive and communicative.[716]

Cyprys pleaded guilty to the charges relating to AVA. He was sentenced in December 2013.[717]

In section 6.6.3, we outlined Mr Waks' experience of reporting abuse, including by Cyprys, to police in 1996. Mr Waks gave evidence that in September 2011, after allegations of abuse at Yeshivah became public, police contacted him to ask whether he had any further information he could add to the September 1996 statement. Mr Waks made a further statement.[718]

In August 2013, Cyprys pleaded guilty to three charges concerning Mr Waks. Mr Waks attended the court hearing. He told us that he found the experience both cathartic and empowering, particularly because what had happened to him had been judicially recognised.[719]

Mr Waks expressed a number of concerns about the police response, particularly in relation to his initial report in 1996, as follows:

> In my victim impact statement I also said that I thought Victoria Police made a major error in their response to my allegations back in 1996. I said that I had never received an explanation as to why a link was not made between my allegations and similar allegations over which Cyprys had faced court only a few years earlier, and that I hoped that Victoria Police would shed some light on the matter. In February 2014 I wrote to the Chief Commissioner of Victoria Police about this matter seeking an explanation.
>
> On 24 February 2014 I received an email from Inspector Mark Galliott, Deputy Chief of Staff to the Chief Commissioner, in which he gave an explanation of why charges were not laid in 1996 when I first went to the police.
>
> While I accept that it may not have been simple to introduce the previous case as evidence in my case, there was no attempt to do so, nor was there any other follow-up action by police. I still feel that had the police response in 1996 been more serious Cyprys would have been exposed many years earlier. I accept that many things were different in the 1990s, but I do believe that Victoria Police could have handled my initial complaint better. My more recent experiences with Victoria Police have been much more positive.[720]

One of the matters we examined in Case Study 37 involved the response of the Australian Institute of Music (AIM) to allegations of child sexual abuse of students made against Professor Victor Makarov.[721] Makarov was arrested in February 2004. He was initially charged with sexual offences against two students, CAA and BZZ. In May 2004, the police arrested and charged Makarov with a further 19 charges of child sexual assault in relation to Ukrainian students BZY, BZX and BZW.[722]

During the public hearing, we heard from CAA, a former student of Makarov's at AIM, and from CAA's father, CAD. CAA gave evidence that Makarov sexually abused him at the AIM premises as well as at Makarov's home over a period of about 18 months from mid-2002 until 2004.[723]

AIM reported the allegations under the reportable conduct scheme and also to police and the Department of Family and Community Services. The JIRT in Chatswood undertook the police investigation.[724]

CAA told us that his experience as a witness in the criminal proceedings against Makarov was positive. He felt supported by the department, the police and staff of the Office of the DPP throughout the criminal process. CAA's father, CAD, gave evidence that CAA worked with police and the DPP in the preparation of Makarov's prosecution. CAD found the engagement from the department, the police and the DPP to be supportive and professional.[725]

Makarov was tried in November 2004 for offences relating to CAA. The jury returned a guilty verdict on eight of the nine counts. Makarov was sentenced to 12 years imprisonment. Charges against Makarov in relation to BZZ were withdrawn. In 2005, Makarov was separately tried and convicted for offences against BZY, BZX and BZW. He was found guilty on all but one of the 19 counts.[726]

Makarov appealed all of his convictions and sentences. In 2008 the New South Wales Court of Criminal Appeal allowed his appeals against the convictions relating to BZW and BZX, and separate trials were ordered. Ultimately, not guilty verdicts were returned in relation those offences. The appeal against conviction with respect to CAA and BZY was dismissed.[727]

One of the matters we examined in Case Study 33, in relation to The Salvation Army (Southern Territory), was the response to the abuse suffered by Mr Graham Rundle. Mr Rundle was placed in Eden Park Boys' Home by his father in around 1960, when he was about seven years old.[728] Mr Rundle gave evidence that within the first two months after his arrival in Eden Park he was sexually abused by other boys who were residents at the home. He said that the sexual abuse continued at least twice a week for three or four years. When Mr Rundle first disclosed the abuse to Salvation Army Sergeant William John Keith Ellis, Ellis sexually abused Mr Rundle and thereafter did so on an ongoing basis. Mr Rundle gave evidence that during the period in which he was a resident at Eden Park he was sexually assaulted at least 200 times.[729]

Mr Rundle gave evidence that in or around April 2004 he received a phone call 'out of the blue' from a police officer in South Australia who asked him if he was interested in giving a police statement in Sydney regarding the abuse he had suffered in Eden Park. The police had obtained Mr Rundle's details after he signed the visitors book at Eden Park in 2000.[730] Mr Rundle gave evidence that up to this point he had not gone to the police. He had had a conversation with his lawyer about it, but his lawyer had advised that, because of the statute of limitations and the length of time that had passed since the offending occurred, it would be difficult for police to pursue the matter.[731]

Mr Rundle gave a statement to police in May 2004. In June 2004, Ellis was arrested and charged with two counts of indecent assault and three counts of buggery against Mr Rundle.[732] Ellis was convicted and sentenced.[733]

One of the other matters we examined in Case Study 33, in relation to The Salvation Army (Southern Territory), involved allegations that Mr Norman Poulter sexually abused a number of boys at Bayswater Youth Training Centre. At the time of our report, BMA was 66 years old. When he was 16 years old, he was transferred from Turana Youth Training Centre to Bayswater, where he stayed for three months. BMA gave evidence that he was sexually abused by Mr Poulter at Bayswater.[734]

BMA gave evidence that he went to the police in 2007 and made a formal complaint. In May 2008, Mr Poulter was charged with offences in relation to BMA and other former residents. Mr Poulter was ultimately acquitted of these offences.[735] We discuss the prosecution of Mr Poulter in Chapter 24 in relation to the issue of tendency and coincidence evidence and joint trials.

BMA gave evidence about his experience of reporting to police in 2007 and 2008:

> I reported Poulter to Victoria Police. In around January 2008, I also provided a statement. At first I made a statement to a female police officer and I held back some information out of embarrassment. I was also not sure if I would be taken seriously and worried that I may be laughed at or not believed. I later made a second statement to a male officer and I provided more information because I felt more comfortable. Overall, I had a good experience with Victoria Police and felt that they handled my complaint very professionally.[736]

One of the matters we examined in Case Study 37 involved the response of RG Dance to complaints made about the behaviour of Grant Davies.[737] We heard evidence from former students of RG Dance and parents of former students who were abused by Davies, who was their dance instructor. Davies was arrested in May 2013 after his wife, BZB, found child pornographic material and messages on his laptop computer and reported him to the police.[738]

One student and a parent of another student reported Davies' inappropriate sexual conduct to police in 2007.[739] The first report of the allegations to any agency was to a DoCS helpline on 12 February 2007. We heard that the investigation was passed to Parramatta JIRT on 8 March 2007.[740] On 14 May 2007 a search warrant was executed to obtain Davies' computer. However, before the search warrant was executed, Davies disposed of his computer and purchased another. The new computer was subsequently seized by the police. The computer was eventually found to contain no illegal material. This lack of corroborative evidence was a key factor in the decision not to prosecute Davies.[741]

While it was acknowledged that Parramatta JIRT had a heavy workload and competing priorities at the relevant time, we were satisfied that the delay in obtaining and executing the search warrant was unacceptable.[742] We were also satisfied that Parramatta JIRT should have

interviewed BZB, Davies' ex-wife, and that they should have interviewed Ms Rebecca Davies, Grant Davies' sister.[743] However, we accepted that there was an insufficient basis to find that police had enough evidence to arrest and/or charge Davies in March 2007.[744]

We were also satisfied that, since 2007–2008, JIRT agencies have more detailed systems and procedures to respond to abuse in an institutional setting when an alleged perpetrator has access to a large number of students and criminal proceedings have not yet commenced, including the JIRT Local Contact Point Protocol, which we discuss in section 9.2.4.

In Case Study 6, we examined the response by the principal and other staff members of a Catholic primary school in Toowoomba, Queensland, to allegations of child sexual abuse made against a teacher, Gerard Byrnes, in September 2007.

Byrnes was arrested in November 2008 after a student, KA, disclosed her abuse to her mother, KO. Byrnes admitted to sexual offences against six girls but initially denied offences against three further girls. However, he subsequently pleaded guilty to child sexual abuse offences against all nine girls.[745]

KQ is the father of KH, who was a student at the school. He said that, when he reported to the school the disclosure that KH made in around September 2007, he was given the option of reporting the matter to the Department of Child Safety or for it to be investigated internally. KQ told us that he did not recall being told that he had the option of reporting to the police himself.[746] KQ was contacted by police in November 2008, and he gave a statement and KH was interviewed. KQ was aware that charges were laid, but he gave evidence that he and his family did not have much to do with the criminal proceedings. He said that they were contacted by police from time to time to be kept informed of the process and outcome.[747]

KR is the mother of KE, who was a student at the school. Byrnes was KE's year 4 teacher.[748] KR was contacted by police, as it was believed KE may have been abused by Byrnes. KR gave evidence that KE's initial response to the suggestion of going to police was that KE did not think anything could be done. KE noted that KH's parents had already told the school, but no action had been taken.[749] KR took KE to the police station for an interview. KE was interviewed without KR present, which had been explained to her by the police. While KR understood why KE was interviewed without her present, KR said she did not feel comfortable leaving KE alone knowing she was frightened and being questioned by strangers.[750]

KE did not initially disclose an offence to police but agreed to return the following day for another interview. On this occasion, KE did disclose that Byrnes had abused her. KR told us that, while it was a revolting situation to be in, she felt the police handled the matter exceptionally well.[751]

KP gave evidence in relation to the abuse of her daughter KC, who was also in Byrnes' year 4 class in 2007. KP was also contacted by police to attend the police station in relation to an incident involving Byrnes. When they attended Toowoomba Police Station, police officers explained to KP and her husband that Byrnes had admitted that he had abused KC.[752]

KC was then interviewed by police. In relation to the interview process, KP said:

> My husband and I left the Police Station for the duration of the interview. I felt anxious and nervous about leaving [KC] on her own. We had just found out that our daughter had been raped and it was very difficult for us to leave her alone with strangers to explain what had happened.[753]

KC did not initially disclose the abuse to police, so police attended KP's home to have a further conversation with her. KP said that she does not believe KC has told anyone about the abuse. KP said that, while it was a very difficult and emotional time for her family, she thought the police were fantastic in the way they handled the matter.[754]

KO, whose daughter KA was also abused by Byrnes, gave evidence. KA disclosed the abuse to KO, and the next morning KO reported the abuse to police. Byrnes was arrested that day.[755]

One of the matters we examined in Case Study 27 involved a number of survivors reporting abuse by John Rolleston, a general practitioner.

AWB gave evidence to the Royal Commission about being abused by Rolleston on at least five occasions, the first of which occurred in 1978.[756] With encouragement from medical professionals, on 4 November 2005 AWB attended Hornsby Police Station. Initially it was a conversation about options to pursue rather than to give a statement. AWB gave evidence that after reporting the abuse he felt a great sense of relief. His concern with pursuing the matter was whether he would have control over the process and whether details of the abuse would become public. AWB was advised that without corroborating evidence it may be difficult for the police to take the matter further and that he should discuss the matter with his family to see if there was any corroborating evidence that could be obtained. AWB told us that at that point he was just happy to be properly heard and to know that the police had taken him seriously.[757]

On 28 November 2007, AWB was contacted by a detective at Hornsby Police Station, who told him that the police had discovered similar stories about Rolleston on their database and that they would need a comprehensive statement. AWB gave his statement on 10 January 2008.[758] AWB was informed in July 2009 that Rolleston had been arrested. AWB gave evidence that he felt shocked at this, as he did not realise his complaint would lead to the arrest and that he thought he would have some control over the process.[759]

AWA gave evidence that he was abused on three occasions by Rolleston. AWA was abused for the first time in 1974, when he was 15.[760] After seeing reports in the media in August 2009 inviting victims of abuse who had been abused by a doctor in the 1970s to come forward, AWA's brother, who had also been abused by Rolleston, informed AWA. AWA gave evidence that the police officer he contacted, Detective Senior Constable Arron Ferguson, 'deserves a medal for the work he has done'.[761] AWA's brother gave his statement to police at Hornsby Police Station, while AWA, who was overseas at the time, gave his statement via telephone and the internet.[762]

AWG was also abused by Rolleston in the 1970s.[763] In 2009, AWG's mother told him the local paper reported that Rolleston had been arrested. In response to this story, AWG contacted police and gave a statement.[764] AWG gave evidence in the prosecution of Rolleston in early 2010. The police and DPP communicated with AWG throughout the process.[765] AWG told us that he was proud of himself and his mother for standing up and telling the world what happened. He said he was grateful to those who started criminal proceedings and saw them through and that the NSW Police and the criminal justice system 'succeeded in telling the truth'.[766]

AWH was abused by Rolleston in 1973, when he was about 12 years old.[767] AWH initially complained to the Health Care Complaints Commission (HCCC) about Rolleston in 2003. AWH gave evidence that he had not considered reporting to police because he thought there was a limitation period for sexual offences, that he was only seeking to stop Rolleston from practising medicine, and that he had previously had experiences with the police which he did not consider pleasant.[768] AWH's initial complaint to the HCCC did not proceed, as AWH was suffering from significant mental health issues at the time. In 2006, AWH was in a position to re-engage with the HCCC process. The HCCC decided to investigate his complaint but required a number of specific details that AWH was deeply distressed to be asked to provide (such as specific dates of abuse and what AWH was wearing when the abuse occurred).[769]

AWH reported to police by writing to Hornsby Local Area Command in Sydney, providing the statement he had already made to the HCCC. Five days after writing, he was contacted by Detective Senior Constable Ferguson. AWH described the experience with Detective Ferguson as very different to the one he had had with the HCCC. He felt believed by the police and was able to communicate effectively. Detective Ferguson flew to Queensland in 2008 to assist AWH, and AWH told us that he felt Detective Ferguson was 'on my side'.[770]

AWC was abused by Rolleston when he attended Royal North Shore Hospital on 24 July 1979, when he was 15 years old.[771] AWC initially tried to pursue his complaint through the HCCC, as his main priority was trying to stop Rolleston from being a doctor and therefore stop him from hurting others.[772] He first made contact with the HCCC on 13 August 1998.[773] In or around January 2008, while his complaint to the HCCC was still being reviewed, AWC was contacted by Detective Senior Constable Ferguson, who advised him that a police investigation of Rolleston was underway. AWC gave evidence that he agreed to give his full support to the investigation.[774] On 3 July 2009 Rolleston was charged in relation to the abuse of AWC. AWC told us he appreciated the work of the police and that what they were able to do in one year far exceeded what the HCCC had been able to do in 10 years.[775]

AWD was abused by Rolleston at a medical practice in Whalan, New South Wales, in October 1984.[776] AWD did not report the abuse to police until 2012, after he found material on the internet describing Rolleston as a criminal.[777] Rolleston was convicted, but AWD gave evidence that he thought Rolleston's sentence was too lenient. AWD told us that, rather than taking account of factors such as Rolleston's age, the court should have focused on the impact of Rolleston's abuse on his victims.[778]

AWF was abused by Rolleston during a consultation in the period 1970 to 1972, when he was between 16 and 18 years old.[779] In 2011, AWF became aware through a media article that an unnamed doctor who had been found guilty of assaulting boys in his North Shore surgery. Upon reading the article, AWF knew that it was Rolleston.[780] After doing further research on Rolleston, AWF decided to contact the NSW Police Force.[781] AWF initially contacted the District Court. He was referred to the Office of the DPP and then put in touch with the NSW Police Force. He spoke with Detective Matthew Ericson at Hornsby Police Station. AWF gave evidence that he 'cannot speak highly enough of the professionalism of Detective Ericson'.[782] AWF gave evidence that the response he received from the NSW Police Force was empathetic and professional. He told us this in the hope that those abused will have the confidence to report their abuse.[783]

In section 6.3.2, we outlined Mr Latham's experiences with police in the 1960s, which we examined in Case Study 30 in relation to Turana Youth Training Centre in Victoria.[784] Mr Latham said that, with the encouragement of a counsellor, he reported the abuse he suffered at Turana to police in 2009. He gave the following evidence about his experience of coming forward:

> At first I didn't think I would be believed, because of my experience with the detective when I was at Turana. However, the counsellor persuaded me that sexual abuse allegations are handled differently these days, and that I would be listened to. Detective John Raglus treated me well and spent all day assisting me. He kept in touch during the investigation that followed and told me that Horne was dead but Wilkie was still alive. In 2013, Wilkie was charged with three counts of buggery with violence, seven counts of buggery, one count of indecent assault on a male person, and two counts of gross indecency with a male person. He was committed to stand trial and I understood from Detective Raglus that there was a second victim too.[785]

Mr Latham gave evidence at the committal hearing. Mr Latham told us he recalls the magistrate saying there was enough evidence for a jury to convict Mr Wilkie of the offences. However, in 2014, shortly before the trial was due to commence, Mr Latham was informed by the Office of the DPP that the trial would not proceed.

In Case Study 23, we investigated allegations of child sexual abuse of a number of former students of Knox Grammar School in Wahroonga, New South Wales, and the way that Knox and the Uniting Church in Australia responded to those allegations.[786] In 2009, a number of former Knox students went to the NSW Police Force to report child sexual abuse by teachers at Knox. After an investigation, five teachers from Knox were charged and ultimately convicted of child sexual offences against students.[787]

Mr Guy Lamond was the first former student to report allegations of child sexual abuse, which were against schoolteachers Barrie Stewart and Craig Treloar.[788] He reported the abuse to Hornsby police in January 2009. Mr Lamond indicated he was happy with the first officer he contacted. However, he gave evidence that, as time passed, he did not feel he was receiving adequate communication and he felt he was the last person to know what was happening.[789]

ARY started at Knox in year 2 in 1969 and was in year 7 in 1974. ARY was abused by Roger James during a canoeing trip as part of cadet activities and later, when ARY was in year 10.[790] ARY explained why he decided to come forward in 2009:

> In early 2009, I heard a news report about sexual abuse allegations at a school in Wahroonga. I was stunned and knew that it must be Knox. I only built up the courage to confront James once I realised that criminal prosecutions were being launched against other Knox teachers. I thought that somebody would finally take my complaint seriously and do something about it. I was concerned that revealing my abuse would shock and shame the generations of boys who were either still attending the school, or who had attended the school in the past, but once the allegations were published in the media I saw no reason to stay silent. I spoke to a trusted colleague about my story and she encouraged me to come forward to the police.[791]

ARY did not need to give evidence, as James pleaded guilty. ARY said that he was pleased with the response he received from police at Hornsby Police Station and that he had a consistent contact officer throughout the case.[792]

Dr John Rentoul also gave evidence to the Royal Commission in relation to the abuse of his son David by Stewart.[793] Mr David Rentoul did not report the abuse to police but was instead subpoenaed by police, as Stewart had advised police that David was one of his victims. Dr Rentoul gave evidence that David did not tell anyone about his abuse because he felt guilt and shame and that Stewart was a family friend. David provided a statement to police in 2009. The prosecution process took approximately two and a half years, and in that time Dr Rentoul acted as the liaison between David, and police and prosecutors. Dr Rentoul expressed his thanks to David's case officer at Hornsby Police Station. Stewart pleaded guilty to the offences in relation to Mr David Rentoul but not to the offences in relation to the other victims Stewart previously identified.[794]

ARG was a student at the Knox preparatory school from year 2 in 1978. ARG gave evidence that he was abused in 1981, when he was in year 5 and 10 years old, by his art teacher, Mr Bruce Barratt. He was also abused in 1984 by his year 8 master, Adrian Nisbett.[795] ARG was contacted by police in 2009 after ARG's friend had reported abuse. ARG went to Hornsby Police Station.[796] While ARG gave evidence at Nisbett's committal hearing, Nisbett subsequently pleaded guilty to a number of offences against other survivors, and the matter in relation to ARG did not proceed.

Mr Adrian Steer started at Knox in 1980 in year 5. Mr Steer gave evidence about abuse he suffered from Damien Vance and Nisbett.[797] Mr Steer made statements to police in 2009. He said that he found the criminal justice process was very traumatic and, while he was not named in any media reports, he knew that the material being discussed related to his abuse.[798]

Mr Matthew O'Neal started at Knox in 1976, when he was eight years old. Mr O'Neal said that he was abused by Stewart when he was about 11.[799] Mr O'Neal first reported the abuse by Stewart in February 2009 after seeing Stewart on the news in relation to allegations against

children. Mr O'Neal contacted Bathurst Police Station. He did not hear much from them until June or July 2009, when he made a statement.[800] Mr O'Neal attended a committal hearing for Stewart in 2011. He was advised by the officer in charge of the investigation that there were 11 complainants in total, that Stewart had pleaded guilty and that he received a suspended sentence.[801]

Mr Scot Ashton started at Knox in 1980 and gave evidence in relation to the abuse he suffered from Mr Barratt and Stewart.[802] Mr Ashton explained the challenges he faced in engaging with police following his previous arrest on another matter. His experiences associated with this arrest led to him developing a fear of police and going to any lengths to avoid any interaction with them, even when he was the victim.[803] Mr Ashton reported to police in March 2009. He indicated that the media reports about the abuse at Knox led to his realisation that the abuse was a widespread problem and not an isolated event, so it would be likely he would be taken seriously.[804] Mr Ashton gave evidence at the committal hearings for both Nisbett and Stewart. He was subjected to extensive cross-examination in the committal hearing for Stewart, after which Stewart pleaded guilty.[805]

ATU, whose son ATS was abused by Treloar, gave evidence about ATS reporting the abuse to police and his decision not to pursue criminal charges against Treloar. She said that, at the time of reporting to police, ATS had ongoing mental health issues and, as there were other ongoing investigations and prosecutions of Treloar, ATS decided not to pursue the matter. ATU told the Royal Commission that she was devastated to learn that Treloar got out of prison before her son had got out of hospital, where he was being treated for health issues arising from the abuse.[806]

In Case Study 16, we examined the Melbourne Response, which was adopted by the Catholic Archdiocese of Melbourne to respond to victims of child sexual abuse and allegations of child sexual abuse against personnel of the Catholic Archdiocese of Melbourne.[807] AFA gave evidence that he was abused by Father Michael Glennon in the 1970s on three occasions over a period of about 18 months, when AFA was about 15 years of age.[808] AFA reported his abuse to police in June 2011. AFA indicated that the police were 'fantastic', very empathetic and keen to progress the matter. Father Glennon was charged, but he died before the trial commenced.[809]

In Case Study 2, in relation to the YMCA's response to the conduct of Jonathan Lord, a number of parents of victims gave evidence about their experiences of reporting to police, and representatives of the NSW Police Force gave evidence about the police response, between 2011 and 2013. We discuss Case Study 2 in detail in Chapter 9.

In Case Study 33, in relation to The Salvation Army (Southern Territory), we heard evidence from a survivor who first reported his abuse to police in 2014. BML gave evidence that in May 1960 he was made a ward of the state and sent to Box Hill Boys' Home. BML gave evidence that he was repeatedly sexually assaulted by a staff member at Box Hill whom he knew as 'the Boot man'. In 2014, BML gave a statement to police about the abuse. BML said that 'the Boot man' had been identified as Mr David Ferguson and that he was deceased.[810] BML said that after reporting to police he felt a huge sense of relief that he was right.[811]

In Case Study 39, in relation to the responses of certain sporting organisations to allegations of child sexual abuse, we heard further accounts of survivors reporting abuse to police in 2014.[812] We examined the response of a local cricket club in Queensland to allegations that Mr Robert Ross, one of its longstanding cricket coaches, had sexually abused children in the cricket club in the 1980s and 1990s. Between September and November 2014, Mr Ross was charged with a large number of child sexual abuse offences. He committed suicide in November 2014.[813]

Mr Troy Quagliata gave evidence that Mr Ross first abused him in 1989, when he was 14 years old, and that the abuse continued for three years.[814] Mr Quagliata felt that he could not report his abuse to anyone at the cricket club or his high school. He feared no-one would believe him and he was afraid of being bullied and targeted by parents and other children at school. He was also afraid that he would be the subject of gossip and that his family would be discriminated against or humiliated.[815]

In 2002, Mr Quagliata went to the local police station and told a police officer that he did not want to make a complaint but that someone should keep an eye on Mr Ross with small children. In Case Study 39, we did not find any evidence that police took any steps at this time, and Mr Ross remained a coach at the local cricket club.[816]

In October 2014, Mr Quagliata received a Facebook message about Mr Ross from a former member of the local cricket club. The former member was concerned that Mr Ross had sexually abused children at the cricket club. As a result of this message, Mr Quagliata reported his abuse to the police. In Mr Quagliata's statement he described his experience of the police investigation of Mr Ross as follows:

> I was very surprised to hear about the investigation into Bob. I thought I was the only one that he abused. I wasn't aware that there were others like me. On 23 October 2014, I was contacted by the Police who asked me what had happened between Bob and me. He advised me that they were in the process of taking Bob's 'blue card' [a Queensland Working with Children Check clearance] away.
>
> On 28 October 2014, I provided a statement to the Queensland Police. I was in jail at the time. This was a difficult process for me, as I had a lot of short term memory loss, but being in jail gave me all the time in the world to think.
>
> I know now Bob was eventually charged with a total of 54 offences against me and some other boys. The detective who was assisting me was really good, he was very supportive and helped me through the process. However, when I went to jail I felt all communication stopped.
>
> I wasn't told that Bob had been charged or how many offences he had been charged with. Around Christmas 2014, my dad told me that Bob had committed suicide.

> It felt like after I had given my statement there wasn't any further contact. I would have liked to be told what was going on and kept in the loop. I tried to ring the police, but didn't get any answers. If my dad hadn't lived in the town at the time, I probably wouldn't have known about anything.[817]

BXI joined the local cricket club in 1984, when he was about nine years old. He gave evidence that Mr Ross started to sexually abuse him when he was 11. The abuse continued until the end of the cricket season in 1990, when BXI was 14 years old. BXI did not tell anyone at the time. He told us that he lived in a small town and that it was very difficult to report abuse. He did not think that he would be believed and thought that his family would be vilified.[818]

BXI reported the abuse to police in August 2014. In October 2014, Mr Ross was charged with 10 offences against BXI. In his statement, BXI described the police investigation in the following way:

> Throughout the process, the police were very accommodating and good to me. I really needed to tell my story, it was time. I knew it was going to be quite hectic, and very daunting, but the police were great to me. The detectives in town kept me updated of the case progress and were working long hours to sift through the information they were receiving. In reporting my abuse, my objective was not for anyone's life to end. It was for the victims to have their day in Court, to make Bob have to stand in front of us and hopefully take a punishment handed down by a magistrate and to also stop any abuse or future abuse from occurring.[819]

BXE was first coached by Mr Ross when he was 11 years old. BXE told us that Mr Ross first abused him in 1989, when he was 14 years old. BXE did not tell anyone about the abuse at the time because he felt ashamed and thought he would not be believed. In or around 1994, BXE's mother found out about the abuse and arranged for BXE to talk to the police, but BXE was not ready to talk to the police.[820]

In 2014, BXE gave a statement to police. BXE gave evidence that he gave his statement partly for himself to get closure and partly for his friend, who had also given a statement to police. BXE said:

> I thought the police were good while taking my statement. They made me feel at ease as much as possible. It was hard though, we were out in the middle of the station, with all the other police officers around me. I would have preferred that we were somewhere more private where I could give my statement and talk about the abuse.
>
> When Bob Ross was charged, I felt good. I wanted everyone in town to know what sort of man he really was. I wanted his name to be wiped off the cricket club. Some people didn't and still don't believe that Bob Ross was capable of abusing kids.
>
> After Bob Ross committed suicide, I was in shock, but I didn't lose any sleep. I would have preferred that he went through the court and given us the opportunity to prove what he did.[821]

7 Current police responses

7.1 Introduction

Our public hearings and private sessions, and some of our research projects, have given us many examples of and information about police responses to child sexual abuse in an institutional context over many decades.

To inform our policy recommendations, we also wanted to understand:

- what reports of child sexual abuse police are receiving and being required to respond to currently
- how police are currently responding to reports of child sexual abuse.

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 data from each state and territory. The data is for the period from 1 January 2010 to 31 December 2014.

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

The project was designed to report on:

- how police proceed when they receive notifications or reports of child sexual abuse, including through what channels police receive reports; and how quickly police assess, investigate and finalise cases of child sexual abuse
- the level of attrition that occurs between notification or report of child sexual abuse and the final disposition of those reports by police
- if and where police discretion is being applied during the response process.[822]

The report, *Police responses to child sexual abuse 2010–2014: An analysis of administrative data for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Police Data Report),[823] is published on the Royal Commission's website.

In addition to analysing all reports of child sexual abuse, the study included a separate analysis of reports of child sexual abuse where the alleged or suspected offender was also a child.

We discuss the limitations of the data in section 7.4. It is particularly important to emphasise that, while the Police Data Report adopted classifications and counting rules to achieve some consistency in its analyses, the differences between jurisdictions mean that the data cannot be used to make comparisons between states and territories. In particular, it cannot be used to make comparisons in relation to:

- the respective levels of child sexual abuse occurring within individual jurisdictions
- whether one jurisdiction is achieving better outcomes than another jurisdiction
- whether one jurisdiction responds to reports of child sexual abuse more efficiently than any other.[824]

It is also important to understand that it may not be clear what constitutes a 'better outcome' in relation to police finalisation of a report of child sexual abuse. For example:

- **Number of reports:** Higher numbers or rates of reporting to police might result from factors such as a higher public awareness of the importance of reporting to police, police providing additional avenues to encourage reporting, and police earning a reputation for responding well to reports of child sexual abuse. In addition or alternatively, higher numbers or rates of reporting to police might indicate a higher prevalence of child sexual abuse.
- **Time to finalise:** A shorter time to finalise a report might not be preferred if it is the result of inadequate investigation or a victim withdrawing their complaint because they found the police interview hostile or unsupportive. A longer time to finalise a report might be preferred if it is the result of a thorough investigation and additional work to lay charges and proceed to court, but not if it is the result of multiple changes in police personnel and significant delays in investigation.
- **Method of finalisation:** Finalising a report by commencing court proceedings might be preferred if it is the result of a thorough police investigation and the victim being willing to proceed to court. However, it might not be preferred if the victim did not want to proceed to court or if the investigation was inadequate and charges were withdrawn before trial.

We discuss the data in the Police Data Report in relation to the following aspects of current police responses:

- what reports police are responding to – in section 7.5
- how police are responding to reports – in section 7.6
- what factors are associated with police finalisation of reports within 180 days after the report is made – in section 7.7
- what factors are associated with police finalisation of reports by initiating court proceedings – in section 7.8
- how police responses to child sexual abuse are currently structured in each jurisdiction – in section 7.9.

7.2 Data sought

7.2.1 Data sought for the Police Data Report

The Royal Commission sought under notice from each state and territory government data on all reports of child sexual abuse to police between 1 January 2010 and 31 December 2014, as well as any further matters that had been reported previously but were either responded to or finalised by police in that period.

Only some jurisdictions were able to include information about reports that had been reported previously but were either responded to or finalised between 1 January 2010 and 31 December 2014. In order to remove this area of inconsistency between jurisdictions, only those cases that were reported within the 2010 to 2014 period were included in the analyses in the Police Data Report.[825]

Any available data was also sought on a number of factors, including:

- the date that the alleged child sexual abuse occurred and when the report was made to police
- the age and gender of the victim and alleged offender[826] and the relationship between the victim and alleged offender
- the location in which the child sexual abuse allegedly occurred and the specific offence alleged to have been committed
- information about the conduct of investigations, including information about steps that police took (such as undertaking interviews or the collection of other evidence), the dates these steps were taken and the outcome of key decisions (such as whether in police's view an investigation should be continued with).[827]

The study initially aimed to analyse investigative processes and the exercise of relevant discretions by police. However, due to the nature and purpose of their administrative data systems, most jurisdictions were unable to supply information about the investigative stages of cases of reported child sexual abuse or whether specific investigative steps had been taken.[828]

7.2.2 Regular reporting of police data on child sexual abuse offences

The detailed data that we obtained for the Police Data Report is not generally reported by police and is not available on a regular basis.

We consider that it would be useful to explore whether police data on child sexual abuse reports could be obtained and reported on an ongoing basis. While it may not be possible to report data to the level of detail that we have obtained, we consider that some ongoing reporting of police data on child sexual abuse reports would be useful.

The Report on Government Services is an annual publication of data managed by a Steering Committee coordinated by the Productivity Commission and comprising representatives of all Australian governments. The Steering Committee reports to the Council of Australian Governments.[829]

We note that the 2017 Report on Government Services included performance reporting for police services.[830] In some cases, data was reported for sexual assault, which includes sexual assault against adults and children.[831] The data is not disaggregated to identify child sexual abuse offences separately from adult sexual assault.

It is unclear to us whether the data could be disaggregated to identify child sexual abuse offences separately from adult sexual assault. It is also unclear to us whether some of the data that relies on crime victimisation surveys, if disaggregated to identify child sexual abuse offences separately from adult sexual assault, would be useful to inform governments' and the community's understanding of child sexual abuse offences.

We note that the current 'outcome' measures for police investigations may not be useful for child sexual abuse investigations. The measures are:

- the proportion of investigations that were finalised within 30 days of the offence becoming known to police
- the proportion of investigations finalised within 30 days of the offence becoming known to police, where proceedings were instituted against the offender.[832]

While these measures are reported for sexual assault generally,[833] sexual assault has the lowest rate of finalisation within 30 days where proceedings were instituted against the offender.

As discussed in section 7.3.4, the Police Data Report used 180 days to measure finalisation. We would be concerned if police were required to report on performance measures that encouraged unreasonably quick finalisations, potentially at the expense of thorough investigations or sufficient concern for the victim's needs and readiness to proceed.

However, we consider that it would be useful for the Steering Committee for the Report on Government Services to review how police data on child sexual abuse could be reported within the Report on Government Services reporting framework and whether any appropriate outcome measures for police investigations of child sexual abuse offences could be developed.

Recommendation

2. Australian governments should refer to the Steering Committee for the Report on Government Services for review the issues of:

    a. how the reporting framework for police services in the Report on Government Services could be extended to include reporting on child sexual abuse offences

    b. whether any outcome measures that would be appropriate for police investigations of child sexual abuse offences could be developed and reported on.

7.3 Terminology

7.3.1 Incidents and cases of child sexual abuse

The Police Data Report adopted a standard counting rule to apply across all jurisdictions. A 'case' was defined as being a single, unique combination of incident, victim and offender. An incident involving two victims and three offenders, each of whom committed one of more offences against each victim, would therefore result in six 'cases'.[834]

This use of 'case' does not refer to a court case or other legal proceeding.[835]

Child sexual abuse offences were identified in accordance with the Australian and New Zealand Standard Offence Classification (ANZSOC).

All offences within ANZSOC Division 03 (Sexual assault and related offences) were included within the study. Division 03 is further divided into two categories – sexual assault (subdivision 031) and non-assaultive sexual offences (subdivision 032). Further, subdivision 031 is divided into aggravated (0311) and nonaggravated (0312) sexual assault.[836]

Cases were included where the age of the victim at the time of the offence was under 18 years.

Although ANZSOC provides for all sexual offences against children to be treated as aggravated offences, jurisdictions do not classify all child sexual abuse offences as aggravated offences.[837] We sought further advice from jurisdictions as to why some child sexual abuse offences are classified as non-aggravated offences. Jurisdictions responded with a number of reasons, including the following:

- The coding of sexual assault offences occurs at a local level, after an initial report is received, and not all factors are known at the time of coding. As an investigation develops and further details are established then this may be updated, particularly at the point of charge. However, an offence may remain coded as non-aggravated even if it could be coded as aggravated under ANZSOC provisions.
- As well as data being updated as investigations progress, laws regarding sexual offences vary from one jurisdiction to another, and some jurisdictions will record whether an offence is aggravated based on specific aggravating factors in their own legislation. Some jurisdictions noted that the data had been provided for the Police Data Report without editing, which may have an impact on the category.[838]

Where the Police Data Report refers to the 'severity' of the offence, this is based on the ANZSOC categories. It does not necessarily reflect the severity of the impact of the sexual abuse on the victim.[839]

The terminology used in the Police Data Report – and in our discussion of it – has been simplified to make the material easier to read. In particular, none of the 'incidents', 'victims' or 'offenders' have necessarily been proved.[840] That is:

- reports to police of 'incidents' or 'offences' should be understood to include *alleged* incidents or *alleged* offences
- 'victims' should be understood to include *alleged* victims
- 'offenders' should be understood to include perpetrators and *alleged* perpetrators, some of whom may ultimately be convicted of child sexual abuse offences.

7.3.2 'Historical' offences

The Police Data Report includes analysis of 'historical' offences. Offences were classified as historical if the offence was reported more than 12 months after it had been committed.[841] In cases where multiple offences occurred over a period of time, the time is measured from the last of the offences reported.

It is not clear that this is a particularly useful measure for distinguishing between cases of delayed reporting and other cases. When we discuss historical offences in section 7.5.4, we also draw on data in the Police Data Report in relation to victims who reported at the age of 20 or older. This measure may better distinguish between reports made as a child and reports made as an adult.

7.3.3 Institutional child sexual abuse

Institutional child sexual abuse is not a separate category of offence under criminal law. Police administrative data systems do not collect information that enables identification of those reports of child sexual abuse that would come within the Royal Commission's Terms of Reference.

The Royal Commission engaged a consortium of researchers including the Australian Centre for Child Protection (ACCP), the Social Policy Research Centre (SPRC) and the Australian Institute of Criminology to conduct a separate research project in relation to the incidence of child sexual abuse in institutional contexts. In their report *Child Sexual Abuse in Australian Institutional Contexts 2008-2013: Findings from Administrative Data,* the researchers assessed the limitations of using particular indicators that abuse occurred in an institutional context in relation to police administrative data.[842]

The following four proxy measures of institutional child sexual abuse were used:

- ICSA_1 – This is the broadest definition, based on the victim–offender relationship only. If the child sexual abuse is extra-familial (that is, the offender is known to the victim but not a family member) then this is categorised as ICSA_1.
- ICSA_2 – The child sexual abuse occurs in an institution.
- ICSA_3 – The child sexual abuse occurs in an institution and is extra-familial.
- ICSA_4 – The child sexual abuse occurs in an institution, is extra-familial and the relationship between victim and offender is not child-to-child.

The researchers found that:

- Using the location of an offence is a conservative indicator of child sexual abuse in an institutional context because it excludes offences committed by people linked to an institution but where the abuse occurs outside of institutional grounds.
- Using an institutional location and the victim-offender relationship being extra-familial – that is, ICSA_3 – is a very conservative, but specific, indicator of child sexual abuse in an institutional context. This indicator only includes people known to the victim and who are not relatives or ex partners. Again it excludes abuse by people in authority (teachers, priests et cetera) which occurs outside of institutional grounds.
- The best indicator would be using an institutional location with the perpetrator being extra-familial or abuse by a person in authority – that is, ICSA_3 plus abuse by a person in authority regardless of location of the abuse. This would be a conservative and specific indicator of child sexual abuse in an institutional context, which includes all abuse reported as occurring in institutions as well as abuse by people in authority that occurs in other locations. However, this indicator could only be used in relation to police administrative data in New South Wales as other states and territories do not record their police administrative data in this way.

The ACCP and SPRC then carried out further work to test a number of aspects of the initial analysis. In *Institutional Child Sexual Abuse: The Reliability of Police Data, Nature of Allegations Reported to Police, and Factors Driving Reporting Rates*, the researchers tested the validity of ICSA_3 as an indicator of child sexual abuse in an institutional context by reviewing police case files in New South Wales and Western Australia.[843] As a result of this further work, the researchers found a small number of errors and concluded that the 'nature of the errors indicate that while generally accurate, the proxy indicators [ICSA_3] are limited in small measure by the accuracy of data recorded by police'.[844]

We consider that each of the proxy measures has deficiencies for our purposes. ICSA_1 would count some reports that are not institutional – for example, abuse by a family friend – but would not necessarily include some reports that are institutional within our Terms of Reference – for example, abuse by a foster parent or sibling may be classified as familial abuse.[845]

The other proxy measures, ICSA_2, ICSA_3 and ICSA_4, each count reports of abuse that is recorded as occurring in an institution. This is determined by reference to the location recorded in the data. Where the location was recorded, those locations that are considered to be institutional premises, such as educational, religious or corrective facilities, consistent with classifications used by the Australian Bureau of Statistics (ABS), were counted.[846] However, this approach is likely to understate institutional child sexual abuse within the meaning of our Terms of Reference. For example, it does not include child sexual abuse committed by an employee or volunteer of an institution off institutional premises (for example, during a school camp).

However, we asked that the police administrative data be analysed using these proxies in an attempt to identify how many of the reports of child sexual abuse might be related to institutional child sexual abuse.

In our discussion of the Police Data Report, we focus on the ICSA_3 proxy as the proxy most likely to be the most accurate, albeit conservative, indicator that can be used for all jurisdictions.

7.3.4 Identifying cases as finalised

One of the main purposes of analysing police administrative data was to identify how reports of child sexual abuse are 'finalised' by police and how long it takes for reported cases of child sexual abuse to be finalised by police. However, in relying on individual systems across various jurisdictions as the source of the data, it was necessary to derive a standard definition of 'finalised' that could be applied across the data. In classifying a matter as finalised, the Police Data Report modified the approach that the ABS uses to categorise the status of crimes.[847]

Cases were classified initially as either being not finalised or finalised:

- Cases were classified as not finalised if there was an ongoing investigation as at the date the relevant jurisdiction collected the data for us.[848]

- Cases were classified as finalised if:
    - court proceedings were initiated against an individual
    - other proceedings (such as a formal cautioning of a juvenile) were initiated
    - an investigation was recorded as completed by police with no further action to be taken
    - police were no longer actively investigating a report but might reopen it if new evidence became available at a later date.[849]

An investigation might be recorded as completed by police with no further action to be taken for a number of reasons, including:

- the victim was unwilling to proceed
- the offender was deceased
- police had determined that no offence had been committed.

Table 7.1 contains a description of the finalisation methods and how they were grouped together for the purposes of the Police Data Report.

Table 7.1: Description of finalisation groupings[850]

Finalisation grouping	Description
Court	Investigation has been finalised by an *offender(s) being charged (that is, initiation of court proceedings)*. Investigative outcomes such as arrest, summons or court attendance notice are included in this category.
Other proceedings	Investigation has been finalised by an *offender(s) being processed via other non-court options* – for example, formal caution; juvenile (written); referred to juvenile justice teams; behavioural counselling (under 10 years); caution; community conference; infringement notice issued; offender dealt with by another agency.
Resolved	Investigation has been finalised but no offender has been proceeded against, either due to the circumstances of the alleged offender(s) or because the offence could not be verified or because the complaint was withdrawn. *These cases are unable to proceed and are unlikely to be reopened.* Examples are: offender deceased; Juvenile victim offence not disclosed at interview; juvenile victim offences cannot be particularised; juvenile victim too young without corroboration; lapsed; offender bar to prosecution; prosecution of offender not in public interest.
Unresolved	*Investigation has ceased; however, the case may be reopened at a later date* – for example, Insufficient evidence; no further action (unspecified detail).

Throughout the Police Data Report, the term 'proceeding to court' is used to describe the initiation of court proceedings by police, such as the laying of charges, or proceeding to court to facilitate other courtordered outcomes (such as alternative proceedings for juvenile offenders). The initiation of court proceedings does not necessarily mean that a finding of guilt was made or that a trial even occurred. In particular, charges may have been withdrawn or discontinued before trial. Court outcomes are not recorded within the systems that police use for recording their administrative data, so court activities and outcomes were outside the scope of the report.[851]

One of the analyses reported in the Police Data Report focuses on whether reports of child sexual abuse were finalised within 180 days of the report. A specified period of time was required in order to provide comparable analyses of finalisations. Overall finalisation rates (as opposed to finalisation rates within 180 days of the report) are measured as at the date the relevant jurisdiction collected the data to provide to us. The date differs across jurisdictions and does not reflect the 'final' finalisation rate because some of the unfinalised cases would be finalised after the data was collected.[852]

The period of 180 days was chosen because earlier research, particularly the 2006 report by the New South Wales Bureau of Crime Statistics and Research (BOCSAR), *The attrition of sexual offences from the New South Wales criminal justice system,*[853] suggested that reports of sexual offences that were not finalised within 180 days were relatively unlikely to be finalised after this period.[854]

The importance of finalisation within 180 days received some support from the analyses in the Police Data Report (see tables 7.15 and 7.18 in sections 7.6.4 and 7.6.5). However, the analyses in the Police Data Report also suggested that finalisation by way of initiating court proceedings may take longer than other finalisation methods and, as tables 7.15 and 7.16 demonstrate, a number of cases are finalised – including by initiating court proceedings – more than 180 days after the report is received.

7.3.5 Victim unwillingness to proceed

The data was analysed to identify the number of cases that were finalised on the basis that the victim of the reported child sexual abuse indicated they did not wish to proceed with any further police action.

It is important to understand that this does necessarily include all cases where the victim was unwilling to proceed. That is, it cannot be assumed that, in all other cases, victims were willing to proceed. It does not include cases that were finalised for other reasons. For example, if a case was finalised as 'resolved' because the offender was deceased, it would not be included, but it cannot be assumed that the victim in that case would have been willing to proceed if the case could have proceeded.

Therefore, the data on victim unwillingness to proceed is likely to be an underestimation of the number of cases in which victims are unwilling to proceed.[855]

7.3.6 Child-to-child sexual abuse

A report of child sexual abuse was defined as 'child-to-child' sexual abuse if the age of the victim and the age of the offender were both known to be under 18 years of age at the time of the incident.

Within the 'child-to-child' classification, the following subcategories were developed:

- **Adolescent peer:** Cases where both the victim and the offender were known to be under 18 at the time of the incident, either the victim or the offender was over the age of 12 at the time of the incident and the age difference between the victim and the offender was less than two years.
- **Simple peer:** Cases where both the victim and the offender were known to be under 18 at the time of the incident, the age difference between them was less than one year and they were friends or otherwise known to each other.
- **Abuse by older child:** Cases where both the victim and the offender were known to be under 18 at the time of the incident and the offender was at least three years older than the victim (this category was developed later in the study and was not included in all tables in the Police Data Report).[856]

There is some overlap between the simple peer and adolescent peer categories, and the three subcategories do not include all cases of child-to-child sexual abuse.[857] The relationships between the subcategories of child-to-child sexual abuse within the category of child-to-child sexual abuse are depicted in the Police Data Report.[858]

We set out summary data in relation to child-to-child sexual abuse in this chapter. We discuss more detailed data in relation to child-to-child sexual abuse in Chapter 37.

7.4 Limitations of the data

There are a number of limitations arising from the data that need to be considered when using the Police Data Report and its findings. These are discussed in the Police Data Report.[859]

7.4.1 Limitations that affect analyses

The Police Data Report analysed reports made to police in relation to allegations of child sexual abuse. We know that there is a significant under-reporting of matters of child sexual abuse, so the data represents *reported* child sexual abuse and not all child sexual abuse. We do not know what proportion of child sexual abuse the data represents because we do not know how much child sexual abuse is not reported.[860]

The study uses data supplied by state and territory police agencies from systems that police use for administrative rather than statistical purposes. Such data was not entirely suited to the purposes of the study. In addition, the data was not audited, and some inaccuracies or anomalies are known to exist.[861]

The data held by police does not provide information on whether particular investigative techniques were used or the reasoning behind decisions to finalise investigations. It was not possible to assess if, or to what extent, operational factors affect police finalisation rates or the decision to initiate court proceedings.[862]

Some data is missing from police records. For example, in most jurisdictions some types of data – particularly offender details – are only entered at the time the case is finalised and only if it is finalised by court proceedings. Therefore, in ongoing investigations or investigations that were not finalised by court proceedings, offender details will not be included within the data that those jurisdictions provided. The absence of offender details means that, for example, the true proportion of cases involving adult or child offenders cannot be calculated because the age of many offenders is not recorded in the data.[863]

Finally, due to low counts of cases in smaller jurisdictions, particularly in relation to child-to-child sexual abuse, findings or conclusions that rely on such data should be treated with caution.[864]

7.4.2 Limitations that affect comparability across jurisdictions

In addition to individual limitations within the data relied on for the research, the data in the Police Data Report cannot be used to make comparisons between states and territories about the prevalence and reporting of child sexual abuse to police, or the responses by police, within individual states and territories.[865]

Issues in the comparability and lack of comparability of police crime data are not new. The PoliceData Report discusses the findings of a two-year investigation by the ABS in relation to the comparison of crime statistics generally, which were published in 2005. The ABS investigation found that the differences in the way that crime was reported to and recorded by police in different jurisdictions were caused by differences in legislation, recording practices and policies to combat particular areas of crime as well as the different systems used to extract the relevant data.[866]

While the Police Data Report relied on ANZSOC standard offence classifications and specific counting rules to attempt to achieve some level of consistency, the differences between jurisdictions mean that the data cannot be used to make comparisons between states and territories in relation to:

- the respective levels of child sexual abuse occurring within individual jurisdictions
- whether one jurisdiction is achieving better outcomes than another jurisdiction
- whether one jurisdiction responds to reports of child sexual abuse more efficiently than any other.[867]

7.5 Reports to police

7.5.1 What are police responding to?

One objective of the police data project was to identify what reports of child sexual abuse police are currently receiving and being required to respond to.

The Police Data Report found that police received a total of 100,488 reported cases of child sexual abuse in the five years from 1 January 2010 to 31 December 2014.

The police administrative data was analysed for the following factors:

- the number and nature of reported child sexual abuse cases received by police
- the characteristics of the victim within the reported cases, including:
    - the victim's gender
    - the age of the victim at the time that the incident occurred
    - the age of the victim at the time the indicent was reported to police

- the types of offences in relation to which reports were made, including:
    - the ANZSOC classification of the offence (see section 7.3.1)
    - the relationship between the victim and the offender
    - cases that could be classified as involving institutional child sexual abuse (see section 7.3.3)
- the characteristics of the offender, including:
    - the offender's gender
    - the offender's age, both at the time of the indicent and at the time of the report.

The Police Data Report provides analyses of these factors for each jurisdiction[868] and in total for all jurisdictions.[869]

7.5.2 Number and nature of reported child sexual abuse cases

Summary of number and nature of reported child sexual abuse cases

Table 7.2 provides an overview of data from each jurisdiction. It shows:

- the total number of reports of child sexual abuse received by police
- the total number of reports of child sexual abuse received by police as a proportion of each jurisdiction's population (expressed as the number of reports per 1,000 population)
- the proportion of reports that related to reports of 'historical' child sexual abuse (see section 7.3.2)
- the types of offence that were the subjects of the reports that were made (see section 7.3.1)
- the age of the victim at the time of the incident and at the time of the report to police
- the proportion of reports of child sexual abuse within the ICSA_3 proxy classification (see section 7.3.3)
- the proportion of all reports that relate to child-to-child sexual abuse (as explained in section 7.3.6).

Table 7.2: Total reported cases of child sexual abuse, 2010–2014, all jurisdictions, summary of incident and victim characteristics[870]

Jurisdiction	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Total reported CSA cases	40,987	18,048	25,234	8,034	5,441	664	1,077	1,003
Rate (per 1,000 persons)	5.6	3.2	5.5	3.3	3.3	1.3	2.9	4.3
Historical (%)	21.1	45.2	25.4	22.9	36.0	36.6	11.4	11.5
Offence group (%)								
Aggravated sexual assault	46.7	73.9	77.4	75.8	64.0	61.8	53.0	84.1
Non-aggravated sexual assault	31.0	16.2	2.2	8.3	12.7	27.4	39.6	10.4
Non-assaultive sex offences	22.4	9.9	20.5	15.9	23.3	10.8	7.4	5.5
Victim at age of incident (%)								
0–4	9.6	11.1	12.8	10.0	9.8	9.9	13.2	6.6
5–9	20.7	24.8	26.0	24.5	21.6	24.9	23.7	19.2
10–14	42.8	41.5	42.5	44.5	40.2	34.6	38.0	45.9
15–17	26.8	22.6	18.7	20.9	28.4	30.6	25.0	28.3
Victim at age of report (%)								
0–9	21.1	16.8	27.8	21.0	14.5	18.7	30.2	20.2
10–14	37.0	29.3	38.6	40.5	33.2	27.0	36.6	43.6
15–19	30.2	30.5	26.5	28.0	34.9	36.2	26.2	30.4
20+ years	11.7	23.5	7.4	10.6	17.3	18.2	7.1	5.8
ICSA_3 proxy (%)	3.8	4.8	4.3	n/a	5.1	1.8	3.1	4.4
Child-to-child (%)	21.3	15.7	22.9	12.5	13.3	13.3	3.2	26.5

We discuss the following factors in more detail below:

- characteristics of the victim – see section 7.5.3
- characteristics of the offences – see section 7.5.4
- characteristics of the offender – see section 7.5.5.

Number of reported cases

The first two rows in Table 7.2 show that there are significant differences in the number of reports of child sexual abuse recorded by police in different jurisdictions, both in absolute terms and in terms of population size.

New South Wales (40,987) and Queensland (25,234) had the highest number of reported cases in absolute terms. To adjust for different population sizes, the number of reported cases was also analysed as a proportion per 1,000 persons in each jurisdiction. New South Wales and Queensland had the highest number of reported cases per 1,000 persons (5.6 and 5.5 reports respectively).

The Northern Territory has the second lowest number of reported cases in absolute terms (1,003), and the third highest number of reports per 1,000 persons (4.3 reports). Tasmania has both the fewest reports in absolute terms (664) and the lowest number of reported cases per 1,000 persons (1.3 reports).

Table 7.3 sets out the number of reports received by each jurisdiction in each year between 2010 and 2014.

Table 7.3: Total reported cases of child sexual abuse, 2010–2014, all jurisdictions, reporting year[871]

Jurisdiction	2010	2011	2012	2013	2014
New South Wales	7,276	7,795	8,081	8,903	8,932
Victoria	2,872	3,216	3,643	4,007	4,310
Queensland	5,500	4,952	5,043	5,180	4,559
Western Australia	1,452	1,458	1,571	1,712	1,841
South Australia	959	1,004	978	1,118	1,382
Tasmania	152	135	93	137	147
Australian Capital Territory	110	228	243	332	164
Northern Territory	205	187	202	187	222

The data analysed by the Police Data Report does not establish whether the different level of reporting across jurisdictions reflects a different level of child sexual abuse offending in jurisdictions, a different level of reporting to police, or different recording practices by police.

The Police Data Report stated that:

> [The differences observed across jurisdictions, including in relation to rates of reporting,] may be attributed to differences in legislative and regulatory frameworks and associated police responses, including differences in police recording practices, in each jurisdiction. In NSW, for instance, we observe both a higher rate of reporting of child sexual abuse and a higher proportion of cases that fall into the less serious (non-assaultive) sex offence category. These findings may reflect differences in mandatory reporting systems.[872] [Reference omitted.]

New South Wales data includes all reports of child sexual abuse, whether they were made directly to police or were accepted by the JIRT Referral Unit (JRU) for referral to the Joint Investigation Response Team (JIRT) or for other police response outside of JIRT on receipt from the Family and Community Services Child Protection Helpline, which receives reports made under mandatory reporting requirements in New South Wales.[873] The reports received from the Child Protection Helpline for referral to JIRT are included in the 'submitting region' data for the State Crime Command in table 3.2 of the Police Data Report, which shows that the State Crime Command was the submitting region in relation to 49.3 per cent of reports.[874] The next highest proportion of reports was 13.8 per cent, submitted by the Northern Region.

7.5.3 Characteristics of the victim

Victim gender

In most cases, police administrative data records the gender of victims. Table 7.4 sets out the gender of victims by jurisdiction.

Table 7.4: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, gender of the victim[875]

Jurisdiction	Female (n)	Female (%)	Male (n)	Male (%)	Missing (n)	Missing (%)
New South Wales	31,729	77.4	9,231	22.5	27	0.1
Victoria	14,081	78.0	3,878	21.5	89	0.5
Queensland	17,236	68.3	4,851	19.2	3,147	12.5
Western Australia	5,289	65.8	1,202	15.0	1,543	19.2
South Australia	3,891	71.5	975	17.9	575	10.6
Tasmania	503	75.8	133	20.0	28	4.2
Australian Capital Territory	789	73.3	249	23.1	39	3.6
Northern Territory	839	83.6	164	16.4	0	0

In each jurisdiction, a substantial majority of victims of reported child sexual abuse are girls, ranging from at least 65.8 per cent in Western Australia (where the gender of the victim is missing in 19.2 per cent of cases) to 83.6 per cent in the Northern Territory.

Victim age at time of incident

Table 7.5 sets out the age of the victim at the time of the incident by jurisdiction.

Table 7.5: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, age of the victim at the time of the incident[876]

Jurisdiction	0–4 years (%)	5–9 years (%)	10–14 years (%)	15–17 years (%)	Unknown (%)
New South Wales	9.6	20.7	42.8	26.8	0.0
Victoria	10.9	24.3	40.5	22.1	2.3
Queensland	11.2	22.6	37.0	16.3	12.8
Western Australia	7.6	18.6	33.7	15.8	24.3
South Australia	8.7	19.2	35.9	25.3	10.8
Tasmania	9.2	23.3	32.4	28.8	6.3
Australian Capital Territory	13.1	23.6	37.8	24.9	0.6
Northern Territory	6.6	19.2	45.9	28.3	0.0

There is a similar distribution of victim age at the time of the incident in all jurisdictions.[877] In each jurisdiction, the most common age group for victims of child sexual abuse at the age of incident is 10–14 years. The proportion of reported cases of child sexual abuse where the victim was between the age of 10 and 14 ranges from at least 32.4 per cent in Tasmania (where the age of the victim is missing in 6.3 per cent of cases) to 45.9 per cent in the Northern Territory. At least 25 per cent of reported cases relate to victims younger than 10 years of age.

Victim age at time of report to police

Table 7.6 sets out the age of the victim at the time the incident was reported to police by jurisdiction.

Table 7.6: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, age of the victim at the time of report[878]

Jurisdiction	0–9 years (%)	10–14 years (%)	15–19 years (%)	20+ years (%)	Data missing (%)[879]
New South Wales	21.1	37.0	30.2	11.7	0.0
Victoria	16.4	28.6	29.8	23.0	2.1
Queensland	24.2	33.7	22.9	6.4	12.7
Western Australia	17.0	32.8	22.6	8.6	19.0
South Australia	13.0	29.7	31.2	15.5	10.6
Tasmania	17.6	25.5	34.2	17.2	5.6
Australian Capital Territory	30.1	36.5	26.1	7.1	0.0
Northern Territory	20.2	43.6	30.4	5.8	0.0

In New South Wales, Queensland, Western Australia, the Australian Capital Territory and the Northern Territory, the most common age of the victim at the time of report is between 10 and 14. In Victoria, South Australia and Tasmania, the most common age of the victim at the time of report is between 15 and 19.

The proportion of reports of child sexual abuse where the victim is younger than 10 at the time of report ranges from at least 13 per cent in South Australia (where the age of the victim at the time of report is missing in 10.6 per cent of cases) to 30.1 per cent in the Australian Capital Territory.

The proportion of reports of child sexual abuse where the victim is 20 or older at the time of report ranges from 5.8 per cent in the Northern Territory to at least 23 per cent in Victoria (where the age of the victim at the time of report is missing in 2.1 per cent of cases). Tasmania (17.2 per cent) and South Australia (15.5 per cent) have the next highest proportions of reports made when the victim is 20 or older. Four jurisdictions have fewer than 10 per cent of cases reported when the victim is 20 or older (although the data is missing in 19 per cent of cases in Western Australia).

7.5.4 Characteristics of offences

Offences by ANZSOC classification

We outlined the ANZSOC classification of offences in section 7.3.1.

Table 7.7 sets out how reported offences were classified by jurisdiction.

Table 7.7: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, offences by ANZSOC classification[880]

Jurisdiction	Aggravated sexual assault (%)	Non-aggravated sexual assault (%)	Non-assaultive sex offences (%)	Attempted offences (%)[881]
New South Wales	46.7	31.0	22.4	0.6
Victoria	73.9	16.2	9.9	n/a
Queensland	77.4	2.2	20.5	0.8
Western Australia	75.8	8.3	15.9	0.9
South Australia	64.0	12.7	23.3	n/a
Tasmania	61.8	27.4	10.8	1.4
Australian Capital Territory	53.0	39.6	7.4	n/a
Northern Territory	84.1	10.4	5.5	4.9

The proportion of offences classified as:

- aggravated sexual assault ranged from 46.7 per cent in New South Wales to 84.1 per cent in the Northern Territory
- non-aggravated sexual assault ranged from 2.2 per cent in Queensland to 39.6 per cent in the Australian Capital Territory
- non-assaultive sex offences ranged from 5.5 per cent in the Northern Territory to 23.3 per cent in South Australia.

Relationship between victim and offender

The Police Data Report analysed the relationship between the victim and the offender where these details were available. The following relationships were identified:

- where the offender was a family member or the intimate partner of the victim
- where the offender was otherwise known to the victim
- where the offender was a stranger
- where the relationship between the offender and the victim was not stated.

This data was missing in most cases (78.4 per cent) in Western Australia.

Table 7.8 sets out how reported cases were classified by relationship between the victim and the offender by jurisdiction.

Table 7.8: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, relationship between victim and offender[882]

Jurisdiction	Family / intimate partner (%)	Otherwise known to victim (%)	Stranger (%)	Not stated / missing (%)
New South Wales	29.0	34.5	4.8	31.7
Victoria	36.5	44.0	11.3	8.2
Queensland	31.2	41.1	0.1	27.6
Western Australia	9.6	5.7	6.2	78.6
South Australia	32.5	41.6	7.8	18.1
Tasmania	39.6	44.7	7.7	8.0
Australian Capital Territory	40.2	41.6	6.5	11.7
Northern Territory	22.1	49.5	14.7	13.8

In all jurisdictions other than Western Australia (where data was missing in most cases), the most common recorded relationship between the victim and the offender was where an offender was known to the victim but was not a family member or intimate partner.

Cases that could be classified as institutional child sexual abuse

We outlined the possible proxies for classifying reports of child sexual abuse as involving child sexual abuse in an institutional context in section 7.3.3.

As set out in section 7.3.3, the following four proxy measures of institutional child sexual abuse were used:

- ICSA_1: This is the broadest definition, based on the victim-offender relationship only. If the child sexual abuse is extra-familial (that is, the offender is known to the victim but not a family member) then this is categorised as ICSA_1.
- ICSA_2: The child sexual abuse occurs in an institution.
- ICSA_3: The child sexual abuse occurs in an institution and is extra-familial.
- ICSA_4: The child sexual abuse occurs in an institution and is extra-familial, and the relationship between victim and offender is not child-to-child.

Table 7.9 sets out the proportions of reports of child sexual abuse that meet the criteria for each of these four proxies.

Table 7.9: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, proportion of reported cases falling within ICSA proxies[883]

Jurisdiction	ICSA_1 (%)	ICSA_2 (%)	ICSA_3 (%)	ICSA_4 (%)
New South Wales	34.5	6.8	3.8	1.2
Victoria	44.0	6.3	4.8	1.3
Queensland	41.1	7.2	4.3	0.3
Western Australia	5.7	5.6	0.6	0.1
South Australia	41.6	6.3	5.1	0.4
Tasmania	44.7	4.2	1.8	0.8
Australian Capital Territory	41.6	5.6	3.0	0.0
Northern Territory	49.5	6.8	4.4	0.9

As discussed in section 7.3.3, the ICSA_1 proxy is likely to overstate cases of institutional child sexual abuse, while the other three proxies are likely to understate cases of institutional child sexual abuse. The ICSA_3 proxy was subject to some validation in other research commissioned by the Royal Commission.[884] Cases within the ICSA_3 proxy range from 0.6 per cent of reports in Western Australia (where data on the relationship between the victim and offender was missing in 78.4 per cent of cases) to 5.1 per cent of reports in South Australia.

In 2015, the Royal Commission undertook a separate project to identify how many of the matters referred to JIRT in New South Wales involved allegations of institutional child sexual abuse within the meaning of the Royal Commission's Terms of Reference. We discuss JIRT in section 7.9.3.

JRU assesses all referrals to JIRT. JRU provided us with a breakdown of the number of matters referred to, and accepted by, 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.

Reports of child-to-child sexual abuse

As discussed in section 7.3.6, the police administrative data was analysed to identify reports of child-to-child sexual abuse and sub-categories of child-to-child sexual abuse.

Within the 'child-to-child' classification, the following subcategories were developed:

- **Adolescent peer:** Cases where both the victim and the offender were known to be under 18 at the time of the incident, either the victim or the offender was over the age of 12 at the time of the incident and the age difference between the victim and the offender was less than two years.
- **Simple peer:** Cases where both the victim and the offender were known to be under 18 at the time of the incident, the age difference between them was less than one year and they were friends or otherwise known to each other.
- **Abuse by older child:** Cases where both the victim and the offender were known to be under 18 at the time of the incident and the offender was at least three years older than the victim (this category was developed later in the study and was not included in all tables in the Police Data Report).[885]

Table 7.10 sets out, by jurisdiction:

- the number of reported cases that were identified as involving child-to-child sexual abuse
- the number of reported cases which can be classified within the three subcategories of 'adolescent peer', 'simple peer' and 'abuse by older child'
- the number of reported cases that were recorded as having occurred on institutional premises.

These analyses are particularly affected by the number of cases in which the offender's age is not recorded.

Table 7.10: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions[886]

Jurisdiction	Total	Simple peer	Adolescent peer	Abuse by older child	ICSA_3
New South Wales	8,733	856	2,757	3,959	665
Victoria	2,828	231	585	1,728	237
Queensland	5,784	511	1,035	1,968	584
Western Australia	1,005	28	145	462	37
South Australia	722	112	230	212	83
Tasmania	88	4	15	54	≤ 3
Australian Capital Territory	35	5	6	27	5
Northern Territory	266	19	72	122	28
Total	**19,461**	**1,766**	**4,845**	**8,532**	**1,639***

* The Total for ICSA_3 excludes the figure for Tasmania as a result of statistical disclosure controls applied in the Police Data Report.

We discuss data in relation to child-to-child sexual abuse further in Chapter 37.

'Historical' reports of child sexual abuse

As discussed in section 7.3.2, the Police Data Report includes analysis of 'historical' offences. Offences were classified as historical if the offence was reported more than 12 months after it had been committed.[887] In cases where multiple offences occurred over a period of time, the time is measured from the last of the offences reported.

Table 7.11 sets out:

- the proportion of reports of 'historical' offences in the sense that the offence was reported more than 12 months after it is alleged to have occurred
- the proportion of reports made when the victim is 20 or older at the time the report is made.

Table 7.11: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, proportion of 'historical' reports and reports made when victim aged 20 or older[888]

Jurisdiction	Reports of 'historical' abuse (%)	Reports where victim 20 or older at time of report (%)
New South Wales	21.1	11.7
Victoria	45.2	23.0
Queensland	25.4	6.4
Western Australia	22.9	8.6
South Australia	36.0	15.5
Tasmania	36.6	17.2
Australian Capital Territory	11.4	7.1
Northern Territory	11.5	5.8

Most reports of child sexual abuse are made within 12 months of the alleged abuse occurring. The proportion of reports made more than 12 months after the alleged abuse ranged from 11.4 per cent in the Australian Capital Territory to 45.2 per cent in Victoria.

Reports made when the victim was 20 years or older at the time of the report ranged from 5.8 per cent in the Northern Territory to 23 per cent in Victoria.

There may be a number of reasons why some jurisdictions receive a higher proportion of 'historical' reports, or reports made when the victim is 20 years or older than other jurisdictions.

The Victorian Government suggested that the higher rate of reports of 'historical' child sexual abuse and reports by adults in Victoria can be explained by:

- the work of the Victoria Police to target historical child sexual abuse allegations through the SANO Task Force
- the opening of multidisciplinary centres, and the associated holistic approach to investigating child sexual abuse, which may encourage survivors who would not otherwise come forward to report to do so, noting that reporting rates to multidisciplinary centre sites are higher than the general statewide rate in Victoria
- the fact that referrals by the Royal Commission under section 6P of the *Royal Commissions Act 1902* (Cth) often involve historical reports of child sexual abuse, noting that 342 referrals have been made by the Royal Commission.[889]

In section 7.9.2 we discuss the findings of research that analysed the impact of delayed reporting on the prosecution of child sexual offences in New South Wales and South Australia[890] (the Delayed Reporting Research). The Delayed Reporting Research found the longest delays in reporting occurred where offences are alleged to have been committed by a person in a position of authority. The Delayed Reporting Research stated:

> In both states [New South Wales and South Australia], 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 …*[891] [Emphasis added.]

7.5.5 Characteristics of the offender

As discussed in section 7.4.1, offender details are missing in much of the police administrative data. In most jurisdictions, offender details are only entered at the time the case is finalised and only if it is finalised by court proceedings. Therefore, in ongoing investigations or investigations that were not finalised by court proceedings, offender details were not included in the data provided by those jurisdictions.

We do not set out detailed data on the characteristics of the offender here because of the amount of data that is missing. The available data can be reviewed by jurisdiction in the Police Data Report as follows:

- For New South Wales and the Northern Territory, the data was collected in all cases. However, even for these jurisdictions, the data is missing in more than 30 per cent of cases in New South Wales and in more than 22 per cent of cases in the Northern Territory.[892]
- In the other six jurisdictions, the data can be considered only in relation to reports that were finalised. However, even in finalised cases, the data is missing in many cases, ranging from almost 30 per cent of finalised cases in Tasmania to more than 80 per cent of finalised cases in the Australian Capital Territory.[893]

Noting the limitations of the available data, we can make a general observation about offender genderder. Where the gender of the offender is recorded, a significant majority of offenders are male – close to or more than 90 per cent.[894]

Offender age (where recorded) is analysed in the Police Data Report in age ranges of under 18, 18 to 34 years, and 35 years or older.[895] Given the varying levels of missing data, we have not set out the data on offender age here. It can be reviewed by jurisdiction in the Police Data Report. We discuss child-to-child sexual abuse, involving cases where the offender is under 18, in Chapter 37.

7.6 Finalisation of reports

7.6.1 How are police responding?

In addition to identifying what reports of child sexual abuse police are currently receiving and being required to respond to, a second objective of the police data project was to identify how police are responding to the reported cases of child sexual abuse that they receive.

This involved considering:

- whether cases were finalised
- how cases were finalised
- how quickly cases were finalised.

In section 7.3.4, we discussed how cases were classified as not finalised and finalised, and how cases were classified under different methods of finalisation. We also discussed the analysis of whether cases were finalised within 180 days of the report to police.

The police administrative data was analysed for the following factors:

- the proportion of reported cases of child sexual abuse that were finalised by police
- the methods police used to finalise reported cases of child sexual abuse
- the time that police took to finalise reported cases of child sexual abuse, analysing cases finalised within 180 days and cases finalised after 180 days
- finalisation of cases with the following particular aspects:
    - cases that could be classified as involving institutional child sexual abuse (see section 7.3.3)
    - cases of child-to-child sexual abuse
    - cases that were finalised on the basis that the victim was unwilling to proceed (see section 7.3.5)
    - cases of 'historical' offences (see section 7.3.2).

The Police Data Report provides analyses of these factors for each jurisdiction[896] and in total for all jurisdictions.[897]

The Police Data Report also identified factors that are associated with whether a reported case is finalised within 180 days of the report being made[898] and factors that are associated with whether a reported case is finalised by the initiation of court proceedings.[899] We discuss these factors in sections 7.7 and 7.8 respectively.

7.6.2 Cases finalised

Table 7.12 provides an overview of the rates of finalisation of reports of child sexual abuse.

Table 7.12: Total reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalisation[900]

Jurisdiction	Number of reports	Proportion finalised (%)	Proportion unfinalised (%)
New South Wales	40,987	92	8
Victoria	18,048	88	12
Queensland	25,234	93	7
Western Australia	8,034	88	12
South Australia	5,441	94	6
Tasmania	664	92	8
Australian Capital Territory	1,077	84	16
Northern Territory	1,003	86	14
Total	**100,488**	**91**	**9**

Table 7.12 shows that, nationally, 91 per cent of cases of child sexual abuse reported to state and territory police between 2010 and 2014 had been finalised by police at the times at which jurisdictions collected the data to provide to us.[901] These dates differ across jurisdictions and the finalisation rate for these cases will have increased since then as further reports are finalised.

The proportion of matters finalised within individual jurisdictions ranged from 84 per cent in the Australian Capital Territory to 94 per cent in South Australia.

7.6.3 How cases were finalised

Table 7.13 sets out the methods by which cases were finalised by jurisdiction.

Table 7.13: Finalised reported cases of child sexual abuse, 2010–2014, all jurisdictions, method of finalisation[902]

Jurisdiction	Number	Court proceedings (%)	Other proceedings (%)	Resolved (%)	Unresolved (%)
New South Wales	37,786	19	3	58	20
Victoria	15,869	48	2	28	22
Queensland	23,531	28	16	48	8
Western Australia	7,049	43	6	29	22
South Australia	5,108	56	1	21	21
Tasmania	608	71	5	23	1
ACT	904	18	41	25	15
Northern Territory	860	48	4	27	21
Total	**91,715**	**31**	**7**	**45**	**17**

Table 7.13 shows that, of the 91,715 reports that were finalised, 31 per cent were finalised by the initiation of court proceedings and a further 7 per cent were dealt with through other legal action.

7.6.4 Time taken to finalise cases

Time taken to finalise cases

Table 7.14 sets out the median number of days taken for finalised cases of child sexual abuse to be finalised in each jurisdiction, by finalisation method. The median number of days represents the number of days in which 50 per cent of cases were finalised, with the other 50 per cent taking more days to finalise.

Table 7.14: Finalised reported cases of child sexual abuse, 2010–2014, all jurisdictions, time taken to finalise, by finalisation method, median days[903]

Jurisdiction	Initiation of court proceedings (days)	Initiation of other proceedings (days)	Resolved (days)	Unresolved (days)	Total (days)
New South Wales	50	37	32	52	37
Victoria	90	150	7	208	81
Queensland	11	12	28	27	17
Western Australia	44	36	39	102	53
South Australia	3	35	25	73	17
Tasmania	10	6	113	183	29
Australian Capital Territory	38	15	14	15	15
Northern Territory	17	42	29	76	28

The median number of days taken to finalise cases ranges from 15 days in the Australian Capital Territory to 81 days in Victoria.

It should not be assumed that finalising cases more quickly provides a better outcome for victims or survivors, even within particular finalisation methods. For example, a case that is classified as resolved or unresolved quickly might not have been investigated as thoroughly as a case that takes longer to classify as resolved or unresolved.

As discussed in section 7.3.4, police administrative data records the method by which police finalised a case and not how the case was finalised within the criminal justice system as a whole. In particular, finalisation by 'proceeding to court' indicates that court proceedings were initiated, but it does not necessarily mean that a trial occurred.

The median time that South Australia Police (SAPOL) took to finalise reported cases by way of the initiation of court proceedings was three days. The Delayed Reporting Research (which considered a different data set) noted that a markedly higher proportion of matters was withdrawn or dismissed in South Australia than in New South Wales.[904]

In Victoria, a report of child sexual abuse took a median time of 208 days to be finalised as 'unresolved' – meaning that there was insufficient information to warrant a charge, so the matter was paused pending receipt of any new material.

Finalisations within 180 days and after 180 days

Table 7.15 sets out the proportion of cases in each jurisdiction that were finalised within 180 days of the date of the report and that were finalised in more than 180 days of the date of the report.

Table 7.15: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, proportion of reported cases finalised within 180 days, and in more than 180 days[905]

Jurisdiction	Proportion finalised within 180 days (%)	Proportion finalised in more than 180 days (%)
New South Wales	79	13
Victoria	59	29
Queensland	60	34
Western Australia	70	18
South Australia	80	13
Tasmania	74	18
Australian Capital Territory	77	7
Northern Territory	71	15
Total	**70**	**22**

Nationally, 70 per cent of reports of child sexual abuse were finalised by police within 180 days, with the rate within individual jurisdictions ranging from 80 per cent in South Australia to 59 per cent in Victoria.

The Victorian Government provided a number of reasons why only 59 per cent of matters reported to police in Victoria were finalised within 180 days compared with a national average of 70 per cent.[906] These include the following:

- Victoria had a higher than average proportion of reported child sexual abuse cases finalised through the initiating of court proceedings, which is a finalisation method that generally takes longer than other finalisation methods.
- Victoria also had a higher proportion of reports of historical child sexual abuse, which generally take longer to finalise, compared with other jurisdictions.
- Policy requires Victoria Police to consider whether all available evidence has been collated and reviewed and the brief of evidence is complete before deciding that a brief of evidence is ready for a decision on whether to lay charges. This may mean that there is a delay associated with awaiting the results of particular tests (such as in relation to DNA or fingerprint analysis).

- A victim or survivor may report to police at a time where they are not ready to pursue the matter, but they may choose to do so at a later date. Victoria Police treat that as a single report, with the time taken to finalise being measured from the date of the first report. Victoria suggests that this issue is particularly relevant in child sexual abuse cases, where the focus is on ensuring the wishes of the victim or survivor are respected. This may have an impact on the number of days identified as taken to finalise a matter.[907]

Finalisation methods for cases finalised after 180 days

Table 7.16 sets out how cases that were finalised in more than 180 days after they were reported were finalised, by jurisdiction. It shows the number of cases finalised in more than 180 days for each finalisation method and the proportion of cases finalised in more than 180 days by that finalisation method as a proportion of cases finalised in more than 180 days.

Table 7.16: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised in more than 180 days, method of finalisation[908]

Jurisdiction	Initiation of court proceedings (number and % of finalised in more than 180 days)	Other procedures (number and % of finalised in more than 180 days)	Resolved, no legal action (number and % of finalised in more than 180 days)	Unresolved (number and % of finalised in more than 180 days)
New South Wales	1,830 (33.6)	147 (2.7)	1,923 (35.3)	1,547 (28.4)
Victoria	2,732 (51.7)	127 (2.4)	455 (8.6)	1,973 (37.3)
Queensland	929 (11.0)	306 (3.6)	6,980 (82.6)	237 (2.8)
Western Australia	628 (43.9)	35 (2.5)	315 (22.0)	453 (31.7)
South Australia	293 (40.1)	15 (2.1)	129 (17.7)	294 (40.2)
Tasmania	68 (57.6)	≤ 3	46 (39.0)	≤ 3
Australian Capital Territory	38 (53.5)	6 (8.5)	17 (23.9)	10 (14.1)
Northern Territory	63 (42.3)	≤ 3	33 (22.2)	52 (34.9)

Note: No percentage figures are provided where the number of cases was equal to or less than three as a result of statistical disclosure controls applied in the Police Data Report.

In a number of jurisdictions, a significant proportion of reported cases of child sexual abuse that were finalised after more than 180 days from the date of report were finalised by the initiation of court proceedings.

7.6.5 Finalisation of cases that could be classified as institutional child sexual abuse

In section 7.3.3, we outlined the possible proxies for classifying reports of child sexual abuse as involving child sexual abuse in an institutional context.

In Table 7.9 in section 7.5.4, we set out the proportions of reports of child sexual abuse that meet the criteria for the four proxies.

Table 7.17 identifies what proportion of the reports in Table 7.9 were finalised within 180 days by the initiation of court proceedings.

Table 7.17: Reported cases of child sexual abuse meeting criteria of ICSA proxies, 2010–2014, all jurisdictions, proportion finalised within 180 days by the initiation of court proceedings[909]

Jurisdiction	Proportion of ICSA_1 finalised by court proceedings (%)	Proportion of ICSA_2 finalised by court proceedings (%)	Proportion of ICSA_3 finalised by court proceedings (%)	Proportion of ICSA_4 finalised by court proceedings (%)
New South Wales	14.3	12.4	14.5	49.5
Victoria	46.8	24.8	24.4	74.5
Queensland	35.0	9.1	10.5	86.7
Western Australia	81.4	24.3	52.3	100
South Australia	54.7	44.6	47.6	100
Tasmania	72.4	56.3	55.6	100
Australian Capital Territory	18.6	2.0	3.9	n/a (no cases)
Northern Territory	51.0	20.7	23.1	57.1

Table 7.18 sets out a further analysis of the finalisation of cases that met the criteria of ICSA_3 (offences committed on institutional premises by an offender who did not have a familial or intimate relationship with the victim) within 180 days or in more than 180 days.

Table 7.18: Reported cases of child sexual abuse identified as ICSA_3, 2010–2014, all jurisdictions, by finalisation time[910]

Jurisdiction	Proportion of not finalised (%)	Proportion of finalised <180 days (%)	Proportion of finalised >180 days (%)	Proportion of total reports (%)
New South Wales	4.0	3.7	3.8	3.8
Victoria	4.9	4.8	4.9	4.8
Queensland	1.6	5.2	3.4	4.3
Western Australia	n/a	0.8	0.4	n/a
South Australia	4.8	5.3	3.7	5.1
Tasmania	3.6	1.8	0.9	1.8
Australian Capital Territory	3.5	3.1	1.4	3.1
Northern Territory	2.1	5.5	1.3	4.4

In some jurisdictions, such as New South Wales and Victoria, it appears that the cases classified as ICSA_3 were treated similarly to other cases in that they were not disproportionately not finalised, or disproportionately finalised, within 180 days or after 180 days.

In Queensland, South Australia and the Northern Territory, cases classified as ICSA_3 were disproportionately finalised within 180 days. In Queensland and the Northern Territory, they were also more likely to be finalised rather than not finalised.

7.6.6 Finalisation of cases of child-to-child sexual abuse

Table 7.19 sets out the proportion of reported cases of child sexual abuse that:

- were not finalised
- were finalised within 180 days
- were finalised in more than 180 days,

and the proportion of total cases in each jurisdiction that involved child-to-child sexual abuse.

Table 7.19: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, proportion of finalised cases and total cases (if available)[911]

Jurisdiction	Proportion of not finalised (%)	Proportion of finalised <180 days (%)	Proportion of finalised >180 days (%)	Proportion of total reports (%)
New South Wales	24.1	35.1	21.3	32.1
Victoria	n/a	23.6	24.8	n/a
Queensland	n/a	46.3	27.0	n/a
Western Australia	n/a	31.5	24.2	n/a
South Australia	n/a	30.6	30.9	n/a
Tasmania	n/a	20.5	8.0	n/a
Australian Capital Territory	n/a	25.2	5.7	n/a
Northern Territory	44.3	35.1	26.5	35.1

Table 7.20 sets out the finalisation method of reported cases of child-to-child sexual abuse that were finalised within 180 days of being reported to police.

Table 7.20: Reported cases of child-to-child sexual abuse, 2010–2014, all jurisdictions, finalised within 180 days, finalisation method[912]

Jurisdiction	Finalised by initiation of court proceedings n (%)	Finalised by other proceedings n (%)	Finalised by resolved/no action n (%)	Finalised by unresolved n (%)
New South Wales	772 (11)	676 (9)	4,251 (58)	1,319 (18)
Victoria	887 (56)	121 (8)	97 (6)	487 (31)
Queensland	822 (15)	3,406 (64)	760 (14)	350 (7)
Western Australia	474 (53)	374 (42)	43 (5)	0 (0)
South Australia	672 (100)	0 (0)	0 (0)	0 (0)
Tasmania	51 (62)	30 (34)	≤ 3	0 (0)
Australian Capital Territory	28 (85)	5 (15)	0 (0)	0 (0)
Northern Territory	66 (32)	30 (15)	49 (24)	59 (29)

Note: No percentage figures are provided where the number of cases was equal to or less than three as a result of statistical disclosure controls applied in the Police Data Report.

7.6.7 Finalisations of 'historical' offences

As discussed in section 7.3.2, the Police Data Report includes analysis of 'historical' offences, which were identified as offences reported more than 12 months after they were alleged to have been committed.[913]

Table 7.21 sets out the proportion of reports of 'historical' offences that were finalised and whether they were finalised within 180 days of being reported to police or in more than 180 days.

Table 7.21: Reported cases of child abuse, 2010–2014, all jurisdictions, finalisation of reported cases of 'historical' offences, and the proportion of those reports finalised within 180 days[914]

Jurisdiction	Proportion of not finalised (%)	Proportion of finalised <180 days (%)	Proportion of finalised >180 days (%)	Proportion of total reports (%)
New South Wales	38.1	14.6	49.2	21.1
Victoria	42.7	39.9	56.9	45.2
Queensland	34.8	22.8	28.2	25.4
Western Australia	22.1	19.9	35.3	22.9
South Australia	48.7	30.9	60.9	36.0
Tasmania	26.8	32.2	59.3	36.6
Australian Capital Territory	15.0	8.2	40.9	11.4
Northern Territory	11.9	8.9	23.5	11.5

Generally, finalised reports of 'historical' offences were disproportionately finalised in more than 180 days, rather than within 180 days.

Table 7.22 sets out data on the proportion of reports where the victim was 20 or older at the time of report and that were finalised within 180 days of the date of report by the initiation of court proceedings.

Table 7.22: Reported cases of child abuse, 2010–2014, all jurisdictions, proportion of reported cases where victim is 20 or older at time of report, finalised within 180 days, by way of proceeding to court[915]

Jurisdiction	Victim aged 20–29 at time of report (%)	Victim aged 30–39 at time of report (%)	Victim aged 40+ at time of report (%)
New South Wales	35.2	23.2	23.2
Victoria	75.7	69.9	67.0
Queensland	66.3	51.3	57.1
Western Australia	48.2	61.5	54.8
South Australia	59.7	51.1	35.1
Tasmania	77.4	68.8	73.1
Australian Capital Territory	60.0	0	0
Northern Territory	36.4	12.5	33.3

The analysis in Table 7.22 suggests that, where a victim reports as an adult and the case is finalised within 180 days, there is a reasonable likelihood of the case being finalised by the initiation of court proceedings in most jurisdictions. We discuss this issue in section 7.9.2 in relation to the relevant findings of the Delayed Reporting Research.

7.6.8 Finalisation by victim unwillingness to proceed

As discussed in Chapter 2, sexual assault matters, including child sexual assault matters, face high attrition rates in the criminal justice system. A study in 2006 found that police commenced proceedings in only 15 per cent of reported child sexual assault matters,[916] although the analyses in the Police Data Report suggest this rate may have improved since 2006.

One point of attrition in child sexual abuse cases is where a victim or survivor who has come forward to make a report of child sexual abuse makes a specific request that the criminal investigation proceed no further. This could occur either at the time that the initial report to police is made or at a subsequent point in the criminal justice process.

Police administrative data recorded reports that were finalised on the basis that the victim was unwilling to proceed. The Police Data Report identified that, nationally, approximately 15 per cent of reports were finalised on the basis that the victim was unwilling to proceed. The Police Data Report noted that this is roughly half the proportion of cases that were finalised through the initiation of court proceedings.[917]

It is important to understand that this measure of unwillingness to proceed cannot be understood to indicate that in all other cases – approximately 85 per cent of reports nationally – the victim *was willing* to proceed. For example, police might finalise a report because they discover that the alleged offender has died; police would then record this report as being finalised for that reason rather than because the victim was unwilling to proceed – even if, in fact, the victim had then decided that they were unwilling to proceed.

Table 7.23 sets out the proportion of reports finalised on the basis that the victim was unwilling to proceed by jurisdiction.

Table 7.23: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, reports finalised by victim unwillingness to proceed[918]

Jurisdiction	Reports finalised through victim unwillingness to proceed (n)	Proportion of all reports (%)
New South Wales	7,532	18
Victoria	2,163	12
Queensland	3,577	14
Western Australia	789	10
South Australia	821	15
Tasmania	29	4
Australian Capital Territory	39	4
Northern Territory	124	12

Victim unwillingness to proceed was the reason for finalising reports in a number of cases, ranging from 4 per cent (in Tasmania and the Australian Capital Territory) to 18 per cent (in New South Wales).

Appendix C provides further analyses of reports finalised on the basis of the victim being unwilling to proceed by victim, offender and offence characteristics. These analyses show that:

- reports involving female victims are more likely to be finalised on the basis of the victim being unwilling to proceed than reports involving male victims
- reports involving teenage victims at the time of the incident, and reports involving teenage victims at the time of report, are more likely to be finalised on the basis of the victim being unwilling to proceed than reports involving younger victims at the time of the incident, or younger or older victims at the time of report.

7.7 Finalisation of reports within 180 days

7.7.1 Reports finalised within 180 days

We discussed in section 7.3.4 why the time period of 180 days was used to measure whether and how reports were finalised. However, we also noted that a number of cases are finalised – including by initiating court proceedings – more than 180 days after the report is received.

Table 7.24 sets out by jurisdiction:

- the number of cases reported
- the proportion of cases finalised within 180 days
- the proportion of cases finalised after 180 days as at the time the jurisdiction collected the data to provide to us
- the proportion of cases unfinalised as at the time the jurisdiction collected the data to provide to us.

Table 7.24: Reported cases of child sexual abuse, 2010–2014, all jurisdictions, proportion of reported cases finalised within 180 days, and in more than 180 days[919]

Jurisdiction	Cases reported 2010–2014 (n)	Proportion finalised within 180 days (%)	Proportion finalised in more than 180 days (%)	Total proportion finalised (%)	Proportion unfinalised (%)
New South Wales	40,987	79	13	92	8
Victoria	18,048	59	29	88	12
Queensland	25,234	60	34	93	7
Western Australia	8,034	70	18	88	12
South Australia	5,441	80	13	94	6
Tasmania	664	74	18	92	8
Australian Capital Territory	1,077	77	7	84	16
Northern Territory	1,033	71	15	86	14
Total	**100,488**	**70**	**22**	**91**	**9**

7.7.2 Factors associated with finalisation within 180 days

Part 4 of the Police Data Report included an analysis of the factors associated with whether a report of child sexual abuse will be finalised by police within 180 days of the report being received. The factors are discussed in section 4.2 of the Police Data Report,[920] and table 4.5 in the Police Data Report presents a summary of the different association between finalisation within 180 days and each factor in each jurisdiction.[921]

The Police Data Report found that there was a range of factors that had a statistically significant association with whether a report of child sexual abuse would be finalised by police within 180 days after the report is received.[922]

The following factors were associated with finalisation within 180 days of the report being more likely:

- **The incident was reported sooner after it occurred:** Across all jurisdictions, reports were more likely to be finalised within 180 days if a report was made soon after the incident occurred.[923]
- **The victim was older at the time of the incident:** In four jurisdictions, reports were more likely to be finalised within 180 days if the report was made in relation to a victim who was older at the time of the incident.[924] However, in the Australian Capital Territory, reports were more likely to be finalised within 180 days if the report was made in relation to a victim who was younger at the time of the incident.[925]
- **The offender was also a child:** In five jurisdictions, reports were more likely to be finalised within 180 days if the report was made in relation to an alleged offender who was aged under 18 years when the incident occurred.[926]
- **The victim was unwilling to proceed:** In seven jurisdictions, reports were more likely to be finalised within 180 days if they were finalised on the basis that the victim was unwilling to proceed.[927]
- **The offence was classified as less serious:** In five jurisdictions, reports were more likely to be finalised within 180 days if they involved a less serious offence.[928] However, in Western Australia and the Australian Capital Territory, reports were more likely to be finalised within 180 days if they involved a more serious offence.[929]

The following factors were associated with finalisation within 180 days of the report being less likely:

- **The offence was 'historical':** Across all jurisdictions, reports were less likely to be finalised within 180 days if a report was made more than 12 months after the incident occurred.[930]
- **The victim was older at the time of the report:** In six jurisdictions, reports were less likely to be finalised within 180 days if the victim was older at the time the report was made.[931]

Some categories of relationship between the victim and the offender had a significant association in five jurisdictions, but the association was different across these jurisdictions as follows:

- In New South Wales, a report was more likely to be finalised within 180 days if the offender was a stranger but less likely to be finalised if the offender was known to the victim as family or friend.
- In Victoria, a report was more likely to be finalised within 180 days if the offender was known to the victim as family or a friend but less likely to be finalised if the offender was a stranger.
- In Queensland, a report was more likely to be finalised within 180 days if the offender was known to the victim and was not family.
- In Western Australia and South Australia, a report was less likely to be finalised within 180 days if the offender was a member of the victim's family.
- In the Australian Capital Territory, a report was more likely to be finalised within 180 days if the offender was known to the victim as family or friend.
- In Tasmania and the Northern Territory, the relationship between the victim and offender had no association with finalisation within 180 days.[932]

The proxies for institutional child sexual abuse produced different associations with finalisation rates, and the Police Data Report found no consistent pattern within a jurisdiction or across jurisdictions.[933]

7.7.3 Discussion

Focusing on what reports are more likely to be finalised within 180 days does not identify the method by which they will be finalised. Also, as noted in section 7.6.4, it should not be assumed that finalising cases more quickly provides a better outcome for victims or survivors.

In addition, identifying factors that are associated with whether a report is more likely to be finalised within 180 days does not identify *why* the report is more or less likely to be finalised within 180 days.

For example, as noted above, across all jurisdictions, reports were more likely to be finalised within 180 days if a report was made soon after the incident occurred.[934] Such reports are likely to include reports which suggest that children will be at significant risk of ongoing abuse if police do not take urgent action – for example, in circumstances of the kind we examined in Case Study 2 in relation to YMCA NSW's response to the conduct of Jonathan Lord[935] and Case Study 9 in relation to the Catholic Archdiocese of Adelaide and St Ann's Special School.[936] If a person reports abuse that occurred decades before the report is made, there may not be the same need for urgency.

However, reports that are made soon after the incident occurred are also likely to include many reports made under mandatory reporting obligations. Some of these reports may include reports of suspected abuse which the named victim says has not happened or reports involving offenders under the age of 18. These are more likely to be resolved quickly and, in some cases, will involve consensual peer relationships where a police response is unlikely to be required.

In the first situation – involving significant risk of ongoing abuse – the report may result in quick police finalisation by initiating court proceedings, while in the second situation – involving reports by third parties that are not verified or that involve a child offender – the report may result in quick police finalisation by being 'resolved' through no offence being verified or through a determination that prosecution is not in the public interest.

Similarly, we can speculate that reports of 'historical' offences and reports by victims who are older at the time of report might not require police to act as urgently to protect the child or other children. They might also take longer to investigate, including interviewing the complainant, identifying and locating the accused and interviewing potential witnesses. This is particularly the case if they involve an adult complainant making a report years or even decades after the abuse occurred and where court proceedings may be initiated. In Victoria, reports were less likely to be finalised within 180 days if the victim was older than 40 years at the time of report.[937]

The finding that, in four jurisdictions, reports were more likely to be finalised within 180 days if they involved victims who were older at the time of incident[938] might reflect a greater ability of older victims to articulate what happened to them sufficiently to allow police to initiate court proceedings. However, it might also reflect the possibility that older victims may be more able to state that no offence occurred or that they are unwilling to proceed. It might also reflect the finalisation of reports of adolescent peer consensual sex by police taking no further action.

The finding that, in five jurisdictions, cases were more likely to be finalised within 180 days if they involved an offender aged under 18 years[939] might reflect the availability to police of options to divert juveniles from the criminal justice system, which could be done quite quickly. We discuss these options in Chapter 37. They could also reflect the factors discussed above, such as reports by third parties involving offences that could not be verified and reports of adolescent peer consensual sex that do not require a police response.

7.8 Finalisation by initiation of court proceedings

7.8.1 Reports finalised by initiation of court proceedings

We discussed in section 7.3.4 the different finalisation groupings used to analyse the police administrative data. One of those grouping – 'court' – identifies that police have finalised the report by initiating court proceedings against one or more offenders.

We discussed in Chapter 2 the low prosecution rates for child sexual abuse offences. The initiation of court proceedings by police is of particular interest because it signals that a prosecution of the offender may follow. However, as discussed in section 7.3.4, the initiation of court proceedings by police does not necessarily mean that a finding of guilt was made or that a trial even occurred. In particular, charges may have been withdrawn or discontinued before trial.[940]

Table 7.25 shows the proportion of finalised cases that were finalised by the initiation of court proceedings by jurisdiction.

Table 7.25: Finalised reported cases of child sexual abuse, 2010–2014, all jurisdictions, finalised by initiation of court proceedings[941]

Jurisdiction	Court proceedings (%)
New South Wales	19
Victoria	48
Queensland	28
Western Australia	43
South Australia	56
Tasmania	71
Australian Capital Territory	18
Northern Territory	48
Total	**31**

The Police Data Report provided what it described as a 'crude' estimate of the level of attrition of reports of child sexual abuse during the police response. It identified the total proportion of reported cases of child sexual abuse that were finalised (the national figure of 91 per cent) and also the proportion of those reports that were finalised through the initiation of court proceedings (31 per cent). The conclusion was that 28 per cent of all reported cases of child sexual abuse were finalised by the initiation of court proceedings. If finalisation by way of other proceedings was also included, the figure rises to 35 per cent of all reported cases of child sexual abuse.[942]

However, as noted above, the initiation of court proceedings by police does not necessarily mean that a trial will take place. In particular, charges may be withdrawn or discontinued before trial.[943] The attrition rate in the criminal justice system as a whole will be higher than the attrition rate during the police response.

7.8.2 Factors associated with finalisation by initiation of court proceedings

Part 4 of the Police Data Report included an analysis of the factors associated with the initiation of court proceedings in relation to a report of child sexual abuse. The factors are discussed in section 4.3 of the Police Data Report,[944] and table 4.6 in the Police Data Report presents a summary of the different association between finalisation by initiation of court proceedings and each factor in each jurisdiction.[945]

The Police Data Report found that there were a range of factors which had a statistically significant association with whether a report of child sexual abuse that was finalised by police would be finalised by the initiation of court proceedings.[946]

One factor was found to make initiation of court proceedings more likely – namely, that the incident was 'historical'. In New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory, reports were more likely to be finalised by the initiation of court proceedings if the incident was 'historical'.[947] However, in the Northern Territory, reports were less likely to be finalised by the initiation of court proceedings if the incident was 'historical'.[948]

One factor had quite mixed associations. In four jurisdictions, reports were more likely to be finalised by the initiation of court proceedings if they involved a less serious offence. However, in three jurisdictions, reports were more likely to be finalised by the initiation of court proceedings if they involved a more serious offence. In Tasmania, the severity of the offence had no association with the initiation of court proceedings.[949]

The following factors were found to make initiation of court proceedings less likely:

- **The offender was also a child:** In seven jurisdictions, reports were less likely to be finalised by the initiation of court proceedings if they involved an alleged offender who was aged under 18 years when the incident occurred.[950]
- **The victim was very young at the time of the incident:** In some jurisdictions, reports were less likely to be finalised by the initiation of court proceedings if the report was made in relation to a victim who was very young – under five years – at the time of the incident.[951] However, in New South Wales and Western Australia, reports were more likely to be finalised by the initiation of court proceedings if the report was made in relation to a victim who was aged five to nine at the time of the incident and in South Australia if the victim was aged five to 14 at the time of the incident.[952]
- **The victim was unwilling to proceed:** Across all jurisdictions, reports were less likely to be finalised by the initiation of court proceedings if they were finalised on the basis that the victim was unwilling to proceed.[953]

Some categories of relationship between the victim and the offender had a significant association in five jurisdictions, but the associaitons were different across these jurisdictions as follows:

- In New South Wales and the Australian Capital Territory, a report was more likely to be finalised by the initiation of court proceedings if the offender was a stranger but less likely if the offender was family.
- In Queensland, a report was more likely to be finalised by the initiation of court proceedings if the offender was a stranger.
- In Western Australia, a report was less likely to be finalised by the initiation of court proceedings if the offender was known to the victim but was not family.
- In South Australia, a report was more likely to be finalised by the initiation of court proceedings if the offender was known to the victim as family or a friend.
- In Victoria, Tasmania and the Northern Territory, the relationship between the victim and offender had no association with finalisation by the initiation of court proceedings.[954]

The Police Data Report found that there was some variation in the initiation of court proceedings by the year in which the abuse was reported to police, but the associations differed between jurisdictions. The Police Data Report also found that the proxies for institutional child sexual abuse produced different associations with the likelihood of proceeding to court, and no clear pattern emerged.[955]

7.8.3 Discussion

As noted in section 7.8.1, given the low prosecution rates for child sexual abuse offences, the initiation of court proceedings by police is of particular interest because it signals that a prosecution of the offender may follow.

However, as with the factors associated with whether a report is more likely to be finalised within 180 days, identifying the factors associated with whether a report will be finalised by the initiation of court proceedings does not identify *why* the report is more or less likely to be finalised by the initiation of court proceedings.

One factor – the victim being unwilling to proceed – seems reasonably clear. If a victim is unwilling to proceed, there will be very little prospect of successful court proceedings in relation to offences in respect of that victim. As discussed in Chapter 2, child sexual abuse prosecutions are often 'word against word' cases, and the evidence of the complainant will often be the only direct evidence of the abuse. In relation to this factor, the Police Data Report stated that the data 'clearly show that police do not initiate court actions against the offender when the victim does not wish to proceed or has withdrawn a complaint'.[956]

Another factor – the offender was also a child – also seems reasonably clear. Reports involving child offenders are likely to include reports made under mandatory reporting obligations. Some of these reports may include reports of suspected abuse which the named victim says has not happened or reports involving consensual peer relationships where a police response is unlikely to be required. Where a police response is warranted, there are options for diverting juveniles from the criminal justice system without initiating court proceedings. We discuss these options in Chapter 37. However, these options do not mean that juveniles are never prosecuted for child sexual abuse offences, and we discuss prosecutions of juveniles in Chapter 37. The Police Data Report identified that reported cases of sexual abuse by a child who is more than three years older than the victim are more likely to proceed to court than other categories of child-to-child sexual abuse.[957]

Some of the other factors are less clear. We can speculate that reports of 'historical' offences are less likely to involve reports made under mandatory reporting obligations, so they may be less likely to involve suspected abuse which the named victims says has not happened or in consensual peer relationships. Reports of 'historical' offences will also include reports made when the victim has become an adult, so they may include those cases where the victim has formed a strong determination to pursue the fullest possible criminal justice response.

We can speculate that reports in relation to victims who were very young (under five) at the time of the incident may be less likely to be finalised by the initiation of court proceedings because it may be more difficult to obtain clear disclosures of what happened from young victims and even from victims who are older at the time of the report but who were very young at the time of the incident.

While some categories of relationship between the victim and the offender had a significant association in some jurisdictions, it is difficult to speculate about the reasons for these associations given that the associations differed across the jurisdictions.

7.9 Features of current police responses

7.9.1 Introduction

States and territories adopt different structures for 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 geography – of the states and territories. As discussed in section 7.5, police administrative data shows that jurisdictions experience different rates of reporting of child sexual abuse and that the nature of the reports also differ.

In section 7.9.2 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 7.9.3 to 7.9.11 we outline the current structure of police responses in each Australian jurisdiction.

7.9.2 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 that is reported when the victim is a child and child sexual abuse that is reported by an adult complainant. 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 when the victim is a child 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' data sets for both police and court data collections.[958] 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.[959]

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.[960] [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.[961]

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[962] and figures 58a and 58b in relation to South Australia.[963]

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).[964]

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.[965]

The Delayed Reporting Research also discusses factors that may lead to differences in the likelihood of conviction between prosecutions where the report was made when the victim was a child and prosecutions where the report was made by an adult complainant. 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 matters is very stressful and complainants are unlikely to go through all it entails unless they are determined and reliable witnesses.[966] [References omitted.]

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.[967] 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*,[968] 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 colocated 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 that directly compare 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.

7.9.3 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 13.) 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 by an adult complainant, 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 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 the 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.[969] [Reference omitted.]

We understand that, where the alleged victim is between the ages of 16 and 18 years and 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 section 7.5.4, we discussed the separate project we undertook in 2015 to identify how many of the matters referred to JIRT involved allegations of institutional child sexual abuse within the meaning of the Royal Commission's Terms of Reference. The sampling results in that project indicated that 19 of the 100 cases reviewed 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 No 8 – Experiences of police and prosecution responses* (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.[970] 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.[971]

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.[972] 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 CART to support squads that are working on complex investigations.[973]

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 Jonathan Lord. It also considered the response of the NSW Police Force through JIRT. Case Study 2 is discussed in more detail in section 9.2.2.
- **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.

In its submission in response to the Consultation Paper, the New South Wales Government discussed how JIRT responses have been improved for Aboriginal children. It described the JIRT Aboriginal Community and Culture Project as follows:

> Enhanced access to JIRT services and an improved response to Aboriginal children and young people have been implemented as part of the JIRT Aboriginal Community and Culture Project.
>
> The overall aim of the JIRT Aboriginal Community and Culture Project is to improve outcomes for Aboriginal children and young people. Specifically, actions under this project aim to provide appropriate JIRT interventions when JIRT staff are dealing with Aboriginal children, young people and families.
>
> Prior to this project, referrals were assessed against JIRT criteria irrespective of cultural and/or community considerations. As a result, some child sexual assault referrals from vulnerable Aboriginal communities were being rejected on the grounds the disclosure was 'third hand' or not sufficiently comprehensive to meet the JIRT acceptance threshold. When considered in a cultural context, this is a consistent feature of how Aboriginal children disclose and report abuse.[974]

The New South Wales Government submitted that the JIRT response for Aboriginal children has been enhanced by:

- applying more flexibility to the assessment of Aboriginal child sexual assault referrals at the JRU
- ensuring that accepted referrals are responded to in a timely manner by JIRT units
- appropriately using services available through Aboriginal Community Programs to support children, young people and their non-offending carers throughout the JIRT intervention.[975]

The New South Wales Government also referred to a review of the operation of JIRT that the three JIRT agencies and the NSW Ombudsman are currently undertaking.[976] We understand that the review is likely to be finalised shortly.

The NSW Ombudsman has provided us with information about the review. We understand that the report of the review will contain useful detail about the operation of JIRT and how it has changed over time, particularly since it was last reviewed some 10 years ago. We also understand that the NSW Ombudsman is likely to make a number of recommendations aimed at strengthening the JIRT program, including recommendations in relation to:

- the JIRT criteria and how discretion should be exercised in applying the JIRT criteria
- better resourcing of the JRU
- improving arrangements for referrals, training and support between the Child Abuse Squad and Local Area Commands in the NSW Police Force, and accountability mechanisms for cases handled by Local Area Commands
- enhancing the resourcing of the child protection and health contributions to JIRT
- investigating the addition of a child and family advocacy role to JIRT
- enhancing JIRT's response to particularly vulnerable children, including:
    - Aboriginal children
    - children with disability
    - children from culturally and linguistically diverse communities
    - children in residential out-of-home care
    - children with harmful sexual behaviours
- use by police of witness intermediaries – we discuss intermediaries in Chapter 30
- strengthening accountability and governance across the JIRT program.

We appreciate the NSW Ombudsman keeping us informed about the review. The NSW Ombudsman's work in this area makes clear the importance of periodically reviewing the structure and operation of police and multidisciplinary responses to child sexual abuse so that lessons are learned from experience – and from approaches in other jurisdictions – and the responses continue to be as effective as possible.

7.9.4 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 Service. 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.[977]
    - Taskforce Astraea investigates online child sexual abuse, grooming and child exploitation. It is now part of the Joint Agency Child Exploitation Team.[978]

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*[979] and relevant parts of the *Victoria Police manual*.[980]

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.[981]

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.[982]

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.[983]

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 CASA, 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.[984]

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

> [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.[985]

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 Stephen 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.

7.9.5 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.

In its submission in response to the Consultation Paper, the Queensland Department of Communities, Child Safety and Disability Services (DCCSDS) provided the following information about the operation of SCAN teams:

> The *Child Protection Act 1999* defines the purpose of the SCAN team system as enabling a coordinated, multi-agency response to children where statutory intervention is required to assess and meet their protection needs.

> It is noted that the provisions which outline the operation of the SCAN system are being considered as part of the comprehensive review of the *Child Protection Act 1999* currently underway in Queensland.
>
> SCAN teams provide an operational framework for information sharing and service coordination between core member agencies in relation to children assessed by DCCSDS (Child Safety) as meeting the threshold for recording a notification and/or when a child is subject to ongoing intervention.[986]

The submission stated that all SCAN team core member agencies may refer a matter to a SCAN team via their SCAN team core member representative provided the matter meets the following criteria:

- DCCSDS has assessed it as meeting the threshold for recording a notification, and/or
- DCCSDS is responsible for ongoing intervention with the child through a support service case, intervention with parental agreement or a child protection order, and
- coordination of multi-agency actions is required to effectively assess and respond to the protection needs of the child.[987]

DCCSDS submitted:

> As it currently operates, a SCAN team is not a decision-making body. Decision making and service delivery responsibility is retained by the core member agency.
>
> Depending on the individual needs of the child, the SCAN team system may be used to respond to the needs of a child who has experienced sexual abuse in out-of-home care including residential out-of-home care.[988]

Other joint responses in Queensland

In its submission in response to the Consultation Paper, the Centre Against Sexual Violence Queensland (CASV) provided the following information about joint responses with police in some parts of Queensland:

> The CASV also works in partnership with the Logan and Redlands Police Services. A Memorandum of Understanding (MOU) has been developed in partnership with the aim of providing a professional and coordinated joint response to survivors of sexual abuse. The MOU includes that both the Police and the CASV share their expertise, participate in regular meetings designed to improve service delivery and provide appropriate information and referral to survivors of sexual abuse. By investing in professional relationships with our local police services the CASV believes that we can directly and indirectly inform, educate and support police in providing a safe and trauma-informed response to survivors of sexual assault.

> Recently, a 24-hour sexual assault response unit has commenced operating in Townsville which includes eight social workers and seven specialist-trained police officers who will immediately respond to any complaints of sexual assault made by women. The sexual assault response unit was developed by the Sexual Assault Support Service in partnership with local Police to provide a prompt and supportive service to survivors in the interests of providing better outcomes.[989] [Reference omitted.]

7.9.6 Western Australia

Structure of police response

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

- **Child Abuse Squad (CAS):** 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.[990]

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.[991] 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.[992]

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.[993]

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 for Child Protection and Family Support], 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.[994]

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.[995]

7.9.7 South Australia

SAPOL manages its investigation of sexual offences using a tiering system. Tier 1 offences are investigated by Local Service Area (LSA) 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:

- **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).
- **FVIS:** FVIS is responsible for family violence but also provides advice on child abuse and child protection matters.
- **SCIB:** 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).[996]
- **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.

7.9.8 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 the Tasmanian Department of Health and Human Services Children and Youth Services and Tasmania Police.

7.9.9 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.

7.9.10 Northern Territory

The Child Abuse Taskforce is a joint initiative between Northern Territory Police, the Department of Children and Families (DCF) and the AFP. The Child Abuse Taskforce 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 Child Abuse Taskforce 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.

7.9.11 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.

8 Issues in police responses

8.1 Introduction

In the Consultation Paper, we identified the following topics as being 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
- police investigations
- police investigative interviewing
- police charging decisions.

Submissions in response to the Consultation Paper were generally supportive of our identification of these topics as important and of our proposed approaches to them.

In the Consultation Paper, we sought submissions on the possible principles and approaches we discussed in relation to issues in police responses. We asked whether it was sufficient to address these issues by setting our general principles or approaches or whether we should consider making more specific recommendations. We also asked, if we should consider making more specific recommendations, what those recommendations should be.

Some interested parties submitted that, instead of recommending principles, we should:

- make detailed recommendations[997]
- recommend protocols and rules[998]
- recommend the establishment of a uniform national standard for the reporting and investigating of child sexual abuse and national codes of conduct.[999]

We are not satisfied that we have the detailed evidence necessary to formulate and recommend national protocols or codes of conduct on policing. The matters we recommend be addressed in principles are the key issues we have identified through our private sessions, public hearings and consultations as being the issues of greatest importance for victims and survivors of institutional child sexual abuse. We have not examined other aspects of police responses to the extent required to propose protocols or codes of conduct.

Two issues have emerged from submissions and evidence in Case Study 46, in addition to those that we raised in Chapter 3 of the Consultation Paper, in respect of which we consider that we should make additional recommendations. They are:

- police responses to reports of historical child sexual abuse, which we discuss in section 8.7
- additional issues in police responses to reports of child sexual abuse made by people with disability, which we discuss in section 8.8.

We also note that police prosecutors conduct some prosecutions of child sexual abuse matters in magistrates' courts or children's courts. In relation to police prosecutions, regard should be had to the principles that we recommend in Chapter 20 in relation to prosecution responses, to the extent they are relevant to police prosecutions.

8.2 Initial police responses

8.2.1 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.

In the Consultation Paper, we suggested 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 7.9, 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 non-specialist police.

8.2.2 Aspects of initial police responses

In the Consultation Paper, we suggested that the following general aspects of initial 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 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 No 8 – Experiences of police and prosecution responses* (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.[1000]

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.[1001]

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.[1002]

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.[1003]

Ultimately, the offender was convicted of 24 offences of child sexual abuse relating to Mr Chandler.[1004]

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.[1005]

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.[1006]

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'.[1007]

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.[1008]

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.[1009]

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.[1010]

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 Victorian Law Reform Commission (VLRC) defined 'victim support' with reference to the *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'.[1011] 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'.[1012]

In its report, *The role of victims of crime in the criminal trial process*, the VLRC identified being treated with respect and dignity, and being provided with information and support, as two of the five 'overarching rights and entitlements' for victims.[1013] We discussed these in section 3.3.2.

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'.[1014] [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. It would also enhance the ability of the criminal justice system to make offenders accountable for their criminal conduct.[1015]

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.[1016]

We suggested in the Consultation Paper that, 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

In the Consultation Paper, we suggested that, 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. They will also want 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.[1017]

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.[1018]

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, Centres Against Sexual Assault (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.[1019]

In Case Study 38 in relation to criminal justice issues relating to child sexual abuse in an institutional context, Detective Sergeant David Crowe of the Sexual Assault and Child Abuse Team (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. I t 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.[1020]

In the Consultation Paper, we suggested that 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.

Possible principles for initial police responses

In the Consultation Paper, we suggested 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.

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

The importance of the initial police response

In submissions in response to the Consultation Paper and in evidence in the public hearing in Case Study 46, a number of interested parties acknowledged the importance of the initial police response.[1021]

Some differences in experiences of initial police responses appeared to arise from whether victims and survivors received specialist or generalist police responses. As discussed in section 7.9, in some jurisdictions, this will depend in part on whether the person reports as a child or as an adult.

In their joint submission, the Survivors & Mates Network (SAMSN) and Sydney Law School discussed positive experiences with specialist police and negative experiences with generalist police as follows:

> Several survivors reported positive experiences with police officers, particularly those working within specialised sex crimes units. In some cases involving female detectives, survivors reported 'a remarkably good experience' in one case, this involved two female detectives who were 'fantastic and "got it"' although the environment itself was stress-inducing. The continuity of contact, and involvement with detectives such as this was greatly appreciated in that it allowed them to develop some trust in these police officers when divulging difficult and sensitive information, often for the first time.

> Several, however, were much less positive about general police in the Local Area Commands, for example, where their experience was very much according to 'the luck of the draw'. In one case, a participant survivor going to the police on the first occasion was told to 'go away and think about it', a message he perceived as discouraging him from proceeding. He did not go back for 10 years.[1022]

In its submission, Micah Projects referred to the importance of the initial police response to an allegation and some of the concerns that survivors had when deciding whether to come forward, particularly as adults:

> In encouraging victims to report their abuse police recognize they are often the first point of contact with the criminal justice system and as such many victims rely on this single experience as a way of ascertaining whether they will proceed or not. Police offer a singularly unique position in creating a trusting relationship with a victim to report sexual abuse with a sense that they are believed. … Many of the participants in the forum reported childhood sexual abuse as adults. Some expressed the view that because the incident of abuse was in their childhood it had poorer prospects of being believed by police. Police responses for urging people to continue with these allegations was considered important.[1023]

Ms Miranda Clarke, representing the Centre Against Sexual Violence Queensland (CASV), told the public hearing:

> A lot of times when people come to our service, the thing that the clients will talk to me about first is about the response that they received, whether it was from the police or somebody else, and I guess that has informed me that sometimes it is the response that that person receives after a sexual assault that can be as traumatising as the sexual assault, at times.[1024]

Mr Warren Strange, representing knowmore, told the public hearing:

> if the initial response by police to a survivor is appropriate and trauma informed and meets the survivor's needs, then their likelihood of continuing to participate in any investigative process is greatly increased. If the initial interactions and the early interactions are handled poorly, then that's a very significant contributing factor to people dropping out of the process.[1025]

The initial police response at the local police station may be particularly important for those reporting sexual offences. Mr Greg Davies APM, the Victorian Victims of Crime Commissioner, referred to a survey conducted by the Victim Support Agency in the Victorian Department of Justice and Regulation which found that victims of sexual assault and rape were more likely to attend their local police station to report the crime rather than calling '000'. This emphasises the important role of police in 'setting a positive first impression for the broader criminal justice system'.[1026]

The Victorian Commission for Children and Young People submitted that the initial police response is also important for victims who disclose as children, suggesting that it may determine the extent to which the child will disclose the abuse:

> While the importance of developing more effective police responses to adults reporting sexual abuse suffered as a child is understood, it is also important to encourage the development of specialist responses focused on child sexual abuse reported as a child. The Commission endorses the principle that a victim's initial contact with police will be vitally important in determining their satisfaction with the entire criminal justice response. Indeed, the experience of initial contact with police will often determine the extent of disclosure. This is particularly the case for a child.[1027]

Mr James McDougall, representing the Victorian Commission for Children and Young People, told the public hearing of children's experiences in the criminal justice system as follows:

> often it's on the basis of limited experience with adult institutions, and those institutions that they have had dealings with – their family environment, their school environment, maybe a sporting club environment – haven't given them a particular sense of the formality or the gravitas that is often related and experienced in the justice system, the criminal justice system in particular, so it's a pretty alien experience for them.
>
> However, they still will engage and seek to contribute and that's why often the contact that they have at first instance with the justice system is a pretty pivotal one; it will frame their reference for how they will engage or not engage with the system on an ongoing basis. So if they've had a poor experience at the hands of a police officer or other authority figures, that may make it more difficult for them to engage with the justice system in a broad sense.[1028]

Mr McDougall agreed that it is very easy to undermine the child's trust and that, once their trust is lost, it is very hard to get it back.[1029]

Training in child sexual abuse issues

Some submissions in response to the Consultation Paper from governments referred to current training for police.

The New South Wales Government outlined the NSW Police Force training framework as follows:

> The NSWPF [NSW Police Force] delivered mandatory child protection training to all sworn police in the 2010–2011 training year. This training covered indicators of child abuse, dynamics of child abuse, offender behaviours, child protection legislation and initial police response to child abuse, including appropriate questioning techniques.

> At present, training on responding to child abuse is provided to police through the Investigators Course, the Detective Education Program, Investigation and Management of Adult Sexual Assault and Child Interviewing Course. The paramountcy of victim care is a key message of these courses.
>
> The Investigation and Management of Adult Sexual Assault Course is open to criminal investigators who are in a position to investigate sexual assault offences. This course is designed to assist investigators to manage and investigate sexual assault offences. During the course the importance of believing victims and showing empathy towards them are explained. The course has a session presented by a Sexual Assault Counsellor and a session by a Sexual Assault Medical Practitioner.
>
> The NSWPF has further reviewed its training to make it more relevant by developing a Child Abuse Investigators Course specifically designed to provide senior investigating officers with the necessary skills to carry out more thorough investigations in child abuse matters. This course is anticipated to commence in early 2017.[1030]

The Victorian Government outlined the training and guidance currently provided to non-specialist police officers in Victoria:

> Victoria Police currently provides guidance to front line police on how to respond to complainants and witnesses when they receive an initial report of a sexual crime in the Victoria Police Code of Practice for the Investigation of Sexual Crime (the Code of Practice). Victoria Police recognises that along with this guidance, specific training for all frontline police on the nature of sexual abuse and the needs of victims promotes good practice and ensures that police officers have necessary skills to support victims. This training can also dispel misconceptions that are commonly held about sexual offences which can negatively impact on the police response.[1031]

Detective Superintendent Mark Wieszyk gave evidence at the public hearing in Case Study 46 in relation to the South Australian scheme for communication assistants introduced in 2016 under the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA), which we discuss in detail in Chapter 30. Detective Superintendent Wieszyk told the public hearing that a corporate training package was delivered, along with a significant communication strategy, across South Australia Police (SAPOL) in relation to the legislation and that everyone within SAPOL received the training. He also referred to the specialist investigative interviewing training run by Deakin University and the interagency practice in child protection course that has been running for many years.[1032]

Protect All Children Today (PACT) referred to the relevant training for Queensland police and commented favourably on it as follows:

> The Queensland Police Service (QPS) utilises the Interviewing Children and Recording of Evidence (ICARE) Training for Police and Child Safety Officers (CSOs) dealing with child victims. PACT provide training at the monthly ICARE courses in relation to the role we play

> in supporting vulnerable children through the daunting criminal justice process. We believe Queensland Police do possess an understanding of complex trauma and treat people with respect and understanding, especially child victims. Police need to be adequately resourced to continue this valuable training.[1033]

Many submissions expressed support for the suggestion that all police should be trained to have a basic understanding of issues associated with victims and survivors and to engage with them in a supportive and respectful way.[1034]

Some interested parties addressed the content of the training, particularly that it be trauma informed. The Ballarat CASA Men's Support Group's submission stated:

> The response from the group is that it is very important that police should receive trauma informed awareness training. Ballarat CASA has developed trauma informed training, for community welfare services which assists participants to understand the impacts of trauma and understand the presentations of people who have experienced childhood trauma. Similar training would provide the police the understanding of issues that impact on people coming into contact with the police. A suggestion is for an information tool kit to be provided to police which would provide basic information about trauma, this could also be informed by the survivors themselves and/or support services, as part of developing this tool kit. It would also assist police to make appropriate referrals for supports. Group members also suggest that trauma awareness training should be part of the police initial trainings with more intensive training through their careers.[1035]

Broken Rites submitted that police being trauma informed is important for their ability to form effective relationships with victims and survivors:

> What the police do will always be important to the investigation. How the police go about doing this will be important to the potential witness. Police do need to have a basic understanding of trauma and its effects and they need to have insight into what survivors may be experiencing. This relates to development of the Persona having been compromised and the consequences thereof. It there are these understanding it will greatly enhance this temporary relationship between police and the potential witness. Police need to understand the role of trust and they need to understand how the potential witness sees the world.[1036]

Dr Wayne Chamley, representing Broken Rites, gave the following evidence about the need to understand how the trauma associated with abuse will have lifelong implications for victims and survivors, including their attitudes towards persons in authority, such as police:

> If the survivor becomes identified as a potential witness, well, as I see it, they can have the Goldilocks experience. In their teenage years, because of their behaviours, they are expelled from school, they're in minor crime, overuse of alcohol, speeding cars, stealing cars, and society responds by these authority figures fronting up to try to correct all this.

> They're the police, lawyers, social workers, magistrates, judges. They're all instrumental in deciding that they'll go to gaol, that they'll be expelled and whatever.
>
> Decades later, after the sexual abuse is reported, the same authority figures turn up again, sometimes in uniform on the first encounter, banging on the front door, and what it's all about is the authority figures seeking the survivor's assistance now to bring about a successful prosecution. It's a total contradiction to that person, a total contradiction.
>
> What it means is that the police and legal people really – there's got to be a huge amount of training about these processes and an understanding of what they represent to this person, because they represent authority, and the person has had a lifetime of trying to trust.[1037]

In their joint submission, SAMSN and Sydney Law School stated:

> The key words used were respect and sensitivity. In particular, survivors discussed the importance of police – and prosecutors – understanding the trauma response to abuse and how remembering and talking about the abusive incidents may lead to adult survivors 'flipping in and out of being a child', and often a frightened child who 'tunes out' and may be unable to respond to questioning at some stages.[1038]

In its submission in response to the Consultation Paper, the Alliance for Forgotten Australians also referred to the importance of police understanding the impact of institutionalisation. It submitted:

> For police personnel, knowledge of complex trauma and its impact on adults who suffered in their childhood is important, but equally important is the need for police to understand the nature and impact of institutionalization. The need for an investigation to have organizational and operational practices that support the survivor are fundamental. Some of these practices will include an understanding of the institutional care environment and an emphasis on autonomy, collaboration and strength based approaches.[1039]

Similarly, Care Leavers Australasia Network (CLAN) submitted that police should be trained in the history of care leavers, including the child welfare system and the police's historical role in supporting and enforcing state care.[1040]

CASV submitted that, in addition to complex trauma and the impacts of sexual abuse, training should also address the myths and misconceptions about sexual assaults.[1041]

Some interested parties addressed the need for training to be ongoing.

Ms Carolyn Worth, representing the South Eastern Centre Against Sexual Assault & Family Violence (SECASA), told the public hearing that SECASA has some input into the training for specialist staff on Sexual Offences and Child Abuse Investigation Teams (SOCITs). However, she said that general

duties police only do the initial police training, yet they will often be the officers who take the first report from a victim or survivor.[1042] Ms Clarke, representing CASV, also referred to the importance of ongoing training for police and that sexual assault organisations should be involved in the training to start building relationships between police and service providers.[1043]

A number of interested parties submitted that police should receive training in relation to Aboriginal and Torres Strait Islander victims and survivors.

The Victorian Aboriginal Child Care Agency (VACCA) submitted:

> Community members consulted were clear that all police should have an understanding of complex trauma and intergenerational trauma and that this should be achieved via mandatory training. In addition all police should receive mandatory cultural awareness training in relation to engaging and working with Aboriginal people and communities. There was the recommendation that all police complete Yarning Up on Trauma, a training package and approach to understanding trauma and attachment for Aboriginal communities and those working with Aboriginal community. The training package was developed by Berry Street Take Two in partnership with the Victorian Aboriginal Child Care Agency (VACCA) and evaluated as part of the Berry Street Take Two Third Evaluation report.
>
> This is an important point – all police must receive training in (1) complex trauma, intergenerational trauma and its impacts and (2) cultural knowledge and understanding in engaging and working with Aboriginal communities, not just police in identified roles. This is because any police officer is likely to come into contact with victims or survivors regardless of their role and it is crucial that every response and interaction by police be trauma informed and culturally-sensitive. Furthermore, training in isolation will never be enough to ensure the police workforce is trauma-informed and culturally-sensitive. An ongoing commitment to cultural knowledge and understanding is required as well as engaging and building respectful relationships with Aboriginal organisations. It also requires that the police force as an institution embed and support trauma-informed practices and address current lack of cultural safety.[1044]

The Victorian Aboriginal Legal Service (VALS) submitted that cultural education for police should be a priority:

> VALS supports systemic change in justice system culture, in order to develop and maintain better relationships between Aboriginal and Torres Strait Islander people and the police, and justice system overall. VALS recognises that this will consist of an ongoing going [sic] educational process, involving multiple community stakeholders, to ensure system change that is enduring against policy and 'people' change. VALS also recognises that this will take some time, but can be achieved by cultural education for workers in the justice system, including first and foremost, the police.[1045]

The Aboriginal Legal Service (NSW/ACT) expressed support for the principles regarding training and treating survivors with respect suggested in the Consultation Paper but submitted that further training was needed:

> However, as observed by the Family Violence Prevention Legal Service Victoria:
>
> > There is still evidence of fear amongst ATSI [Aboriginal and Torres Strait Islander] communities about asking for police assistance for numerous reasons, yet police members show limited understanding of this.
>
> The ALS further suggests that police engage in training to gain an understanding of the specific nature of trauma suffered by Aboriginal and Torres Strait Islander people and how that may impact their interactions with police. For example, an Aboriginal or Torres Strait Islander survivor's 'difficulty asking questions or giving their opinions'is likely to be influenced by the ongoing colonial and inequitable relationship between police and Aboriginal and Torres Strait Islander communities. Aboriginal and Torres Strait Islander survivors are also more likely to have had prior 'difficulties dealing with institutions' given the historical and ongoing institutionalisation of Aboriginal and Torres Strait Islander people, demonstrated by the Stolen Generations and current disproportionate rates of Aboriginal and Torres Strait Islander incarceration and youth in out of home care ('OOHC'). …
>
> The ALS submits that police would benefit generally from training in these areas, and specifically in relation to institutional child sexual abuse.[1046] [References omitted.]

Referral to support services

A number of submissions in response to the Consultation Paper commented on the importance of support services and the type of support services that should be available for victims and survivors.[1047] Some interested parties commented on the importance of victims and survivors being able to have a support person present when they come forward to make a statement to police.[1048]

We are conducting a separate project in relation to support services.

No submissions expressed opposition to police having processes in place to refer victims and survivors to appropriate support services.

Mr Davies, the Victorian Victims of Crime Commissioner, expressed his support for the importance of providing access to support services as follows:

> Providing victims of child sexual abuse with information and access to crisis support services is also critical to ensure that victims/survivors remain engaged with the system. The provision of effective and integrated responses provides victim/survivors with confidence and support to report incidents and pursue them through the criminal trial process.[1049]

The Victorian CASA Forum described problems that they say they have experienced with police processes in Victoria where early referrals where not made to a CASA:

> In situations where SOCIT [Sexual Offences and Child Abuse Investigation Teams] police have neglected to include the local CASA at point of statement making, clients are compelled to find their own way through a system they're not familiar with and frequently reach the CASA, at some point down the track, in a very distressed state, confused about where things are at and what they might expect.[1050]

In their joint submission, SAMSN and Sydney Law School referred to the importance to survivors of having access to support services while participating in the police interviewing process:

> Survivors also emphasised the importance of a non-judgemental response from police when they are experiencing periods of addiction and mental health problems. One survivor said he had 'no support at all' and developed substance-abuse problems during the interviewing process. The interview experience may also leave complainants in an emotional state which means that they may be at risk travelling home alone afterwards, although many men would be very reluctant to admit to such vulnerability. One spoke of his suicidal state following one interview session, one of many over several months. For this reason, these participants suggested that the police should consider their duty of care to complainants, including referring complainants to victim support services and recommending that they bring another supportive adult with them for the journey home.[1051]

8.2.4 Conclusion and recommendations

Given the strong support for the possible principles we suggested in the Consultation Paper in relation to initial police responses, we are satisfied that we should recommend these principles.

We are satisfied that a victim or survivor's initial contact with the police is likely to be highly influential in determining how they view the criminal justice system as a whole and whether they are prepared to continue to seek a criminal justice response.

Particularly for survivors who report to police as adults, the police response is more likely to come from general duties police rather than from specialist police who have received additional specialist training. Even where victims and survivors receive a specialist police response, their initial contact with police may be with general duties police at the local police station.

We are satisfied that all police should therefore be trained to have a basic understanding of complex trauma. We are also satisfied that all police should be trained to be sensitive to the needs of those who may have difficulties dealing with institutions or persons in positions of authority. These difficulties may arise particularly for victims and survivors who have been in state care and for Aboriginal and Torres Strait Islander victims and survivors.

We are considering here only the basic training that should be provided to all police officers. We are not considering general training for detectives or the specialised training required for specialist police responses to child sexual abuse. We would also expect that all police would have some training in cultural safety, including in relation to Aboriginal and Torres Strait Islander people and people from a culturally and linguistically diverse background.

We also consider that there is value in including a specific recommendation in relation to police establishing arrangements to ensure that, on initial contact from a victim or survivor, police refer victims and survivors to appropriate support services. Establishing effective arrangements in relation to referrals to support services should help to ensure that all police who may have initial contact with victims or survivors are alert to the need to treat victims and survivors sensitively and to take account of their possible needs for support services. Ensuring that victims and survivors have access to appropriate support services should improve their ability to continue to seek a criminal justice response.

Recommendation

3. Each Australian government should ensure that its policing agency:

    a. recognises that a victim or survivor's initial contact with police will be 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

    b. ensures that all police who may come into contact with victims or survivors of institutional child sexual abuse are trained to:

        i. 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)

        ii. treat anyone who approaches the police to report child sexual abuse with consideration and respect, taking account of any relevant cultural safety issues

    c. establishes arrangements to ensure that, on initial contact from a victim or survivor, police refer victims and survivors to appropriate support services.

8.3 Encouraging reporting

8.3.1 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 a 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 offences for failures to report child sexual abuse in Chapter 16. We also discuss the issue of blind reporting to police by third parties, particularly institutions and survivor advocacy and support groups, in section 9.3.

In the Consultation Paper, we suggested that 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 8.2
- making information available to victims, their families and survivors about what will happen when they report to police and that 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.

We also suggested 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 is likely to 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 groups 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.

8.3.2 Aspects of encouraging reporting

The under-reporting of child sexual abuse

As noted in section 2.4.1, 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.[1052]

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.[1053] In some cases, survivors do not trust police.

In its submission in response to the Consultation Paper, CLAN referred to the difficulties faced by survivors who were abused in state care in reporting their abuse to police. CLAN stated:

> For many Care Leavers, reporting abuse is an extremely difficult task. Not only is it psychologically and emotionally draining but the physical task of trying to answer specific questions and details about events which occurred in childhood can be a daunting one. This situation is easily compounded when Care Leavers are reporting to police who have no understanding of the Care Leaver experience and who do not understand the psychological difficulties created by child abuse and the limitations on an adult's memory who is suffering from Post-Traumatic Stress Disorder.[1054]

Ms Leonie Sheedy OAM, representing CLAN, gave the following evidence about why care leavers may be reluctant to report abuse to police:

> Because they are fearful of being not believed, they can't name the perpetrator. They say, 'What's the point? He's probably dead.' They have been laughed at when they have been to the police. Today I was told another reason, and I hadn't thought of that reason, and this man has come to the very first Royal Commission hearing today and he told me that he didn't want to do anything about it because he wanted to wait until his mother had died.
>
> They are ashamed that they won't be believed. They hate the police, because the police were involved in the removal of us from our families. Also, some children were put into police cells at three years of age; some care leavers were raped while they were in those prison cells, or bashed, and they have a great distrust of police. And police don't know – current police don't know this history and they need to be given training into this.
>
> They feel that some of their family and friends – and the community in general – still don't believe them. I was in Western Australia on Saturday speaking to an 88-year-old man, and they gave me two examples of the street where they live in, that people said, 'Oh, that didn't go on', 'The nuns wouldn't have done that', 'The brothers wouldn't have done that to you.' So still today there are people out there that disbelieve care leavers, that they were abused in these horrid orphanages.
>
> When children did try to run away from all forms of abuse – not just sexual usage – the police were responsible for apprehending those children and returning them, no questions asked, straight back into the hands of the abusers. That's why care leavers don't trust the police.[1055]

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.[1056]

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.[1057]

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.[1058] [Reference omitted.]

Reporting to police may also assist other victims and survivors of the same perpetrator. At the public roundtable on reporting offences, Dr 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.[1059]

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.[1060]

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.

In its submission in response to the Consultation Paper, the Victorian Government stated that Victoria Police would continue to investigate an offender even if the victim or survivor chose not to pursue the matter if there was an ongoing risk to the community or if it was otherwise in the public interest. The Victorian Government submitted that tension between the wishes of the victim and the need to investigate is addressed as follows:

> To support this approach the Code of Practice includes guidance for allowing a victim as much control as possible when making an initial report, and it sets out the procedure for police to follow for when a victim decides to withdraw their report.
>
> Victoria Police acknowledges that in some cases a victim's complaint cannot be progressed if there is insufficient evidence but an investigation could be re-opened if further victims of the same offender or other witnesses come forward. To enable this, Victoria Police supports the establishment of formal arrangements for victims to provide their consent to be re-contacted in these circumstances even if they do not make an initial formal statement.[1061]

Mrs Nicola Ellis from Ellis Legal told the public roundtable on reporting offences:

> these 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.[1062]

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.'[1063]

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.[1064]

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.[1065]

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 …[1066]

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.[1067] 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 Victoria Police told the public roundtable on reporting offences that, following 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), he recognised that Victoria Police needed a pamphlet to give people options for reporting to police.[1068]

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 D.

In its submission in response to the Consultation Paper, the Victorian Government referred to this information provided by Victoria Police and to the SANO Task Force's dedicated telephone number and email address.[1069]

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.[1070]

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.[1071]

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.[1072]

We suggested in the Consultation Paper that, 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.[1073] 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.[1074]

We suggested in the Consultation Paper that, 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

We suggested in the Consultation Paper that 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.[1075] 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 Victoria Police gave the following information to the public roundtable on the current approach of the Victoria Police.[1076] 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 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.[1077]

We suggested in the Consultation Paper that 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.

In the Consultation Paper, we identified the following barriers that had 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.[1078]

- **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 because 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 being in conflict with prosecuting an offender of child sexual abuse.

Options for more effective responses

In the Consultation Paper, we stated that 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, 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.[1079]

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.[1080]

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 Joint Investigation Response Teams (JIRTs) in New South Wales[1081]
- the Aboriginal Community Liaison Officers Program in Victoria
- Community Constables in South Australia
- Aboriginal Community Police Officers in the Northern Territory.

Ms Nadine Miles, representing the Aboriginal Legal Service (NSW/ACT), told the public hearing in Case Study 46 about the Aboriginal Community Liaison Officers (ACLOs) in New South Wales:

> the police have, which are welcomed in some communities absolutely, the ACLO positions – there are over 50 of those scattered through New South Wales …
>
> They are community members who identify as Aboriginal working to support and assist police within the communities where they operate. They are usually working within the hours of 9 to 5 or 8 to 4. They're there to assist and support Aboriginal people who come into custody for whatever reason to link back to family and to offer assistance and support in the cells.
>
> … I commend the police for having those positions, and they are attempting to and are working with their ACLOs across the state to better engage in the communities that they serve. However, I would say more work needs to be done to ensure that there is a relationship of trust and there is the appropriate support given to Aboriginal people who are coming into contact with police on a daily basis across the state.[1082]

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.[1083]

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.

We suggested in the Consultation Paper that 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 needs

- bring an alternative cultural lens to the service to reflect Aboriginal and Torres Strait Islander family, culture and community.

We suggested in the Consultation Paper that 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.[1084]

We suggested in the Consultation Paper that there may be a need for particular channels for reporting or 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.

Possible approaches to encourage reporting

In the Consultation Paper, we suggested that, 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.

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

A number of submissions expressed general support for police taking steps to encourage reporting.[1085]

Respecting victim and survivor choices, publishing information and providing a range of channels for reporting

A number of submissions expressed support for encouraging reporting through police:

- respecting a victim or survivor's wish not to proceed
- publishing information
- providing a range of channels for reporting.[1086]

Submissions in response to the Consultation Paper and evidence in the public hearing in Case Study 46 suggest that these measures to encourage reporting are closely linked.

The Ballarat CASA Men's Support Group submitted that, if survivors are advised that their wishes will be respected, this can provide them with a sense control in the process.[1087]

Some submissions suggested that it was important not to push victims or survivors to make quick decisions about whether they want to proceed. The Ballarat CASA Men's Support Group submitted:

> The common experience for the group members is that reporting to the police is a process that can take some time. Many outline that they initially spoke to the police, but did not make a statement straight away and if they were pressured to do that, they probably would have been frightened away. An initial understanding response from the police assists people to feel ok about going further and making a statement. Therefore encouragement is best achieved through positive initial responses and understanding rather than hurrying people to complete. The ability to have support people such as counsellors as part of the reporting process also encourages people to continue.[1088]

Micah Projects submitted that victims and survivors should be given clear guidance about their options:

> Participants considered it that [sic] police begin by outlining the options available to victims, including pointing out that they may withdraw at any stage of the investigation. There should be no penalty or requirement for new evidence if a person wants to change their mind and recommence proceeding in the future.[1089]

Mr Glenn Davies, representing the In Good Faith Foundation, told the public hearing:

> survivors can make very good choices for their own wellbeing … Survivors of institutional and clergy sexual abuse know what they need, they know exactly what they need, and they know what the choices and the consequences of those choices might be, but they need information and information that comes from a source that's going to be honourable and not going to be conflicted in any way.[1090]

Ms Clare Leaney, also representing the In Good Faith Foundation, told the public hearing:

> Once they [survivors] have the option of police reporting explained to them appropriately, once they have been provided with all the options, like take, for example, Task Force SANO, where there is the ability to provide information only, then they may agree to certain steps within that process, but they may not want to proceed through to a trial, for example.
>
> So once they have that understanding, they are in a much better position to say, 'I wouldn't mind going through a criminal process if that's an option', but they also have that ability to go, 'No, I really don't think I can do that.' …
>
> One of the points we make in our submission is that it needs to be individualised. There may be some people who are further progressed in terms of their mental health care, who may be able to say, 'Yes, I am definitely able to go through with a criminal prosecution', and there may be someone who is just disclosing for the first time and doesn't have that necessary resilience. …

> It's also possible that they may say to us, 'I'm not ready now. Could you provide my information to the police and I may be ready later on.' We've certainly had that be the case as well.[1091]

Some submissions suggested that requiring that victims or survivors report their abuse to the local police station nearest to where the abuse occurred creates difficulties. CLAN submitted:

> CLAN are also aware that another issue which creates difficulty for those wanting to report their abuse is the recommendation that they attend the police station closest to where the abuse occurred. For many Care Leavers this is beyond difficult, it may be impossible. Many Care Leavers are elderly, sick, suffer from a physical or psychological disability, or have consequently moved interstate or overseas. This requirement or recommendation places an added hurdle in the way of many Care Leavers who upon hearing this say it is all too difficult and give up on their quest for justice.[1092]

Ms Walsh, representing Micah Projects, also gave evidence that reporting to the local police station is not the ideal way to proceed.[1093] Micah Projects submitted:

> Police should provide both face to face and phone opportunities to victims to talk about their experience. People supported a specialist phone line which would assist people to report their abuse without as much shame or stigma, eventually however, a person needs to make a statement with police. The discussion about online contact to police was divided due to issues of privacy where people felt they didn't know where their report was going and how it would be responded to.[1094]

Ms Worth, representing SECASA, gave the following evidence about the value of additional options:

> I think it's important that people do have multiple avenues, because I think there are a number of our clients who, for various reasons, are not comfortable with the police, so they don't necessarily head to the police for the first place. I think it would be useful if all of the police had an online capacity, and I know New South Wales and Queensland do, but it's a very onerous online capacity – you have to feel very determined to go through all the drop-down boxes. But I think that would be a very useful thing for every police force to have.[1095]

The National Association of Services Against Sexual Violence noted that, while other options are beneficial, a direct engagement with police will be a necessary aspect of any investigation:

> The serious nature of sexual assault requires a face-to-face response at some point. An online mechanism could only be an initial stage to a further meeting where a thorough 'options' discussion could be held and the full extent of the matter is known. It would be extremely difficult to conduct any type of investigation or rapport building between police/victim via online reporting.

> Additionally, there would need to be some form a [sic – of] validation in relation to any information being submitted via any online portal, otherwise there it would be open to abuse or misuse.[1096]

A number of interested parties commented on the benefits that may arise where police are willing to engage with victims and survivors through advocacy and support groups and support services.

Ms Leaney, representing the In Good Faith Foundation, told the public hearing about Victoria Police engaging with survivor advocacy and support groups as follows:

> Particularly we have seen this with the responses of Task Force Sano, their willingness to engage with our community group, which is Melbourne Victims Collective, their willingness to engage with us as an independent advocacy service but also their commitment to survivors and ensuring that they are cared for in the appropriate manner.
>
> Now, it's never going to be a perfect process, and we admit that there are still things that can be improved, but those steps of making the survivor the centre of that process, the person in control of that process, have been absolutely a step forward.[1097]

In its submission in response to the Consultation Paper, CLAN stated that 'Police need to start using advocacy groups such as CLAN as the invaluable resource that we are'.[1098] Ms Sheedy, representing CLAN, told the public hearing:

> we had our first email from the Queensland Police in 16 years just this year. And I really want to highlight that case in Tasmania. There was an investigation going for eight years in the Kennerley Boys' Home and we never received one phone call from the Tasmanian police, and yet we've got members who were raised in that home. Why aren't they contacting us? We will help them, we will support them. We will give them any information that we've got. We will put a Tweet up there asking people to come forward. We've done that for Victoria and New South Wales.[1099]

Dr Jess Cadwallader, representing People with Disability Australia, told the public hearing about the need for greater assistance for children with disabilities when they are reporting abuse to police:

> People with disability frequently may face impediments even in getting to the police or even being able to speak to the police. For example, if they are living in an institutional setting they may not have independent access to a telephone, so they may not be able to call with any kind of privacy. They may need someone's support in order to actually attend a police station to make a report. And in those circumstances, that often means that they are having to disclose to people who are providing them with supports, which may not be appropriate.

> Additionally, those people may not know how to respond to disclosures, and this is particularly the case for children, I think, and so may not know how to support them to ensure that they get access to the police.[1100]

In relation to barriers to reporting faced by culturally and linguistically diverse communities, the Victorian Multicultural Commission (VMC) submitted:

> The VMC has learned from its community consultations and state-wide regional advisory councils, that barriers to services and support, in general, are often influenced by a lack of accessible information, concerns of privacy and confidentiality, mistrust of authorities often based on negative pre-settlement experiences, language/communication difficulties, and cultural sensitivities or differences (such as concern about stigma). These barriers are even more pertinent in relation to sexual violence, including child sexual abuse. An aspect of this review might therefore be to look at the ways the criminal justice system and key associated agencies could seek to improve the agency of victims and survivors from culturally diverse backgrounds in accessing a criminal justice response, including aspects of encouraging reporting.[1101]

Ms Jesse Rankin, representing the VMC, told the public hearing:

> In terms of coming into contact with police, I think it would be important to recognise that sometimes generally with culturally diverse communities there is often a mistrust to engage with authorities, and that's sometimes due to their pre-arrival experiences.
>
> In terms of overcoming that barrier, I believe that that would be more around the cultural responsiveness of police and key associated agencies.[1102]

One submission expressed caution about respecting victims' choices where the victims are young children. PACT suggested that there may be some risks in giving younger children an option not to proceed. PACT submitted:

> We appreciate the importance of reporting to enable Police to investigate effectively and to prevent perpetrators from further offending. This is particularly challenging for child victims, who need to establish trust, rapport and feel safe in order to divulge what has happened to them. We do not believe that it is appropriate for younger children to be given the option not to proceed unless they want to. We would suggest that they do not have the emotional maturity and experience to make this decision. Further, in matters where the child's carer is unsupportive, such as assaults perpetrated by a step, foster or natural parent, sibling, relative etc., children are likely to be coerced not to proceed.[1103]

Aboriginal and Torres Strait Islander victims and survivors

A number of submissions referred to negative experiences Aboriginal and Torres Strait Islander people have had in the past with government agencies, including police, and the barriers these create to reporting.[1104] A number of submissions referred to the importance of encouraging Aboriginal and Torres Strait Islander victims and survivors to report their abuse to police.[1105]

Some submissions in response to the Consultation Paper and witnesses in the public hearing in Case Study 46 suggested measures to encourage reporting by Aboriginal and Torres Strait Islander victims and survivors.[1106]

In its submission to the Consultation Paper, the Aboriginal Legal Service (NSW/ACT) expressed support for police:

- being aware of services and external support that may be available for Aboriginal and Torres Strait Islander victims and survivors
- adopting a strengths-based approach to respecting and supporting Aboriginal and Torres Strait Islander families and their communities rather than attributing shame to the family or community
- ensuring that a culturally appropriate support person, such as a Witness Assistance Scheme officer or intermediary, is present for victims and survivors to assist in building trust at the initial reporting stage
- being sufficiently flexible in order to ensure that the setting is comfortable for victims and survivors and maintains their confidentiality. This could include allowing meetings in places other than police stations
- providing multiple channels for reporting, including channels for reporting that do not require attendance at a police station, or communication with police, including for prisoners.[1107]

Ms Ellen O'Brien, representing the Aboriginal Legal Service (NSW/ACT), told the public hearing:

> I think a lot of the time, especially talking about child sexual abuse in Aboriginal and Torres Strait Islander communities, there's a tendency to label communities as dysfunctional and disadvantaged.
>
> And while there's definitely low socio-economic disadvantage in communities, I think it's important for the justice system to have respect for the people who are coming before them with disclosures, who are reporting, and to focus on the strengths of that person and their community rather than, I guess, resorting to stereotypes, to label and diminish Aboriginal and Torres Strait Islander people and communities.[1108]

VACCA submitted that the community members it consulted believe a support person is needed throughout the reporting process:

> Community members did not support either telephone or online reporting and instead believed Aboriginal victims and survivors needed to have a support person with them at all times throughout the police reporting process. Given the fear and mistrust of police that Aboriginal people have due to previous negative experiences the need for a support person is important. Community members said it was critical that children have someone present that they know and trust as they are 'not going to trust the coppers'. One community member spoke: 'still today, I need to have someone I know and trust, ever since being in the home'. This is the experience for most of the clients VACCA supports through our Royal Commission Support Service.[1109]

VACCA referred to the benefits of police being flexible in where they will meet survivors and in allowing support workers to be present during the interview:

> VACCA's experience in supporting clients who have told their story to the Royal Commission as adults and then decided to report to the police has generally been positive. Police members of the SANO taskforce, established to specifically receive and investigate these reports has members who are flexible in where they will meet survivors, for example willing to attend the Link-Up office and allow the client to have their support worker in attendance throughout the interview. Learnings from the way the SANO taskforce operate need to inform police practice more broadly when dealing with victims and survivors reporting abuse.[1110]

In her evidence in the public hearing in Case Study 46, Ms Jeannie McIntyre, representing VACCA, also referred to the importance of police spending time to hear the victim or survivor's story:

> I have to say the SANO Task Force that was set up in Victoria to specifically work with these sorts of historic cases has been amazing, has been prepared to come and interview clients with us being present and are much more flexible around being able to sit and hear the stories of clients, rather than this, you know, 'Answer these questions', because Aboriginal people are storytellers, and they need to tell the story, and from the story, the relevant information needs to be taken by police and then moved forward. That isn't often how police, in their very busy jobs, are able to afford the sort of time, and have support staff with clients.
>
> And I think that goes for children today. We need a better way for children to have better trust in police, and advocacy to be able to tell the stories they need to tell, because, sadly, there are many Aboriginal kids who still won't volunteer to go to police.[1111]

Ms McIntyre also told the public hearing:

> But with SANO, they are also willing to have one of our workers with the client, whoever the client's worker is, and, yes, listen and take – and ask the questions they need to ask, but sort of listen to the story, take the time out, come and listen to the client on our terms and in our space, not in the police station, which still is very frightening to a number of Aboriginal people.[1112]

Ms McIntyre agreed that the 'whole-story' framework, which we discuss in section 8.5.5, is more culturally sensitive for Aboriginal and Torres Strait Islander victims and survivors.[1113]

In relation to children who are reporting abuse, VACCA submitted that culturally safe support should be provided:

> Currently, VACCA's experience in relation to children and young people in out-of-home care reporting abuse is that we are often excluded from being part of the police reporting process, not necessarily by police but by the Department of Health and Human Services (DHHS) who are concerned about contaminating the forensic process. VACCA and Victoria Police are currently in discussions to ensure that Aboriginal children who have been sexually abused are culturally supported to report abuse and that Victoria Police have a better understanding of the barriers in interviewing Aboriginal children.[1114]

Ms Dixie Link-Gordon, representing Women's Legal Service NSW, discussed barriers to reporting. She told the public hearing:

> The whole process of reporting and the distrust that Aboriginal and Torres Strait Islander people have with the policing system – there's all this stuff around community education that we have to do, where there is going to be a trust. Now we are seeing that the police have to be more experienced in or trained up more around trauma. Well, everybody's saying, 'I'm traumatised and they don't know much about it, so I'm not going to go and tell them about my problems', especially around child sexual assault. So I think that's a lot of the stuff, and there is so much secrecy.
>
> … I like to think that the work that we do in the Indigenous Women's Legal Program when we go out and we do have community legal education, so it is around talking about your rights and how you can access justice for issues that may be impacting on your life. That could very well be historical child sexual assault and maybe something that's currently happening in your family that you want to do something about.[1115]

Ms Link-Gordon also spoke of the importance of police providing different channels for reporting and being prepared to listen to the victim or survivor tell their story:

> There has to be a pathway for people. No-one is just going to walk into the police station and say, 'I want to tell you about child sexual assault.' It rarely happens.

> There has to be, like I said, a pathway that is accessible. And the language around how you want to tell your story, too – I think there is a lot to do with that, so that you are not going to be blocked off because people are not understanding how you're telling a yarn about – their story, I should say, about sexual assault.[1116]

Mr Alister McKeich, representing the Victorian Aboriginal Legal Service, told the public hearing that it can often be difficult for Aboriginal and Torres Strait Islander victims and survivors to deal with traumatic events while also trying to survive day to day. He told the public hearing:

> When we're talking about such a major, catastrophic and traumatic life event such as child sexual abuse, often because of those socio-economic concerns that people have – people are surviving day to day, on welfare often, they don't know maybe where they're going to live or where their next meal is coming from, they might have just come out of prison – there's a lot of really pressing concerns, so people may just not have I guess what you'd term the life space to be able to start to deal with some of these traumatic events such as child sexual abuse.[1117]

Mr McKeich also spoke of cultural safety and the importance of police developing their skills to engage with Aboriginal and Torres Strait Islander victims and survivors rather than requiring support services to provide cultural safety. He said:

> Often legal services and other Aboriginal and Torres Strait Islander community services are tasked with being that inroad into justice or health, or what have you, but I would put it back on some of the mainstream, and the justice system in particular, to get more well versed in Aboriginal culture, languages and history so that it's not just up to an underfunded Aboriginal agency to be a culturally safe space for people to access justice, so that an Aboriginal person can go to a police department or the SANO Task Force, for example, in Victoria and feel like, 'Yes, I know that those non-Aboriginal people actually do understand where I'm coming from, they do know the different mobs around Victoria or New South Wales', or what have you, and so that cultural safety extends beyond just a community organisation.[1118]

Mr Strange, representing knowmore, spoke about the importance of cultural safety and building trust:

> Our experience is very much that Aboriginal and Torres Strait Islanders need to feel a sense of cultural safety when they're engaging with a service, and we were specifically established and funded to have indigenous staff members with expertise in that area, and they have worked very effectively to gain the trust of many of our indigenous clients.
>
> It's often a process that unfolds where they will speak to an indigenous adviser, build a relationship, before they feel comfortable in talking to a lawyer or to one of our social workers. So for them, it's about a sense of being able to relate to a fellow indigenous

> person and to have a sense of cultural safety. That often isn't provided in current police processes: the first person, if they want to make a complaint, is a non-Aboriginal police officer; there's no early relationship or trust established.
>
> … I think it's about trying to create an environment where Aboriginals and Torres Strait Islanders feel safe individually and as a community in engaging with the police, and part of that is ensuring that there are appropriate cultural connections to ensure cultural safety.[1119]

Mr Strange referred to the approach of the Queensland Police Service in employing Aboriginal and Torres Strait Islander police liaison officers, who he said 'in some respects operate as a bridge between the sworn police personnel and communities'.[1120] In its submission in response to the Consultation Paper, knowmore expressed its support for Aboriginal and Torres Strait Islander people being employed as cultural advisors and for having liaison officers within the police and support services to support survivors and advise police on culturally appropriate and supportive services.[1121] knowmore also emphasised the importance of confidentiality and stated that some Aboriginal and Torres Strait Islander clients ask to work with a non-Aboriginal or Torres Strait Islander person because they have concerns about close family relationships and confidentiality.[1122]

knowmore referred to language barriers and submitted:

> Further, there may be additional barriers facing Aboriginal and Torres Strait Islander survivors in reporting, particularly in remote and regional communities where English is not the first language. In order for a detailed complaint to be made there should be a trained interpreter to assist, with whom the client feels comfortable. Assessing whether an interpreter is an appropriate person should take into account family relationships and cultural practices regarding who a person can speak to about these matters.[1123]

In relation to difficulties that arise in remote communities, Mr Strange said:

> Providing services in a remote location may not be what is culturally safe. People may want to leave their small community to make a complaint and not to be dealing with that sort of business on their own community.
>
> … We often encounter, particularly in smaller and remote communities, that sense that everybody knows everybody else's business. Cultural and kinship relationships are such that most people are known to each other or they know somebody in the family, and there's often a reluctance to engage with a local service, such as a medical or a counselling service, for that very reason – they want somebody who is not connected with their own family and community.[1124]

The Ballarat CASA Men's Support Group submitted:

> It was suggested by group members that police be provided a tool kit, that assists them to understand diversity, and specific cultural issues. Aboriginal and Torres Strait Islander people have historical mistrust of authority and government, including police, so statements and contacts away from the police station are especially important.[1125]

Options for prisoners and former prisoners

A number of submissions in response to the Consultation Paper identified additional supports needed for prisoners to come forward, noting the difficulties faced in speaking up in a prison environment and the legacy of mistrust of authority that may arise with people with criminal histories.[1126]

In its submission, Legal Aid NSW told us about the reluctance of prisoners to report their abuse:

> Legal Aid NSW welcomes consideration of measures to support and encourage current and former prisoners to report allegations of child sexual abuse. In the experience of the Legal Aid NSW Prisoners Legal Service, prisoners are reluctant to engage with police to make a complaint: it is virtually impossible for prisoners to call police to come to prisons so that they can make a complaint. If a police visit takes place, it is very obvious to other prisoners and will lead to allegations that the prisoner is being a 'dog', putting their safety at risk.
>
> We submit that channels should be developed to allow prisoners to report abuse safely and to receive necessary support.[1127]

Legal Aid NSW suggested the following approaches:

- Multiple potential reporting pathways should be provided, including alternatives to reporting to police.
- Facilities should be provided to enable prisoners to make telephone calls to police on a private line (for example, in a welfare officer's office). Legal Aid NSW stated that telephone calls (other than legal calls) must be made in an open area where there is no privacy and where the conversation may be overheard by other inmates and recorded.
- Untimed phone calls should be provided. Legal Aid NSW stated that prisoner telephone calls are timed unless organised through a welfare officer and that prisoners' access to welfare officers is increasingly restricted as a result of the rapid rise in the New South Wales prison population over recent years.
- An appropriate support person should be present during disclosure interviews.
- Support after disclosure should be provided through a regular, accessible, confidential, in-person, specialist counselling support service. Legal Aid NSW submitted that a major problem for current or former prisoners reporting abuse is the lack of follow-up specialist counselling and that inmates who disclose while in prison do not have access to specialist counselling support.[1128]

NSW Legal Aid also expressed support for the steps that the Royal Commission has taken to engage with prisoners in New South Wales.[1129]

In its submission, Sisters Inside expressed support for the importance of recognising the particular needs of prisoners and those with criminal records and proposing strategies to encourage them to report allegations of institutional child sexual abuse. It supported the proposal that police provide alternative channels for reporting, such as those that can be used from prison and those that do not require a former prisoner to report at a police station.[1130]

The submissions of both the Women's Legal Service NSW and Dr Linda Steele referred to the available research indicating that between 57 per cent and 90 per cent of women in prison were sexually abused as children.[1131]

The Women's Legal Service NSW submitted that additional counselling services and alternative forms of reporting should be made available for women in prison:

> In our submission to Issues Paper 10 *[Issues Paper 10: Advocacy support and therapeutic treatment*] we argued for improved access to counselling services available to women in prison, if they choose to engage in counselling or other therapy. Helping women address their trauma by offering treatment and support programs while they are in prison, along with information and alternative forms of reporting may encourage reporting of allegations of sexual assault.[1132]

Dr Steele submitted that the re-traumatising effects of imprisonment and the social isolation it causes will negatively impact on survivors who are trying to come forward to report their abuse. Dr Steele identified this as a particular concern for those who would have to report their abuse at the same police station where they were dealt with as offenders.[1133]

In their joint submission, Relationships Australia Western Australia and Anglicare WA submitted:

> Prisoners have reported difficulty accessing the police when they wish to report sexual assaults. They have said there is an apparent reluctance by prison authorities to make such reports.
>
> There is no specialist police unit dealing with sexual offences in prison. Rather, we understand that individual prisons simply report to the police within their geographic area.[1134]

The submission also raised concerns about the level of detail contained within information that is provided to police, the priority given to a response and the reductions in counselling services that are available for prisoners who report.[1135]

Mr Kevin Chattelle and Ms Gail Green, representing Relationships Australia Western Australia and Anglicare Western Australia respectively, made additional recommendations during the public hearing. These included:

- developing specific protocols to respond to prisoners who make disclosures
- providing appropriate support and advocacy services after a disclosure has been made
- providing specialist counselling services in metropolitan youth correctional facilities to assist young people who are less comfortable disclosing in their local community
- recognising that the person who is disclosing may have disclosed previously regarding an historical event and may have had a negative experience.[1136]

Mr O'Connell, the South Australian Commissioner for Victims' Rights, stated that South Australia Police had established a reporting option for prisoners in relation to homicides and submitted that it should be extended to prisoners who are reporting sexual abuse. He stated:

> As an element of Operation Persist in South Australia (which addresses unsolved homicides), a dedicated telephone line has been set-up so prisoners can contact police direct without 'monitoring' by corrections staff and discretely so as to reduce the risk other prisoners will overhear conversation.
>
> A like approach ought to be adopted for prisoners (no matter whether they be young offenders and adult offenders) seeking to report sexual abuse. Further, data on sexual assaults in institutions, such as prisons, should be collected and published. Such data is published in, for example, the USA.[1137]

Some submissions referred to difficulties in reporting for those who are not currently prisoners but who may have been involved with police or the courts or engaged in illegal behaviour.

In relation to children in out-of-home care, the CREATE Foundation submitted:

> It is important to acknowledge that children and young people in out-of-home care could already have had involvement with police and/or the courts through issues related to family violence and custodial sentencing. Young people in care, particularly if they live in residential care, are over-represented in juvenile justice systems and, therefore, highly likely to have experience with police. Furthermore, a study by the Australian Institute of Criminology found that victims of childhood sexual abuse were almost five times more likely than their peers to be charged with an offence. A higher proportion of charges against them resulted in a guilty verdict, more received a custodial sentence, and they continued offending to an older age.[1138] [References omitted.]

The Ballarat CASA Men's Support Group submitteed:

> Many male survivors have a mistrust of police and of authority. Illicit drug use through late childhood and early teens, also leaves them feeling anxious around police. Criminal behaviours can also merge into this fear. It is important though, that all people have the opportunity to report to authorities what was done to them, and that they are treated respectfully as victims of crime.[1139]

People from culturally and linguistically diverse backgrounds

The Royal Commission convened multicultural forums in each state and territory, with representatives from 220 organisations participating in eight events. Issues identified at these forums that may discourage people from culturally and linguistically diverse communities from reporting child sexual abuse to police included:

- mistrust of authority stemming from their country of origin or migration experience, particularly for refugee populations
- prior experience of racism or culturally inappropriate service delivery in Australia, including a lack of available language and cultural translation
- concerns about community reputation or marginalisation leading to the suppression of reports about child sexual abuse
- limited access to information about Australian laws and systems, particularly for recently arrived populations
- fear of removal from Australia.

At the forum held in Adelaide, one participant said:

> We are asking people with trauma and refugee backgrounds to speak to government agencies. Regardless of whether they have citizenship or not they will never feel safe because of their citizenship status. It will always feel like it could be taken away. The chance of them coming forward is slim because of fear of deporting.[1140]

A police officer told one forum that there was limited cultural and linguistic diversity among police officers, particularly in smaller jurisdictions.

Participants at the forums identified the following approaches that could encourage reporting:

- police and other authorities should focus on building trust with communities through developing relationships with community leaders and organisations
- police should provide clear information about what will happen once a report is made
- police should engage dedicated cultural advisors and community liaison officers, who should be available in addition to any required interpreter.

Other issues raised in submissions

A number of submissions referred to the role that survivor advocacy and support groups and support services can play in encouraging and supporting – or discouraging – reporting.

VACCA's submission and Ms McIntyre's evidence in relation to the SANO Task Force's willingness to interview survivors on support services premises and allow survivors to have their support worker present throughout the interview provide an example.

In its submission to the Consultation Paper, CLAN submitted that police engagement with service providers and advocacy groups, such as CLAN, could be one way to see greater engagement between police and victims and survivors.[1141]

CLAN also supported the proposal that police allow survivors to have a support person present:

> CLAN also recommends that whenever a Care Leaver or other victim of childhood abuse comes forward to make a statement, that it be given with someone there as a support person. It can be incredibly distressing and upsetting for someone reliving their abuse and not only do they require emotional assistance while making a report but they also require assistance after the fact in recalling what was said and what the next steps are as this information may not be processed properly at the time and many Care Leavers forget what is supposed to happen. Having a support person there not only lends that emotional assistance but gives the individual another set of ears and someone to remember what else was said and what the next steps are in the process. This also highlights the importance of follow up from the police after the initial report is made to give the Care Leaver the important information regarding where to from here.[1142]

Similarly, in respect of children, the CREATE Foundation submitted that a trusted adult should support the child or young person and facilitate his or her interaction with the criminal justice system through every step of the process, including reporting to police, police investigations, prosecutions, giving evidence in court, sentencing and appeals.[1143]

It is clear from our consultations that it is important to provide up-to-date information about what to expect from police and the criminal justice process, not only for individual victims and survivors but also to inform survivor advocacy and support groups and support services. These groups and services are likely to be a trusted source of information for some victims and survivors who are considering whether to report to police.

It is also clear that police could be assisted in encouraging reporting by respecting the support offered by survivor advocacy and support groups and other support persons. Unless it would risk interfering with the police investigation or contaminating evidence, there does not appear to be any good reason why victims and survivors should not be able to have the benefit of the presence of a support person during their dealings with police if they wish.

Some submissions also raised the issue of whether police should take a statement from survivors even if the alleged perpetrator of the abuse is dead. We have heard from some survivors and survivor advocacy and support groups that survivors may welcome the opportunity to give an account of their abuse to police even if no charges can be pursued.[1144]

In its submission in response to the Consultation Paper, the Alliance for Forgotten Australians noted the importance of encouraging victims and survivors to report even if the alleged perpetrator has died:

> SANO [Task Force] has also emphasised the importance of complaints being made even if the perpetrator is dead. This willingness to engage survivors in the criminal justice system even if there is no possibility of a prosecution being brought, provides a validation for past events.[1145]

The In Good Faith Foundation also expressed support for the approach of the SANO Task Force in accepting reports from survivors even if the perpetrator is deceased.[1146]

knowmore submitted that police should be particularly sensitive when a survivor is seeking to make a complainant about a perpetrator who is dead. knowmore stated:

> Most survivors understand that a criminal matter cannot be prosecuted where a perpetrator is no longer alive. However, making a police report may still be important for the survivor, given the years it may have taken for them to reach the point in their lives where they felt they could approach the police. If survivors are told at the outset, as many have been, that there is no point making the report as the perpetrator is dead, this can have devastating consequences for them.[1147]

Survivors may benefit from giving a formal account of what happened. It may also be useful to police – and the broader community – to have the fullest possible intelligence about the circumstances in which child sexual abuse is alleged to occur. Similar considerations arise where the alleged perpetrator is still alive but is either already serving a lengthy sentence or is too elderly or unwell for it to be likely that charges could be pursued to trial.

Police willingness to engage with survivors in these circumstances may encourage other victims and survivors to report to police. It may also increase the confidence of survivor advocacy and support groups and support services to encourage other victims and survivors to report to police.

8.3.4 Conclusion and recommendations

We are satisfied that police should pursue the possible approaches to encourage reporting that we suggested in the Consultation Paper. It is clear that some police agencies have already implemented some of these approaches in some circumstances. These efforts should serve as useful examples for other police agencies to consider.

We are also satisfied that there is likely to be benefit in making explicit reference to the role of survivor advocacy and support groups, support services and other support people in encouraging and supporting victims and survivors to report to police, including to encourage reporting by people from culturally and linguistically diverse backgrounds and people with disability. We also consider that there is value in police taking statements from victims and survivors even where the alleged perpetrator is dead or is otherwise unlikely to be able to be tried.

If these approaches are implemented and operate alongside other measures we recommend, particularly in relation to the principles for police investigations, we are satisfied that they will encourage increased reporting of child sexual abuse, including institutional child sexual abuse. We are satisfied that they will particularly encourage increased reporting from groups that are harder to reach, including Aboriginal and Torres Strait Islanders victims and survivors, survivors who are in prison and survivors who have criminal records.

Recommendations

4. To encourage reporting of allegations of child sexual abuse, including institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. takes steps to communicate to victims (and their families or support people where the victims are children or are particularly vulnerable) that their decision whether to participate in a police investigation will be respected – 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

    b. provides 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 groups and support services to provide it to victims and survivors

    c. makes available a range of channels to encourage reporting, including specialist telephone numbers and online reporting forms, and provides information about what to expect from each channel of reporting

    d. works with survivor advocacy and support groups and support services, including those working with people from culturally and linguistically diverse backgrounds and people with disability, to facilitate reporting by victims and survivors

    e. allows victims and survivors to benefit from the presence of a support person of their choice if they so wish throughout their dealings with police, provided that this will not interfere with the police investigation or risk contaminating evidence

    f. is willing to take statements from victims and survivors in circumstances where the alleged perpetrator is dead or is otherwise unlikely to be able to be tried.

5. To encourage reporting of allegations of child sexual abuse, including institutional child sexual abuse, among Aboriginal and Torres Strait Islander victims and survivors, each Australian government should ensure that its policing agency:

    a. takes the lead in developing good relationships with Aboriginal and Torres Strait Islander communities

    b. provides channels for reporting outside of the community (such as telephone numbers and online reporting forms).

6. To encourage prisoners and former prisoners to report allegations of child sexual abuse, including institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. provides channels for reporting that can be used from prison and that allow reports to be made confidentially

    b. does not require former prisoners to report at a police station.

8.4 Police investigations

8.4.1 Introduction

We have heard from many victims and their families and survivors about their experiences of the police investigation that took place after they reported their abuse. Some reported positive experiences, some reported negative experiences and some reported a mix of positive and negative experiences.

In the Consultation Paper, we suggested 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.

We recognised that 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.

We suggested that 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.

8.4.2 Aspects of police investigations

Based on the information we had received and our consultations to that date, we suggested in the Consultation Paper 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 those involving 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, we suggested in the Consultation Paper that, recognising the importance for victims and survivors of consistency in police staffing, it might be possible for police agencies 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 the public hearing in Case Study 46, we heard from a survivor, FAB, about his positive experience of communication with police. FAB participated in a private session with the Royal Commission. Following the private session, with FAB's consent, the Royal Commission referred FAB's allegations of abuse to the police. FAB was contacted by Goulburn police and asked whether he would be prepared to provide a statement in relation to the abuse.[1148] FAB told the public hearing:

> Following my statements to police, I felt pretty good. I felt that I had done the best I could at the time. The police from Goulburn were very helpful. They kept me informed about the charges they were bringing against Rafferty and their progress with investigations in the lead up to the trial.[1149]

In his submission in response to Issues Paper 8, the South Australian Commissioner for Victims' Rights, Mr O'Connell, stated:

> victims 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.[1150]

However, in private sessions and in personal submissions in response to Issues Paper 8, we 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
- after they sent a police officer information they had asked for, 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.[1151]

It is also important that police communication with victims or survivors is effective. Stress, language difficulties and unfamiliarity with the criminal justice system may make it difficult for some survivors or their families to understand information the police provide. It may be important for police to be willing to communicate through a support person nominated by the survivor or their family, if this will facilitate more effective communication.

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.[1152]

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.[1153]

In the Consultation Paper, we suggested that, particularly when police are investigating cases of historical abuse, it is important that the police who are 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.

8.4.3 Possible principles for police investigations

In the Consultation Paper we suggested that, 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.

We suggested that, if police investigations were 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 and survivors who have criminal records.

8.4.4 Information about mandatory reporters

In the Consultation Paper, we also discussed possible reforms to the protections against disclosing the identity of mandatory reporters to assist police investigations, and we sought submissions on this issue.

The ALRC and 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.[1154]

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 despite 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 Australian Federal Police 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.[1155]

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, in the Consultation Paper we sought submissions as to whether interested parties consider that we should support the ALRC and NSW LRC recommendations in the context of institutional child sexual abuse.

8.4.5 What we were told in submissions and Case Study 46

Continuity in staffing

A number of submissions in response to the Consultation Paper expressed support for the importance of continuity in police staffing.[1156]

The Victorian Government expressed support for continuity in police staffing, noting the organisational aspects which can lead to a change in staffing:

> Despite implementation of the SOCIT service delivery model, police rostering, transfers and the pressures that arise from the need to address other crime inevitably impact on SOCIT units. As a result Victoria Police agrees that there should be an ongoing focus on the need to ensure continuity of staffing for the investigation of sexual offences.[1157]

The Alliance for Forgotten Australians strongly supported the continuity of police personnel throughout the investigation:

> AFA cannot stress how important continuity of police personnel is during the course of the investigation. It must be recognised that the issue of power and the imbalance of power remains at the forefront of many survivors perception of the 'authorities'. The decision to report a crime of sexual abuse will once again bring the survivor up against the institution(s) which failed to protect and then report the abuse.[1158]

Micah Projects expressed support for continuity in police staffing:

> Having the same police contact to explain the process and having a central contact person was considered vital in maintaining trust and confidence in the criminal justice process.[1159]

The Ballarat CASA Men's Support Group submitted that continuity of staffing is very important:

> Every time a survivor retells their story, they are re-traumatised in some way. The police process is for them to provide details of the offences as best as they can remember. Most survivors spend their lives actively trying to avoid thinking about the traumatic experiences, so retelling the story can be very confronting. The relationship developed with the police member is an important part of the trusting relationship.[1160]

CASV also referred to the difficulty for survivors if they have to repeat their accounts of abuse on multiple occasions:

> Survivors also appreciate consistency in who they are speaking to about their sexual assault. It is difficult for a survivor to tell their story and it can feel evasive for a survivor to feel like they have to share their story over again to different members of the police.[1161]

The joint submission of SAMSN and the Sydney Law School referred to the benefits of continuity and some specific experiences of survivors:

> Continuity of contacts and investigating officers is seen as important in facilitating communication, and developing trust in the process. Keeping promises in relation to feedback and communication is also very important, regardless of staff continuity.
>
> > 'It was really upsetting when you were told that the detective was going to call at 10 am on Monday and he did not do so – because you are hanging out for every bit of information and needing to know where things are going.'

> 'I know from my personal experience [that continuity] is not the case. The investigating officer I first made contact with and took my statement has now moved on in her career and has another position within police. I receive little if NO communication from the QPS [Queensland Police Service] and have not for a number of years now.'[1162]

VACCA referred to the importance of continuity in police staffing for Aboriginal and Torres Strait Islander victims and survivors as follows:

> Community members spoke of the importance of having the same police involved throughout the reporting and investigation. Community members spoke of reporting their abuse as re-traumatising and therefore having changes in police assigned to their investigation re-triggered and re-traumatised survivors. One community member suggested that when change in police personnel was unavoidable there needed to be decent hand over to avoid the amount of re-telling and therefore re-traumatising for survivors.
>
> From VACCA's experience in supporting clients who have told their story to the Royal Commission as adults and then decided to report to the police, changes in personnel add to what is already an extremely difficult experience. The struggle clients have with hearing the police officer they were dealing with has left or been transferred to another department and there will be a further wait for another police officer to take over is significant. This is obviously very distressing especially for someone who has little trust in authority. For one of our clients this has occurred twice.[1163]

knowmore also expressed support for continuity in staffing:

> it can be very difficult for survivors to come forward to report to police. For survivors the first police officer they disclose to will be a very important person to them, who has the capacity to significantly influence the survivor's future conduct and co-operation. It therefore follows that after the initial disclosure, it becomes important for the survivor to see the same personnel continuing to help them going forward. We understand that this is potentially difficult for the police, but an effort should be made by police to keep at least one person involved throughout a matter, to show the client that there is continuity. …
>
> knowmore assisted one client who made a complaint to the appropriate taskforce and found his matter was moved from one police officer to the next, through three police officers, with little or no progress made by any officer. The client was unhappy with the lack of communication and limited assistance provided to him, resulting from the multiple changes in responsible officers.[1164]

Dr Robyn Holder and Ms Suzanne Whiting submitted:

> Victims are particularly unsettled with changes to prosecution personnel dealing with the case; changes moreover that are rarely explained. Continuity in prosecution team staffing for personal offences involving children and sexual offences should be maintained to the maximum extent possible to ensure regular communication and deep understanding of the case. Indeed, we would say that continuity of prosecution personnel is important for all personal offences with high impact on victims.[1165]

A number of interested parties referred to the importance of victims or survivors being able to ask to deal with a different police officer, particularly if they have preference for dealing with a female officer rather than a male officer or vice versa. Other interested parties submitted that, given it would not always be possible to maintain continuity in police staffing, it was particularly important to manage handovers effectively and to keep victims and survivors informed.

Mr Daryl Higgins, a survivor, told us in his submission of the importance of continuity for survivors:

> I believe it to be imperative that that [sic] the original police officer who took the report maintain their interest in the case. But, the victim may have the right to request another officer to handle the case if there conflict with the original officer. I also believe that a female officer is better mentally to handle the original enquires.[1166]

In relation to gender, Micah Projects submitted:

> The issue of the gender of the police hearing the first complaint was considered important but is obviously a resource issue for police to evaluate.[1167]

CASV referred to handovers and gender:

> Where circumstances require a change in a police investigator, a warm handover should be conducted in which the survivor has the opportunity to be included. A survivor should also have the right (and their right should be respected) to ask to work with a different member of the police staff if they are not comfortable working with the assigned officer. Survivors should be given the choice to work with an officer of the same gender. Female survivors, in particular, report having difficulty speaking to male officers about their sexual abuse as the majority of cases the sexual assault was perpetrated by a male in a position of authority.[1168]

knowmore referred to the importance of effective handovers and gender:

> Perhaps more important than dealing with the same police officer, in terms of continuity, is making sure that if there are any personnel changes, the handover is effective and that there is no deficit in knowledge as a result. The survivor should be kept fully informed as to the change. …

> Where 'hand-overs' need to occur they should be handled sensitively, with introductions and explanation and time to allow survivors to build a new relationship and trust. Obviously critical times of high stress (such as going to court), should not coincide with survivors receiving news about a key change in investigative or support personnel.
>
> Gender issues are also important to many survivors. A number of our clients only feel comfortable working with a male or female police officer, as a result of the abuse they suffered as a child. Often their preferences are influenced by the gender of their abuser. Others may have gender preferences based on their cultural needs or other circumstances. knowmore has worked with clients who have clearly communicated their preference when engaging with the police. When there is a lack of continuity in police staffing or a matter is transferred to a new police officer who is of the non-preferred gender, this can cause unnecessary distress to the client and delay to the investigative process.
>
> These matters further illustrate the need for continuity in police staffing and/or clear handover instructions.[1169]

Regular communication

Many interested parties identified regular communication about the progress of investigations as an important issue, and a number identified better communication as being linked to continuity in police staffing.[1170]

The Victorian Government expressed Victoria Police's support for ongoing, effective communication with victims and survivors as follows:

> Victoria Police also agrees that ongoing communication and support for victims and their families is a key component of police investigations. The Code of Practice supports this approach and articulates the role of police in providing victims with regular updates, referrals for counselling and support, advice on investigation and court processes, and notification of key dates (for example, court hearings). The Code of Practice also explains that police must inform a victim about decisions to not charge a suspect or to discontinue an investigation, the reasons for this decision, and that the decision will be reviewed if further information becomes available.[1171]

CLAN submitted that their members have had many experiences of inadequate communication from police as follows:

> Another issue that CLAN has seen is prevalent with both the police and DPP is often a lack of communication once an individual has made a statement or once charges have been laid. The whole process can be extremely re-traumatising for Care Leavers, but when they feel they are not being updated regularly or are left out of the loop it can be even more difficult. For some there is not just a lack of communication but NO communication sometimes over periods of a year or more.

> … Many of our members have made a statement and then hear nothing more for months or even years as to what is happening with an investigation etc. This leaves many feeling in a constant state of angst, concern, depression and often hypervigilance. Police and those working with the DPP's office need to understand the psychological toll making a statement and undergoing this process can take on Care Leavers and other victims. It is not okay for them to leave victims hanging on and waiting for crumbs of information. Communication about cases should be conveyed in easy English language.[1172]

The Alliance for Forgotten Australians made the following comment in relation to the need for communication to victims and survivors:

> The process itself needs to be carefully and repeatedly explained. Once a statement has been made the survivor will be anxious for the next step. Realistic timelines need to be provided. It is at this point that ensuring continuity of police personnel is important. The police role will become one of 'touching base' and providing updates. Even if there is nothing to say about the progression of the case, the fact that contact is maintained and that the survivor does not feel abandoned is reassuring and will maintain trust and confidence.[1173]

The Ballarat CASA Men's Support Group submitted that it is very important to victims and survivors that police maintain regular communication with them to keep them informed of the status of their report and any investigation. It stated:

> Group members were unanimous in response to this question. It is so important that they are kept informed throughout the process.
>
> It is one of the biggest complaints from people who have made a statement to police and are going through the criminal just [sic – justice] system. They often complain about the lack of consistent contact from police, it can be months sometimes before they receive any communication. The result is that survivors are left feeling more disempowered and worthless, feeling like they don't matter. Survivors are aware that this is a resource issue as they are aware that the police are so busy that they don't have the time to keep in regular contact.[1174]

The Victim Support Service South Australia referred to victims' reports of satisfaction being based as much on procedural justice as they are on the outcome of the criminal justice process. The procedural justice elements will include police providing 'timely and meaningful responses to their questions and preferences' and '[o]rganisational factors such as providing sufficient information explaining police processes, allocating skilled, dedicated and suitable officers throughout the investigation and ensuring timely responses and updates'.[1175]

The Victim Support Service recommended that police communicate with victims through dedicated contact points, and it gave the example of the Victim Contact Officer role in South Australia Police, although it noted that this role does not operate in rural areas.[1176]

knowmore submitted that inadequate communication may cause survivors to choose not to pursue their complaint:

> given the sensitive position of survivors coming forward to report their abuse, any lack of or deficiency in communication by police following a first report may result in the survivor discontinuing their complaint. Reporting by survivors is often done with concomitant fear and dread of others finding out about the abuse and of public humiliation. In the absence of regular contact with police, survivors can lose confidence and 'heart' in following through with the investigation and supporting a possible prosecution. Our work to date indicates that these issues are particularly acute for survivors of institutional abuse, many of whom will be approaching reporting with an existing and in some cases profound lack of trust in institutions generally, including the police and the law.[1177]

knowmore gave the following examples of good and bad experiences of communication from police:

> One knowmore client's experiences demonstrate the benefit of regular communication and continuity of police contact. The client's complaint was assigned to a detective. This detective kept in regular contact with the client and her support worker throughout the investigation. The client spoke positively about the progress the detective was making finding witnesses and seeking statements. The client talked about the investigation in a way that indicated she felt she had a 'voice' in the process. Unfortunately as the investigation progressed, it was impacted by some prior proceedings. This information and its implications (it was determined the complaint could not proceed) was conveyed carefully to the client, in as much detail as was possible. While the client was understandably upset that the investigation could not progress further, she was positive about the actions of the detective and her interactions with this officer.
>
> Another client made a complaint to police around two years ago. The investigation progressed slowly due to the complexity of the matter and uncooperative witnesses. The client instructs that there was little ongoing contact from the police. The client made many attempts at contacting the police, including sending numerous letters. Then, without having had any ongoing information about the progress of the case, the client was told that the investigation was being discontinued. This example illustrates the importance of police members undergoing trauma-informed training to ensure that they have an understanding of how trauma can impact a survivor's presentation and attempts to communicate.[1178]

The joint submission of SAMSN and the Sydney Law School reported responses from survivors to the question of whether it is important that police maintain regular communication with victims and survivors and keep them informed of the status of their report and any investigation as follows:

> The response [from survivors] … was unanimous and strong.
>
> > 'My main issue? Lack of communication would be high on my list. And not using terminology that is translated without context.'
> >
> > 'During my time giving my statement I asked about how and when I would be communicated to, and was informed that I could contact them anytime I needed to. I asked to be kept up to date with new information and how my case would progress. I felt the responding communication was treated somewhat in a "secretive response" because you were informed not to talk to anyone about the conversations.'
>
> The information and communication complainant survivors were seeking concerned the likelihood of any action being taken, the likely timeframe and reasons for decisions, what the interviewing and investigation process would be, and the availability of guidelines and referrals to support services. …
>
> … Keeping promises in relation to feedback and communication is also very important, regardless of staff continuity.[1179]

CASV submitted that regular communication from police helps a survivor to feel engaged and in control of their matter:

> The CASV recognises that it is important for the police to keep in regular contact with survivors and keep them up to date about their case. By not keeping in contact, survivors often feel that what happened to them is not being prioritised or taken seriously. They will also feel that the police do not care and they may not have any control over the criminal justice process. This is often not the case and a regular weekly or fortnightly update from the police could alleviate this anxiety and stress for survivors. We recommend that police talk to the survivor about how and when they would like to be contacted about their case and do their best to meet the survivor's communication needs.[1180]

The Victorian CASA Forum submitted that being kept informed is a critical issue for victims and survivors:

> [Keeping victims and survivors informed] is often seen as a low priority by police, understandably, as police are very busy, however, this is actually a critical aspect for victims and survivors who have disclosed and reported. In our experience, people who have experienced sexual abuse do need to be supported and encouraged by the police dealing

> with their case, and to be kept in the loop about progress, or they will lose faith in the process and disengage. Unsurprisingly, trust is a major issue for people who have experienced sexual abuse. Specialist police services should be resourced to ensure that victim support can be central to their role in investigating these crimes.[1181]

Dr Holder and Ms Whiting referred to Australian and international surveys of victims of crime in general – not victims or survivors of child sexual abuse in particular – which show that:

> victims rank the provision of information as their most important requirement of criminal justice agencies. It is insufficient that information is only of a general nature. People need to know the specifics that apply to their case. The criminal justice process is recognised as a source of secondary victimisation and most victims have little or no knowledge or experience of it. Victims who are kept informed about what is happening in their case and what to expect from the trial process are better able to cope with the process and to give their best evidence. In our view a key problem is that information systems are not robust in the routine provision of information. Unfortunately it can be 'hit and miss' and can be responsive to those who shout loudest or who have a strong advocate.[1182]

Dr Holder and Ms Whiting submitted that:

> our recommended independent victim advocate organisation [should] have particular responsibility not only to ensure criminal justice agencies deliver case information in a timely and meaningful way, but also then to be the follow up organisation to discuss with the victim that they understand the nature of that information, what it may mean to their particular circumstance, and how they might constructively engage with it.[1183]

Some submissions suggested that how police communicate with victims and survivors is also very important.

The Victorian CASA Forum identified the importance of clear communication, submitting that 'Police frequently use language victims and survivors do not understand: information sheets with acronyms and brief explanations for each step of the way would help'.[1184]

knowmore submitted that:

> It is important that police also have guidance and training about how best to communicate with a survivor, ensuring that they acknowledge through their communication the gravity of the offence and its impacts on the survivor. This is important even where they are not able to pursue a complaint any further due to insufficient evidence. knowmore has assisted a client who took the evidence she had to police and then received a letter in response saying that there was insufficient evidence to proceed. The police have not provided her with any further clarification or explanation, despite her requests.[1185]

Credibility of the survivor

In its submission in response to the Consultation Paper, the Victorian Government stated that Victoria Police's approach focuses on the credibility of the complaint rather than the credibility of the complainant as follows:

> As noted above, the Victoria Police model for responding to sexual crime incorporates specialist training of police investigators. A key component of the training is an investigative framework that focusses on the credibility of the complaint rather than the credibility of the complainant. Investigators are trained to fully explore an offender's sexual and non-sexual grooming behaviours and so called counter-intuitive victim behaviour in order to gather evidence that objectively demonstrates the perpetrator's criminal offending.[1186]

A number of submissions expressed support for the need for police to focus on the credibility of the complaint rather than the credibility of the survivor.[1187]

In its submission in response to the Consultation Paper, Micah Projects stated:

> Reporting instances of historical child sexual abuse was of particular interest to Micah Projects group of participants. Participants agreed police need to be nonjudgmental in their attitude recognizing some people may have developed substance abuse problems, have issues with mental health and may have a criminal record. Police need to focus on the credibility of the complaint rather than the complainant.[1188]

knowmore submitted that:

> Focusing on the credibility of the complaint rather than the complainant is an important principle. Many survivors have had negative ongoing interactions with the police and other services, including arising from circumstances of homelessness, substance abuse and mental health issues. Some survivors may have a criminal recordand be known to police, which may have the effect of prejudicing the response they receive. A number of survivors have spent extensive periods of their life in prison or are making a complaint from prison. In these situations the police need to have an understanding of the impacts of childhood trauma and the link with criminal offending and ensure that they do not dismiss a complaint due only to the later criminal offending of the survivor.
>
> In knowmore's submission to Issues Paper 8, we submitted that an experience of child sexual abuse is often strongly associated with a subsequent diagnosis of mental illness. This illness may impact the client's presentation to the police and lead to an unfair assessment of their credibility, rather than that of the details of the complaint.[1189]

Along with its submission in response to the Consultation Paper, the Federation of Community Legal Centres provided a copy of a submission it made in relation to the Victorian failure to protect offence. That submission identified particular challenges that Aboriginal and Torres Strait Islander women face when reporting abuse:

> If abuse is reported, in addition to the many barriers women often faced in terms of giving their evidence in court, it has been commented that Aboriginal women would further suffer the discriminatory practices of a criminal justice system that was racist; often ignorant of Indigenous culture; and disproportionately questioned their credibility, their alcohol and drug use, and their sexual behaviour.[1190] [Reference omitted.]

In its submission, the New South Wales Government identified the potential impact of cultural attitudes towards communication on disclosure and assessment of credibility. It referred to the Joint Investigation Response Team (JIRT) Aboriginal Community and Culture Project and submitted:

> Prior to this project, referrals were assessed against JIRT criteria irrespective of cultural and/or community considerations. As a result, some child sexual assault referrals from vulnerable Aboriginal communities were being rejected on the grounds the disclosure was 'third hand' or not sufficiently comprehensive to meet the JIRT acceptance threshold. When considered in a cultural context, this is a consistent feature of how Aboriginal children disclose and report abuse.[1191]

Information about mandatory reporters

The New South Wales Government submitted that the recommendation made by the ALRC and NSW LRC is based on the relevant provisions in the *Children and Young Persons (Care and Protection) Act 1988* (NSW). It submitted:

> This provision ensures that an effective criminal justice response is activated to protect not only the child who is the victim of the alleged offence, but other children whose safety may also be at risk. The provisions in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provide an appropriate balance between encouraging reporting, the need to protect mandatory reporters and the need to ensure the police can access relevant information.[1192]

The Queensland Department of Communities, Child Safety and Disability Services outlined how the mandatory reporting provisions operate in Queensland:

> Currently in Queensland, section 186 of the *Child Protection Act 1999* provides confidentiality for persons who make child protection reports. It also imposes a penalty where a person unlawfully discloses information likely to lead to the identification of a notifier (section 186(2)). Some limited exceptions are provided, for example, where disclosing the notifier's identity is for purposes related to functions being performed under the *Child Protection Act 1999* (section 186(2)(a)), or by way of evidence given in a legal proceeding under subsections 186(3) and (4).
>
> The intent of the protection of notifier confidentiality is to encourage people to report a concern about a child to Child Safety without fear of their identity being disclosed, to protect notifiers who have made a report from possible retaliation, and to help professionals to maintain positive (and often protective) working relationships with children and families.
>
> There may be circumstances where police request notifier information as part of a criminal investigation that do not fall within the exceptions in section 186. This includes requests made in relation to the investigation of an alleged offence against a person when they were a child that is being investigated after the person is an adult. Given the sensitivity of notifier information, Queensland will carefully consider the implications of any changes to the provisions protecting the confidentiality of notifiers as part of the review of the *Child Protection Act 1999.*[1193]

In its submission in response to the Consultation Paper, CLAN submitted that confidentiality should not apply in a way that interferes with the effectiveness of any criminal trial:

> CLAN also believe that mandatory reporter's identities should not be held confidential if they are needed to give evidence at a trial. Whilst it may be important or in some cases in the best interests of the victim or others surrounding the case to keep the mandatory reporters identity confidential, if the mandatory reporter is needed to give evidence at trial etc, their identity obviously needs to be revealed and should not be an impediment to a full and thorough prosecution.[1194]

Mr John Hinchey, the Victims of Crime Commissioner for the Australian Capital Territory, expressed his support for the reforms recommended by the ALRC and NSW LRC.[1195]

Mr O'Connell, the South Australian Commissioner for Victims' Rights, noted the importance of the right of a victim to have their privacy protected and to be aware of how their personal information is being managed but submitted:

> The Royal Commission, however, should further examine 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.[1196]

8.4.6 Conclusion and recommendations

The possible principles to inform police investigations that we suggested in the Consultation Paper were well supported in submissions, and we are satisfied that we should recommend them.

Continuity of staffing in the police response – and effective handovers where continuity is not possible – and regular and appropriate communication are likely to be critical aspects of the police response for many victims and survivors. They are likely to be important for building and maintaining trust and for maintaining the willingness of victims and survivors to continue to participate in the criminal justice process. They are also likely to be significant factors in determining victims' and survivors' satisfaction with the police response and with the criminal justice response more generally.

Being non-judgmental and focusing on the credibility of the complaint rather than focusing only on the credibility of the survivor is also important for building and maintaining trust. This approach is likely to encourage more survivors to report to police and will be important in ensuring that survivors – particularly prisoners, former prisoners and Aboriginal and Torres Strait Islander survivors – are not denied the opportunity to pursue a criminal justice response.

We are also satisfied that we should indicate our support for the reforms recommended by the ALRC and NSW LRC in relation to the protections against disclosing the identity of mandatory reporters.

Although disclosure of the identity of mandatory reporters has not been raised with us as a particularly significant issue, we note that the recommended reforms reflect the current position that applies in New South Wales. Based on what we have been told, and what we have seen in the report *Police responses to child sexual abuse 2010–2014: An analysis of administrative data for the Royal Commission into Institutional Responses to Child Sexual Abuse,* there does not appear to have been any discouragement of or decline in mandatory reporting in New South Wales despite the greater ability in New South Wales to disclose a reporter's identity to law enforcement agencies in exceptional circumstances.

Recommendations

7. Each Australian government should ensure that its policing agency conducts investigations of reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

    a. 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 steps to facilitate, to the extent possible, continuity in police staffing on an investigation of a complaint.

    b. 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.

    c. 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:

        i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record

        ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

8. State and territory governments should introduce legislation to implement Recommendation 20-1 of the report of the Australian Law Reform Commission and the New South Wales Law Reform Commission *Family violence: A national legal response* in relation to disclosing or revealing the identity of a mandatory reporter to a law enforcement agency.

8.5 Investigative interviews for use as evidence in chief

8.5.1 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 30.

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 in relation to complainants' evidence, *An evaluation of how evidence is elicited from complainants of child sexual abuse* (Complainants' Evidence Research), suggests that, while using prerecorded investigative interviews for evidence in chief significantly reduced the levels of stress that complainants experienced[1197] and generally improved both the reliability and completeness of evidence,[1198] there is room for improvement in the conduct of these interviews.

Research we commissioned in relation to memory and the law, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Memory Research),[1199] also provides some guidance on police investigative interviewing methods. We outlined the Memory Research in Chapter 4.

8.5.2 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 8.5, 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 30.

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.

8.5.3 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.[1200]

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.[1201]

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.[1202]

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.[1203] 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.*[1204]

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.[1205]

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.[1206]

A number of the findings of the Complainants' Evidence Research in relation to investigative interviews are also supported by the Memory Research. In section 4.3.4, we discussed the impact on a complainant's memory of circumstances that apply at the time the memory is retrieved, including when it is retrieved for the purposes of reporting to police.

More generally, as we outline in section 4.3, the Memory Research summarises what people can be expected to remember about events in their own lives. This suggests that police interviews should avoid pressing for details that the complainant does not provide in response to free recall questions if they are not essential for the police investigation or any prosecution that might follow.

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.[1207] While in 51 transcripts investigators asked general questions about the complainant's life, only four interviews did so using a free narrative.[1208]

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.[1209] 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.[1210]

The use of open questions

The Complainants' Evidence Research finds that open questions – defined as questions that cannot be answered yes or no and that encourage a more elaborate answer without specifying what information is required – 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.[1211]

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.[1212]

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.[1213] 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.[1214] 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.[1215]

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.[1216] 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.[1217]

The use of open questions was also supported in the Memory Research because they can produce a more complete and accurate account of the complainant's memory. The Memory Research stated that '[i]n general, using open-ended questions and narratives and avoiding closed questions produce more complete and accurate accounts of the information recalled'.[1218]

The discussion at our public roundtable on complainants' memory of child sexual abuse and the law, which was held on 31 March 2017 in conjunction with finalising the Memory Research, also highlighted the importance of open questions. Professor Martine Powell from the School of Psychology at Deakin University told the roundtable the onus should be on the interviewer to avoid question types that make children more prone to error. She said:

> if you're looking at accuracy, which is paramount in these types of interviews, individual differences due to vulnerabilities, cognitive reasons, language reasons, have negligible differences when asked open-ended questions. …
>
> When you are asked more narrowly focused questions or questions that focus on specific details, error rates are compounded, the individual differences are compounded in response to those questions. I think while there is a lot of discussion around limitations of various individuals, I think there should be more onus put on the interviewer.[1219]

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.[1220]

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).[1221] Young children, who the researchers identify as being highly susceptible to leading questions, were asked the same proportion of leading questions as older children.[1222] The researchers report that Victorian interviewers asked significantly more leading questions than New South Wales and Western Australian interviewers.[1223]

Choosing question order for repeated or recurring abuse

The Memory Research outlined how memory is likely to be affected if a child is sexually abused by the same perpetrator on multiple occasions and in similar circumstances. As we discussed in section 4.3.4, the Memory Research suggests that repeated or recurring events are likely to be remembered differently from single events.[1224]

In relation to memory for recurring events generally – and not just for child sexual abuse – the Memory Research reported:

> For repeated or familiar events, people generally develop a schema or 'script' for the core or gist features of that type of experience in their long-term memory. These memory templates spare a person from detailed encoding of redundant information.[1225]

The Memory Research identified that, for recurring events:

- once a schema exists, the specific details of every instance of a recurring event may not be encoded or consolidated and thus cannot be recalled
- people tend to report the gist of what happened in similar and recurring events but do not clearly remember details particular to one of the events
- people's memory for the gist of an event tends to be accurate and long-lasting, but all memories fade over time
- even reliable memory reports of core features of the recurring events will often be accompanied by minor inconsistencies related to the core features of the event. [1226]

In relation to questioning a child who experienced repeated sexual abuse, the Memory Research suggested that the child should first be asked about what generally happened before being asked about particular occasions of abuse. The Memory Research reported the findings of studies as follows:

> In one study, children who were asked to describe what happened generally before they were asked about a specific occurrence within a series of recurring events provided more information and were better able to distinguish one event from another than children who were asked the questions in the reverse order.[1227] [Reference omitted.]

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.[1228] 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.[1229]

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.[1230] 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.[1231]

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.[1232]

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.[1233] 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.[1234]

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.[1235] 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.[1236] 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 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.[1237]

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 8.1.[1238]

Table 8.1: 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

The discussion at our roundtable on memory and the law suggested that interviews may need to be longer with adults who have mental disorders. Professor Richard Bryant AC from the School of Psychology at the University of New South Wales told the roundtable that survivors with mental disorders may have more difficulty retrieving specific details of abuse. He said:

> it's not that they can't do it, they are just slower at doing it. They don't do it as spontaneously. If you give them more time or you give them prompts, they often can do it. I think we just have to keep that in mind. Often it's a simplistic notion relative to healthy people they do have that relative deficit, but it's not that they can't do it.
>
> …
>
> In terms of the fragmentation, we know that in most cases of trauma, that is how that memory will get encoded, because of the very high arousal. It won't be in a neat narrative. We'll have a bit of this, a bit of this and a bit of this. The greater the arousal, the more likely it's going to get encoded that way.
>
> When I put it together, repeatedly over time, it tends to get created into a coherent narrative.[1239]

Using multiple interviews

The Memory Research acknowledged that the issue of multiple interviews is controversial.[1240] However, it reported in relation to autobiographical memory generally that '[r]epeatedly recalling the same information tends to increase the amount remembered with each attempt, an effect known as hypermnesia' (reference omitted).[1241]

The Memory Research suggests that conducting multiple or supplementary interviews for children can facilitate more accurate and complete memory reports, including by helping children to rehearse and remember original details and to provide reminder cues to enable children to remember additional information. However, it also cautions that multiple interviews should only be used if appropriate questioning techniques are adopted.[1242]

The discussion at our public roundtable on complainants' memory of child sexual abuse and the law identified that multiple or supplementary interviews must be used carefully. Participants identified the importance of:

- using the correct type of questioning, particularly using open questions and avoiding contamination of the evidence, which may then be carried through to subsequent interviews
- the interviews being conducted by the same person so that the victim does not have to repeat their account to different people
- ensuring that any subsequent interviews:
    - are held to raise additional matters of importance (for example, if it seems that a child has not made a full disclosure of the abuse) and not merely to seek extra details that the victim may be no better able to provide at a subsequent interview
    - do not merely repeat questions asked in an earlier interview, particularly for children who may respond to being asked the same question again by assuming that their first answer was incorrect and changing it.[1243]

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.[1244]

The labelling of incidents of sexual abuse is discussed in more detail in Chapter 30. 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.[1245] 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.[1246] 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.[1247]

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.[1248]

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.[1249] 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?[1250]

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.[1251]

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.[1252]

The Complainants' Evidence Research identifies key elements for teaching interviewing skills, particularly teaching questioning sub-skills before interview skills.[1253]

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.[1254]

The researchers are also critical of the absence of evidence-based quality assurance systems in most jurisdictions.[1255] 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.[1256]

Training in understanding child sexual abuse

Although the Complainants' Evidence Research emphasises the importance of improving skills training and practice rather than imparting knowledge,[1257] 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 this understanding can 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.[1258] 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.[1259]

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 30. 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.[1260] 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.[1261] [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.[1262]

These memory issues are also discussed in detail in the Memory Research.

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 Sexual Offences and Child Abuse Investigation Teams (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
- the victim's story of childhood sexual abuse.[1263]

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.[1264] We discuss the evidence given in the public hearing in Case Study 46 in relation to the whole-story approach in section 8.5.5.

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.

We suggested in the Consultation Paper that 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.[1265] 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 had heard at the time we published the Consultation Paper, we suggested that it seemed 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.[1266]

Ratings of audio and image resolution quality were reported as set out in Table 8.2.[1267]

Table 8.2: 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 8.3.[1268]

Table 8.3: 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 8.4.[1269]

Table 8.4: 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.[1270]

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

In the Consultation Paper, we suggested that 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.

New South Wales and South Australia have introduced intermediary schemes to assist children to communicate in police interviews and in court. We discuss interpreters and intermediaries further in Chapter 30.

8.5.4 Possible principles for investigative interviews

In the Consultation Paper, we suggested that, 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.

8.5.5 Victoria Police's 'whole-story' approach

In the public hearing in Case Study 46, we heard evidence in relation to Victoria Police's approach to investigating child sexual abuse matters, particularly the 'whole-story' approach it has adopted in relation to interviewing complainants of child sexual abuse.

The following witnesses gave evidence concurrently:

- Mr Patrick Tidmarsh, a criminologist and Forensic Interview Advisor to the Sexual Offences and Child Abuse Team in Victoria Police
- Detective Senior Sergeant Craig Gye of Victoria Police, who is in charge of the Dandenong SOCIT
- Sergeant Belinda Cowley of the Research and Training Unit in the Prosecutions Division of Victoria Police
- Mr Andrew Grant, a Crown prosecutor in Victoria.

Mr Tidmarsh explained the rationale for Victoria Police adopting the whole-story approach as follows:

> The fundamentals of 'whole story' are that sexual offending is a crime of relationship. The previous investigation methodology looked primarily at what went where, how far it went in, what the charge was and whether there was external corroborative evidence of that. Unsurprisingly, given what this [Royal] Commission has heard and what the literature says, that is not the way sexual crime works. That does not explain it.
>
> After the deliberation in one particularly frustrating trial that we witnessed, we said, well, that's not fair, that jury didn't hear the whole story, and we began to reflect on what would more accurately represent sexual crime and what should be investigated.
>
> So whole story determines that investigators investigate the entirety of the relationship between the suspect and the victim and seeks to find relevant evidence, where it is, within that narrative. The vast majority of people are offended against by people they know in [a] relationship, in premises they know. A British study last year said that the average length of the child sexual abuse relationship is seven years. That's seven years of potential evidence as to what took place.
>
> The other really important factor, the biggest issue we have in the entire system, is what people don't know about sexual offending and how many myths and misconceptions there are about what took place. There are so many that you could list – that offending never happens in close proximity; that when children are abused, they will immediately tell a trusted adult; that adults, too, will immediately tell.
>
> So the biggest issue we had was that our investigators didn't understand those misconceptions and they didn't understand the way victims then told their stories. They didn't have training in memory and traumatic memory, so they didn't understand what was coming at them in terms of the narrative. Other misconceptions are that people will be able to explain their story in linear form and repeat it precisely. Well, that's palpably not true and it's one of the reasons that the false reporting belief was so high. So whole story is designed first and foremost to improve the knowledge acquisition of investigators, to create attitudinal change and to develop skills in utilising or eliciting the content.[1271]

In relation to whether the whole-story approach is consistent with the narrative questioning style supported in the Complainants' Evidence Research and discussed in section 8.5.3, Mr Tidmarsh said:

> most of us use the narrative interviewing methodology that Martine Powell and Deakin University and the Centre for Investigative Interviewing have researched. That is the process. 'Whole story' is a content-based element, so we are looking for what is relevant evidence in that narrative, and we use the narrative interviewing methodology that Martine Powell has developed, which is established international best practice, for the process of eliciting that information.[1272]

Detective Senior Sergeant Gye described how police apply the whole-story approach in investigative interviews:

> investigators go out and they capture in a free narrative style the entirety of the story. The reason we want to do that is, as you would be well aware, with historic reporting, there is no forensics, often. There is very little corroboration. The offending isn't witnessed directly, more often than not.
>
> So the free narrative encourages a better recollection, for a start. We get relationships into context. We get family attitudes into context. We get, often, how power and control is exercised within the family, which can often explain why offences aren't reported at the time. We find all the aspects of grooming – grooming one and grooming two – and the unique signifiers. All this helps to put together the picture, which we call the whole story, that explains in a way that might not have been done otherwise how the offending took place and why the complainant respondedin the way that they did.[1273]

Mr Tidmarsh explained 'grooming one' and 'grooming two' as follows:

> What we found is that most of our investigators sort of understood the concept of grooming, but what they didn't get is that there are two phases of it. The first is the establishment of power and control and authority over that person and that that will continue throughout the relationship and, at some point, there will be a sexualising of that relationship. What we found is that there is a huge amount of relevant evidence in that grooming one phase that traditionally was not thought to be important, and now it absolutely is.
>
> Unique signifiers is language we created to get [Victoria Police] members to, where possible, elicit more precise information. For example, it's very common that offenders play games in order to introduce particular activities and then move that to a sexualised element, but they all call it something different. That's both useful ultimately when the story gets told, but it's very useful in suspect interviewing as well.

> So the broader picture they get, but also we try to break down the methodology of it so it is pretty simple to follow and you know that you are looking for one and then two, and then one and two together, and that you need those unique moments in the middle of that.[1274]

We also heard evidence about how Victoria Police had changed its approach in terms of who should conduct the investigative interview. Mr Tidmarsh told the public hearing that, originally, a uniformed police officer – usually a woman – would take the statement from the victim and they give the statement to a detective – usually a man – who had not met the victim at that time and who then undertook the investigation. Mr Tidmarsh said that '[u]nsurprisingly, victims were not happy with that process whatsoever'.[1275] Mr Tidmarsh said that the new training model was designed to train detectives in understanding sexual offending so that the detective would both take the statement and investigate the allegations.[1276]

Detective Senior Sergeant Gye gave the following evidence about his experience of the specialist training:

> Once you have commenced the training – and I've done the training, and I did it nearly six years ago now – it taught me a whole range of things that I had never had any experience in dealing with before. I may have thought I knew them, but I didn't actually have them illustrated to me in the way that they were, and it has certainly changed the way that I have approached investigation of sexual offences and the interviewing of witnesses.[1277]

The witnesses were asked about refresher training after the initial training. Mr Tidmarsh told the public hearing:

> At the moment it's left predominantly to their sergeants and senior sergeants to provide on-field training. Of all the elements of the evaluation we conducted, interestingly, in the investigative interviewing, their skill set diminished over the time because we haven't got that refresher right. But I teach suspect interview planning as well, which is largely a knowledge-based skill, and that actually improved in the field.
>
> So we have some things that, because of the way they interact with their sergeants and senior sergeants, improve or stay the same, but the skill set is really important. … there needs to be ongoing training of supervisors and that that supervision needs to go extensively.
>
> Policing isn't particularly keen on continuous improvement training because it's time consuming and it's expensive. We have 400 investigators, but more than 12,000 people walked through the door last year. That's time away from the front line, so it's quite hard to persuade institutions as big as ours that they should put that investment in over an extended period, not just for the block training.[1278]

The witnesses were asked whether the whole-story approach risks focusing on peripheral details that can be used in cross-examination to attack the complainant's credibility. Mr Tidmarsh told the public hearing:

> That's more of a process issue about how you ask the question. For example, questions like, 'What colour shirt was he wearing?', that presuppose that he was wearing a shirt and that it had a colour – those are the questions that cause you detail issues and inconsistency later.
>
> Free narrative questioning that gets what memory is there through open questioning, so, 'Tell me everything that you saw? Tell me everything that you heard?' – those types of questions are much more easily remembered by people 18 months later when they are in court. So the fact that the content of 'whole story' is being elicited is, in one sense, irrelevant. It is the process that is causing problems if we get problems, not the content itself.[1279]

Mr Tidmarsh agreed that open questions were vital in interviewing the complaint. In answer to a question as to whether police had difficulty asking open questions, Mr Tidmarsh suggested they do,[1280] while Detective Senior Sergeant Gye told the public hearing:

> I think we're getting better at it. I read a lot of statements and I look at a lot of interviews, and I think we're getting better at it, because also at the interviewing stage when we are interviewing offenders, we're asking a lot more open questions and seeking to elicit free narrative. I think by and large we are getting much better at it, not just police who investigate sexual offences, but investigators overall are getting better at this.
>
> We really need to get down to, no matter what we are investigating, what is relevant. A yellow shirt 12 years ago is not particularly relevant, but how the offender behaved is particularly relevant. That is where you need to balance what you are looking for.[1281]

Mr Grant gave his perspective as a Crown prosecutor in relation to the effectiveness of questioning and the inclusion of peripheral details as follows:

> The issue of perhaps distracting issues coming up – I agree with Patrick [Tidmarsh]: I've noticed – there's been no real assessment or evaluation of the interviews over the last few years – the number of those types of distractions seem to be lower, in a sense. With the greatest of respect to the police who previously conducted interviews, it would be more likely that a policeman or woman, police member, because of their own preconceptions or because of inferences or assumptions they make, will ask a leading question that will elicit that distracting answer that becomes the subject of cross-examination. And so allowing the complainants to actually freely disclose what happened I've found to be quite … powerful.[1282]

In answer to a question as to whether Victorian police generally understand the need for their approach to interviewing to change, Mr Tidmarsh said:

> I think the leap is still how can you prosecute one person's word against that of another, and that external corroboration still looms large. I think one of the reasons we're not having particular problems introducing this in the Children's Court or the Magistrates Court or VCAT [the Victorian Civil and Administrative Tribunal] is that there is more openness to this information. It is where there are the rules of evidence in the higher courts that these are being challenged and seem more problematic.
>
> In terms of the public's understanding of sexual crimes, the misconception is still there that there will be some kind of 'Evidence', with a capital E. It's unrealistic, but it's still there, and it is a very strong theme.[1283]

In answer to a suggestion that if police have those misconceptions then members of the public are also likely to have them, Mr Tidmarsh agreed and told the public hearing that:

> It's always a surprise, because most of our investigators – they may have been police for five or six years before they come to us, but effectively, we're meeting the general public when we first give them these ideas, and you can see their eyes, you know, bulge. It's a surprise to them, and if it is – and they often say, because they have been at SOCITs for a period of time, that they wish they could go back and do some statements again that they did earlier in their career and talk to people earlier ...[1284]

In terms of the effectiveness of the whole-story approach, Mr Tidmarsh gave the following evidence regarding the improvements that Victoria Police has seen in relation to both the number of reports that it is receiving and the positive response it is receiving from victims and survivors:

> I think the fact that our reporting has gone up 50 per cent in the last five years and that the victim support agency said that victims of sexual crime now in Victoria are the most satisfied of any crime group with their service from police I think is a testament to the fundamentals of this, which is that listening to victims, understanding their narratives and producing a brief of evidence is our job, and then, where it goes from there, I suppose, is for Belinda [Cowley] and then Andrew [Grant] to talk more about. But that is the fundamental of our role.[1285]

Sergeant Cowley gave the following evidence about the effectiveness of the whole-story approach in relation to prosecutions which take place in the Magistrates' Court and Children's Court:

> in relation to the prosecution within the summary jurisdiction, police prosecutors are responsible for those matters within the Magistrates Court and the Children's Court, and, as your Honour has mentioned with regard to the police, they're representative of the community and carry with them those myths and misconceptions, and we have noticed over the years, and since we have changed our training, that it's very important to continue that training on to our prosecutors.

> We have 312 of our prosecutors within Victoria who are all now undergoing training, as they come through, with 'whole story', and then not only just the whole story itself, but how do prosecutors go about adducing that evidence and allowing for the whole story to be put before the court so that the court can hear the full narrative and make an assessment, not coming from a position where we all have our own myths and misconceptions about sexual offending and how it occurs, but that particular victim's experience of what happened to them, so that all of the evidence is before the court. That has been a very significant change in ensuring that not only do we capture the evidence in the investigative process but then it is able to be put before the courtroom.
>
> I appreciate that is different for the juries, and Andrew [Grant] can speak to that, but it has definitely had an impact in the summary jurisdiction.[1286]

Mr Grant gave his perspective as a Crown prosecutor in relation to the effectiveness of the whole-story approach as follows:

> I've noticed certainly over the last years since the VAREs [Video and Audio Recorded Evidence] were first introduced, until the development of things as they've moved along, that the quality of the interviews that are produced, in terms of the recorded interviews, have improved. Certainly things like leading questions have been replaced by open questioning.
>
> Perhaps to answer an issue that your Honour raised a moment ago, the fact that the complainant is asked to give a free narrative I've found to be a very powerful part of the process and something that juries can relate to in terms of jury trials, because they are watching the complainant describe what happened to him or her, hopefully not too along [sic – long] after it happened – although as Patrick [Tidmarsh] indicated, there are often delays, and that's not unusual – but certainly at a time closer in time than when the trial is actually taking place. And, beyond that, describing it in their own words and their own language, in a free-flowing manner. My experience is that that is something that juries can actually relate to and find quite a powerful fact in terms of assessing the credibility of the witness.[1287]

Mr John Champion SC, the Victorian Director of Public Prosecutions (DPP), also gave evidence in Case Study 30 of the improved quality of police interviews as follows:

> Obviously the Commission would know that we have police doing VARE recordings with children and cognitively impaired witnesses. They get very good training. The quality of that product is getting better and better.[1288]

As we noted in section 8.3.3, in her evidence in the public hearing in Case Study 46, Ms McIntyre, representing VACCA, agreed that the 'whole-story' framework is more culturally sensitive for Aboriginal and Torres Strait Islander victims and survivors.[1289]

8.5.6 What we were told in submissions and Case Study 46

Possible principles generally

A number of submissions in response to the Consultation Paper expressed general support for our proposed principles for guiding investigative interviewing.[1290] Victoria Police strongly endorsed the Royal Commission's proposed principles to guide police investigative interviewing and the ongoing professional development of sexual offence investigators that allows for all investigators to update their knowledge and skills in line with current research and international best practice.[1291]

The Victorian Victims of Crime Commissioner identified appropriate resourcing to improve the quality of evidence obtained through special measures, including prerecorded interviews, as a priority:

> In view of the high attrition rates relating to cases of child sexual abuse, the improvement of these measures is critical. The required funding, training and commitment to improve the standard of their delivery should be viewed as a priority by government and courts.[1292]

The South Australian Commissioner for Victims' Rights also supported the principles; however, he further submitted:

> The principles suggested … or like principles, should be implemented to govern policing, although the history and research shows principles alone will not necessarily bring the desired compliance.[1293]

In its submission, PACT supported the principles but raised concerns in relation to intermediaries, which we discuss below.[1294]

The Victorian Commission for Children and Young People recommended a national approach to identifying and implementing best practice as follows:

> There is developing knowledge of best practice in police investigations involving children including in interviewing and communicating with them and the use of pre-recorded investigative interviews, interpreters and support persons. It is vital there is a high level of cooperation and coordination between police and prosecutors, and other professional bodies and institutions.
>
> To assist with this, a coordinated national training approach and an appropriately funded research program based in an appropriate multidisciplinary institution such as the Australian Institute of Criminology or the Australian Institute of Family Studies is suggested.[1295]

Possible principles in relation to training in investigative interviewing

We set out the evidence given in the public hearing Case Study 46 in relation to the Victorian whole-story approach, which focuses on understanding sexual offending, including the nature of child sexual abuse, in section 8.5.5.

The need for police to be trained in understanding sexual offending was endorsed by the National Association of Services Against Sexual Violence, the joint submission of SAMSN and Sydney Law School, and the Federation of Community Legal Centres in Victoria.[1296]

The New South Wales Government acknowledged that the availability of training about the nature and impact of child sexual abuse (as well as appropriate interviewing skills) is vital for initial police and multi-disciplinary responses to victims.[1297]

In its submission in response to the Consultation Paper, the New South Wales Government outlined the training that is provided to members of the NSW Police Force, and the JIRT partner agencies – the New South Wales Department of Families and Community Services (FACS) and NSW Health – as follows:

> All Health and FACS staff working within the JIRT program undertake the JIRT Foundation Skills Course which includes the interviewing of children and young people.
>
> …
>
> All reports of child sexual abuse are investigated by the Child Abuse Squad. The *Child Interviewing Course* is the entry level course for all NSWPF [NSW Police Force] officers commencing a position in the Child Abuse Squad. Child development, memory recall and questioning techniques are extensively covered in the course in accordance with current research. The course also includes subjects on interviewing children of indigenous background, managing cultural issues and using an interpreter in an interview. In addition, training is provided on the admissibility of evidence in criminal proceedings, interviewing witnesses and victims, covert and overt methodology, as well as the use of children's champions … NSWPF is also proposing to implement biennial refresher skills training for all Child Abuse Squad staff in 2017.[1298]

The Victorian Government outlined work it is undertaking to provide a continuous improvement framework for its specialist training:

> Victoria Police SOCIT and other sexual crime investigators participate in specialist training delivered through the SOCIT VARE (Visual and Audio Recorded Evidence) Course. A project is also underway to align this course to the Victoria Police Education and Training Quality Standards which will provide a framework for continuous improvement of the course in accordance with current research and international best practice for the investigation of sexual crime and investigative interviews.[1299]

The Tasmanian DPP, Mr Daryl Coates SC, endorsed the need for appropriate training and outlined steps that are being taken in Tasmania to develop training programs as follows:

> It is important that officers who conduct interviews with complainants are well trained because such interviews are an integral part of the success of any prosecution. A steering committee has been formed with Tasmania Police, sexual assault services and our Office. The committee has been in discussions with Professor Martin[e] Powell and Dr Nina Westera of Deakin University to develop a number of training programmes based on best practice.[1300]

Some submissions commented on the possible principle that police 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 events.

The New South Wales Government described how understanding memory is a component of the wider training provided in its training material for all police, and that training is required to be completed to be afforded the designation of Detective:

> The NSWPF Interviewing of Children by Local Area Command (LAC) Police Workshop provides a base level understanding of child interviewing. It draws on some key elements from the Child Interviewing Course and aims to enhance the skills and knowledge of LAC police when interviewing children and vulnerable people. The workshop covers child development, how memory works and questioning techniques. This workshop is available to all police and is a mandatory requirement for criminal investigators to be designated as a Detective.[1301]

Some submissions commented on the possible principle in relation to recognising the importance of video recorded interviews for children and other witnesses

The joint submission of SAMSN and Sydney Law School agreed with the importance of video recorded interviews.[1302] The South Australian Commissioner for Victims' Rights agreed that the quality of the interview is crucial and submitted that, despite the training undertaken by police, there is room for improvement.[1303]

The Victorian Government submitted that in Victoria the prerecorded interview adds to the quality and quantity of evidence obtained and gives the victim a better interview experience:

> Some victims of child sexual offences are more likely to be vulnerable as a result of their experience and this can influence their ability to provide the level of detail that police require regarding painful and often highly personal details. As identified in the Complainant's Evidence Research, video recording of the investigative interview and using this as evidence-in-chief for a subsequent court hearing improves the quality and quantity of the evidence presented.

> The experience of Victoria Police suggests that conducting a video-recorded interview allows the interviewer to respond to the victim in a sensitive and supportive way. As a consequence, in comparison to taking a dictated statement, video-recording ensures a vastly superior interview experience for the victim.[1304]

We discuss the benefits of prerecording evidence in Chapter 30.

Some submissions commented on the possible principle in relation to investigative interviewing of children and other vulnerable witnesses being undertaken by police with specialist training.

The New South Wales Government submitted that NSW Police Force policy and procedure require that a complaint of sexual assault must be taken by a criminal investigator.[1305]

The Victorian Government submitted that only investigators who have completed the SOCIT Visual and Audio Recorded Evidence (VARE) course are qualified to take a VARE statement from a witness. The course covers academic theory and practical exercises that include sessions where investigators interview children and people with disability.[1306] The course curriculum addresses topics including:

- the developmental and communication needs of vulnerable witnesses
- how memory works
- appropriate questioning techniques.

In its submission in response to the Consultation Paper, PACT submitted that its volunteers have reported an increase in the quality of police interviews over the past decade. PACT commended the Queensland Police Service for its efforts in improving the quality of recordings and interactions with vulnerable children.[1307]

PACT provided examples of feedback it has received from children who have engaged with the Queensland Police Service and noted that feedback surveys completed after the giving of evidence have been overwhelmingly positive. Responses included:

- 'It was calming and it felt good.'
- 'The police made me feel comfortable to speak to and easy to tell the truth to.'
- 'It was alright. They weren't mean and were good listeners and understood me as I spoke.'
- 'Wasn't bad. Felt good after cause I told them what happened.'
- 'I was relieved because it was getting it off my mind.'
- 'Scary, shy at first and then I developed confidence.'
- 'Good, let me take time to tell the truth.'
- 'I felt comfortable and safe by sharing what happened and knowing what happened will be dealt with.'

- 'I felt safe and like I could talk to them about anything.'
- 'I felt really good talking to the Police about what happened. It was like a heavy pain on my chest wanting freedom'.[1308]

In the public hearing in Case Study 46, Ms Joanne Bryant, representing PACT, gave evidence about the training provided to officers of the Queensland Police Service for engaging with young victims:

> Most of the investigations in relation to child crimes are undertaken by specialised police officers from the Child Protection and Investigation Units, and all of those officers have been ICARE trained – that's interviewing children and recording of evidence – as are child safety officers. PACT attends that monthly training to provide training to the officers in relation to the feedback mechanisms about children and what things are particularly important when building that rapport.
>
> We've seen, again, a significant improvement in the initial police interviews, which are essentially the child's evidence-in-chief when it comes to trial, which results in the child having much less cross-examination. So, yes, in Queensland we've seen significant improvements. Yes. I've been with PACT 13 years, and in my time I've seen significant improvements over time.[1309]

Ms Bryant attributed the improvements to better training and the use of '[s]pecialised police officers and equipment, the recording equipment, to make sure that the child's initial statement is taken and is effective for the jury to understand the trauma they have been through'.[1310]

The CREATE Foundation expressed its support for the need for specialist training for police to interview children, including in relation to understanding out-of-home care. It submitted:

> It is preferable that all allegations are referred to specialist police as early as possible in the process, and that any police interacting with children and young people in care have training in, and knowledge of the issues for them. CREATE believes that police and prosecutors would benefit from training developed in conjunction with children and young people with an out-of-home care experience to help them respond appropriately to incidents involving children and young people in care.[1311]

In its submission in response to the Consultation Paper, People with Disability Australia (PWDA) expressed concern about the ability of police to understand crimes against people with disability and to have sufficient expertise to interview people with disability. It submitted:

> As is clear, these are not simply problems with how the police communicate with people with disability, although this is also a problem. It is also about how significant crimes against people with disability are understood within the police, and the priority given to these matters. One of the key problems, raised even by multidisciplinary teams in the Royal Commission's *A systematic review of the efficacy of specialist police investigative*

> *units in responding to child sexual abuse*, was the lack of availability of expertise in interviewing people with disability, particularly those with communication needs and intellectual disability. This was particularly highlighted by the Joint Investigation Response Team (JIRT) themselves, and does not appear to have been a lens of the original research.[1312]

Following Case Study 41 in relation to the responses of disability service providers to allegations of child sexual abuse, the NSW Ombudsman's Office wrote to the Royal Commission to provide information in relation to steps it is taking to improve the investigative interviewing of people with disability:

> It is well documented that in NSW and other Australian jurisdictions there are substantial barriers to people with disability engaging with the criminal justice system on an equal basis with others, including reporting to police and participating in investigations and court proceedings. To ensure allegations of abuse are effectively investigated and prosecuted, it is essential that investigators have the resources to assist them to interview people with cognitive disability using an appropriate and sensitive approach.
>
> As part of our Rights Project for People with Disability, we have commenced a project to develop a guidance and training package for complaint handling staff and investigators in disability services to improve their communication skills with people with cognitive impairment, and to provide advice on obtaining 'best evidence' from people with cognitive impairment who are the subject of, or witnesses to, alleged abuse. The resources will provide practical advice about the impact of trauma and cognitive disability on communication, fundamental principles of investigative interviewing, specific interview techniques, and practices to avoid. The resources will also include a broad disability awareness component which focuses on cognitive disability, and will be tailored for use by police in their training of investigators and other officers.
>
> To assist us to develop these resources, we are engaging an expert with extensive knowledge and experience in relation to communication with people with a cognitive disability in an investigative environment. We will also seek input and advice from a range of stakeholders in the disability and criminal justice sectors.[1313]

The need for training in interviewing was supported by the National Association of Services Against Sexual Violence and the joint submission of SAMSN and the Sydney Law School.[1314]

In Case Study 46, Detective Superintendent Wieszyk of South Australia Police told the public hearing that, as part of the implementation of the South Australian communication assistant scheme, training in investigative interviewing had been provided by Deakin University.[1315] The training program also contains an evaluation project.[1316]

In its submission in response to the Consultation Paper, the Victorian Government discussed the issue of effective interviewing and the need to avoid a focus on peripheral details. It suggested that, while this is something to work towards, the dual nature of the prerecorded interview as both the evidence in chief and the investigative interview requires some flexibility and that reforms may be needed in relation to cross-examination:

> Victoria Police acknowledges the need for police to ensure VARE [Video and Audio Recorded Evidence] interviews are of the high quality for use as evidence in court proceedings, by avoiding peripheral details and focusing on the key evidence to prove charges. However, the interview must serve the dual purpose of informing the investigation (and indeed providing the mandate to investigate) as well as forming the evidence-in-chief, should the matter proceed to court. At the outset, the investigator may not be in a position to determine what is remembered by the child as central to their experience as a victim, and therefore the key components of the case are not obvious. Therefore, by necessity, investigators need to be allowed some scope in terms of the type of information elicited, in order to fully investigate allegations and eventually produce the best evidence on behalf of the victim to the court.
>
> Whilst this should not result in disadvantage to the victim, the Royal Commission's Complainant's Evidence Research clearly demonstrates that this is in fact often the result (for example, by cross-examination on details that are not central to the case to draw out unreliable, conflicting evidence from the witness, to cross-examine victims on inconsistencies and undermine their overall credibility as a witness).
>
> Victoria Police can pursue improvements in their interview practice, but this may have limited impact on victims being able to provide their best evidence to the court if there are no corresponding reforms in how the VARE investigative interview is used in the court context. For example, in a simulation study research focusing on the effect of cross-examination on children's accuracy found that even though 9 and 10 year old children were more likely to change incorrect responses than correct ones, they nonetheless changed over 40% of their correct responses, and cross-examination still exerted a significant negative effect on their overall accuracy levels.[1317] [References omitted.]

We discuss cross-examination in Chapter 30.

Some submissions commented on the possible principle in relation to refresher training.

The New South Wales Government stated that the NSW Police Force is proposing to implement biennial refresher skills training for all Child Abuse Squad staff in 2017.[1318] It submitted:

> The child interviewing training delivered by the NSWPF has been reviewed including by Professor Martine Powell, Founding Director of the Centre for Investigative Interviewing, and it [sic] based on her research and developed best practice. The Child Abuse Squad has approximately two hundred investigators conducting in excess of 4,000

> interviews with vulnerable children and witnesses per year covering a large geographical area. The current training regime is administered by experienced child abuse investigators with qualifications in adult education. The current practice of block face to face training with practical assessment and a post course field component is considered the most efficient and effective method of training delivery given the volume of investigators covering a large geographical area.
>
> The NSWPF acknowledges further improvement in the form of refresher training together with the implementation of a quality assurance regime would improve the quality of child interviews.[1319]

We outlined the evidence given in the public hearing in Case Study 46 in relation to refresher training in Victoria in section 8.5.5.

In its submission, the Tasmanian Government stated that Tasmania Police conduct a range of training courses aimed at the issues that arise in relation to child sexual abuse victims. These courses are available to police officers who are engaged in the investigation of crimes against the person and include:

- interviewing vulnerable witnesses
- sexual assault investigation.

While the effectiveness of training programs conducted by Tasmania Police is assessed and evaluated, the Tasmanian Government stated that Tasmania Police noted the Royal Commission's observations in relation to refresher training and recognised that there are benefits in conducting refresher training, particularly for specialist investigators, to retain currency of skills and techniques.[1320]

Some submissions commented on the possible principles in relation to expert review of recorded interviews for quality assurance and training purposes and the removal of any legislative barriers to ensure that this review can occur.

The New South Wales Government outlined how it undertakes a periodic quality review of child interviews and a new approach for annual review of investigators' interviews:

> The Child Abuse Squad conducts periodic quality review of child interviews. Currently Child Abuse Squad Team Leaders conduct reviews of their investigators' interviews in addition to the requirement for submission of a field interview as part of the Child Interviewing Course. The Child Abuse Squad proposes to implement a structured review process where each investigator will have one of their interviews reviewed annually to ensure that the interviews continue to be conducted in line with the training provided through the Child Interviewing Course. This will be a mandatory requirement and enforced as part of the Child Abuse Squad Command Management Framework overseen by the Child Abuse Squad Management Team.[1321]

The New South Wales Government also confirmed that there is no legal impediment to the NSW Police Force providing records of interview to relevant police officers or supervisors, as well as to any person engaged by the NSW Police Force, for a law enforcement purpose.[1322]

Mr Dennis Dodt, a survivor, submitted that there should be a much broader approach to involving expert review of the work investigative interviewers. Mr Dodt recommended that all people working in the criminal justice system in relation to institutional child sexual abuse should be assessed on their competency to maintain their role on an annual basis.[1323]

In relation to removing legislative impediments to reviewing recorded interviews, the Victorian Government expressed support for change. It submitted:

> The ability of Victoria Police investigative interview training experts to view VARE statements would allow them to monitor quality and would inform both feedback to individual investigators and training more broadly. However, in contemplating any changes that will allow access to VARE, consideration must also be given to the privacy and consent of victims.[1324]

The South Australian Commissioner for Victims' Rights recommended a narrow exception to limit access to the recorded interview to particular supervisory and training staff, without allowing the use of recorded interviews for general training purposes:

> There should be no unnecessary intrusion into victims' privacy. There is not a right, however, to absolute privacy. While I concur that state and territory, and I add Commonwealth, 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.[1325]

Possible principle in relation to technical aspects of investigative interviews

Some submissions commented on the possible principle in relation to improving the technical quality of video recorded interviews.

PACT endorsed the Queensland Police Service's use of technical equipment as one of the reasons that the quality of its interviewing has increased over time.[1326]

The Victorian Victims of Crime Commissioner referred to the findings of the Complainants' Evidence Research regarding the need to overcome technical problems with special measures generally, including the prerecorded investigative interviews, and identified fixing these problems as a matter of priority.[1327]

In its submission, the New South Wales Government gave an overview of its equipment and locations for interviewing children and the steps it takes to improve the technical quality of interviews:

> All Child Abuse Squad offices and co-located JIRT units have been equipped with child interviewing suites or equipment to allow video/audio recording of interviews. These suites are child friendly interview rooms equipped with discreet digital recording equipment. This equipment is regularly reviewed and maintained by the NSW Police Investigative System Support (ISS) Unit. The ISS Unit has implemented a digital recording review project with the ODPP, Department of Justice and Legal Aid NSW to standardise the compatibility of digital recordings used across the agencies.[1328]

The New South Wales Government also suggested that improvements could be made:

> In light of the evidence presented by the Royal Commission, NSWPF acknowledges there are improvements which can be made in the quality of video recorded interviews, particularly in respect to focusing on the child's face. The Child Abuse Squad will continue to examine technology to enhance the quality of interviews.[1329]

The Victorian Government submitted that, in order to effectively manage the implementation of new technology supporting special measures, the Royal Commission could consider whether national standards for the technical aspects of recording evidence should be introduced to maintain standards at an acceptable level.[1330]

Possible principle in relation to interpreters

Some submissions commented on the principle in relation to police recognising the importance of interpreters, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses.

The New South Wales Government submitted that the Child Interviewing Course, which is the entry-level course for all NSW Police Force officers commencing a position in the Child Abuse Squad, includes subjects on interviewing complainants with an Indigenous background, managing cultural issues and using an interpreter in an interview.[1331]

The South Australian Commissioner for Victims' Rights expressed his support for the provision of interpreters for victims, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses as an important factor in enhancing victims' access to justice.[1332]

VALS identified a lack of cultural support across the justice system for Aboriginal and Torres Strait Island people, and submitted that it is more pronounced when dealing with matters of institutional child sexual abuse. It identified the types of support that could be provided:

> Support may be required for translation (for Aboriginal and Torres Strait Islander people for whom English may be a third or fourth language), or it may be that a community member be required to explain lengthy and complex legal procedures into a language and format that can be better understood by the victim/ survivor.[1333]

Possible principle in relation to intermediaries

Some submissions commented on the principle in relation to making intermediaries available to assist in police investigative interviews of children and other vulnerable witnesses.

A number of submissions expressed support for intermediaries.

We discuss intermediaries more generally in Chapter 30, including their use in New South Wales and South Australia. We also discuss in section 30.7.3 what we have been told about the experiences of those involved in working with intermediaries, including police.

In relation to the use of intermediaries by police, the New South Wales Government submitted:

> As of 16 September 2016, Victims Services had received 265 requests for a children's champion from the Child Abuse Squad pilot sites. Victims Services has matched 89% of these requests with a suitably qualified children's champion who has assessed the child's communication needs and assisted at the police interview. Victims Services has also received court orders requesting a children's champion for 18 matters involving 27 child complainants and has matched 100% of these requests with a suitably qualified children's champion.[1334]

In the public hearing in Case Study 46 in relation to the use of communications partners in South Australia, we heard evidence that there had been 16 requests for a communications partner, 15 of which came from South Australia Police. Communications partners were provided in 10 of those cases. In the cases where communications partners were not provided, this was as a result of a more detailed needs analysis by the Victim Management Section within South Australia Police.[1335]

As noted above, we discuss the use of intermediaries, including at the police stage, in more detail in Chapter 30. We note here two particular concerns raised in submissions in relation to intermediaries at the police interview stage.

In its submission in response to the Consultation Paper, PWDA expressed concern that we had not discussed witness intermediaries in relation to police. It submitted:

> Given the Royal Commission's commitment elsewhere in the Consultation Paper to the consideration of the UK model of witness intermediaries, it is concerning that the aspect of this system that supports the police responding to victim-witnesses is not discussed in

this chapter. It is clear that police require highly specialised expertise to respond adequately to, and interview, children and adults with disability. It is equally clear that current training and education even for specialists from multidisciplinary teams is sorely lacking; in Case Study 38, it was revealed that in police training, half a day in a multi-day training course was spent focussing on interviewing techniques for people with disability.

Providing police with the expertise that they require during the investigation of a case of child sexual abuse against a person with disability is therefore essential. Relying on ad hoc arrangements including requesting that family or a support worker be present as a communication aide is inadequate. We encourage the Royal Commission to elaborate the benefits of witness intermediary arrangements for the initial phases of report-taking, police response and investigation, including the increased likelihood of prosecution being pursued. In terms of specific recommendations, this matter is of particular import for this policy area.

Finally, general principles have long been in existence regarding police responses to and interviewing of people with disability. We believe that detailed recommendations are required to ensure adequate responses across Australian jurisdictions.

PWDA recommends that witness intermediaries be introduced to support police in responding adequately to children and adults, including those with disability, and to enhance interviewing and investigation techniques.[1336]

In the public hearing in Case Study 46, Dr Jess Cadwallader, representing PWDA, gave evidence in relation to how police engage with people with disability and the role of intermediaries as follows:

I did really want to emphasise that there do need to be changes in how police engage with people with disability. That acts as such a substantial barrier, and there is quite a bit of evidence of this fact now. Even where there are multidisciplinary task groups, they are not always well equipped with disability, and particularly with disability in communication, specialist expertise.

I think we need to confront the fact that when you have the availability of communication professionals who spend their entire lives developing expertise around communicating with people with disability, that is always going to be more appropriate than someone who has had potentially, you know, extensive training, but for whom it's not their kind of core business.

So I would encourage an approach to police responses that makes sure that witness intermediaries are available to police and that police's role is primarily in the identification of disability to ensure that witness intermediaries are made available to those who need them. I think requiring more and more expertise of police is always going to be difficult and it's much better to kind of bring the expertise in from outside, particularly when it's this specialist kind.[1337]

While our discussion of intermediaries in the police chapters in the Consultation Paper was brief,[1338] this was because we discussed the role of intermediaries in both police and prosecution responses in Chapter 9 of the Consultation Paper. In this report, we discuss intermediaries in both police and prosecution responses in Chapter 30. Focusing the discussion in one place is not intended to understate the importance of intermediaries at the police interview stage. In the Consultation Paper, we suggested the possible principle for police responses in relation to intermediaries being available at the police interview stage to ensure that this aspect of the role of intermediaries was not overlooked in relation to police responses.

In its submission in response to the Consultation Paper, PACT expressed a concern that involving a witness intermediary in the initial police interview could inhibit the ability for the child to build rapport and trust with the investigating officer.[1339]

In her evidence in the public hearing in Case Study 46, Ms Bryant, representing PACT, provided further detail regarding this concern:

> I'm coming from our experience in Queensland, where the police work really hard to build the rapport and enable children to be comfortable and in a safe environment to disclose issues about the case, and I have concerns that putting another person in there could inhibit that form of communication, that flow of communication, and the rapport building that is really important for the child to have with their arresting officer and also their prosecutor.[1340]

In relation to rapport building and the use of an intermediary, Detective Chief Inspector Peter Yeomans of the NSW Police Force Child Abuse Squad gave evidence in the public hearing in Case Study 46 that the New South Wales child sexual assault evidence pilot provides ongoing access to the one witness intermediary so that the witness intermediary can build rapport with the child and be the intermediary for that child from the police interview right through to the end of court proceedings.[1341]

In relation to rapport building and the South Australian communications partner scheme, Detective Superintendent Wieszyk of the South Australia Police gave evidence in the public hearing in Case Study 46 that the program had improved the opportunity for police officers conducting interviews to build rapport. He said:

> The Victim Management Section comes under my branch, and I've spoken to the members there that actually conduct these interviews, and they do have the opinion that it does help to build rapport, particularly – because not all victims actually have a communication assistant available. So in some cases previously there may have been an interview done with a person, to the best of the ability of the interviewer, and the communication assistant is not particularly required because they are not of that stage where they actually really need one, but with a communication partner there, it does provide them some support, independent support, in those cases.[1342]

8.5.7 Conclusion and recommendations

We have heard detailed evidence about the effectiveness of investigative interviewing provided that it is conducted by investigators who have been trained with the appropriate skills and understanding of child sexual abuse issues to obtain the best evidence possible.

We have also heard of the benefits which the prerecording of investigative interviews can have, not just in relation to child witnesses but also, as we have been told in submissions to the Consultation Paper and in evidence to our public hearing, their potential benefits to other vulnerable witnesses, including witnesses with disability.

We have heard detailed evidence about the importance of effective training in investigative interviewing and the benefits in that training being ongoing and based on the actual interviews being undertaken by police. We consider that training in this area should be ongoing.

We understand the need to ensure that the privacy of victims and other witnesses is protected. We recommend that prohibitions on using prerecorded interviews for training and evaluation purposes be removed; however, video recorded interviews should not be used for general training purposes where privacy concerns might arise. For example, it may be possible to allow the use of de-identified excerpts of transcripts or the audio component of recorded interviews to be used for general training purposes without raising concerns for the privacy of the victim.

We appreciate the work that jurisdictions have commenced to ensure that the technical standard of prerecorded interviews continues to improve. We also recognise the importance of these improvements to ensure the best available evidence is led in criminal trials and the likelihood of any unnecessary and unexpected delays is reduced.

We support the ongoing engagement of interpreters and the use of intermediaries to assist in the collection of the best evidence available. We discuss these issues in Chapter 30**.**

Recommendation

9. Each Australian government should ensure that its policing agency conducts investigative interviewing in relation to reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

    a. 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.

b. 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.

c. 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.

d. Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:

    i. a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses

    ii. skill development in planning and conducting interviews, including use of appropriate questioning techniques.

e. 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.

f. 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.

g. 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 should not authorise the use of video recorded interviews for general training in a manner that would raise privacy concerns.

h. Police should continue to work towards improving the technical quality of video recorded interviews so that they are technically as effective as possible in presenting the complainant's and other witnesses' evidence in chief.

i. Police should recognise the importance of interpreters, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses.

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

8.6 Police charging decisions

8.6.1 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 prosecution subsequently withdrew or downgraded the charges. We discuss prosecution decisions in relation to charging in Chapter 20.

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, in the Consultation Paper, we suggested that 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.

In the Consultation Paper, we suggested possible principles for police charging decisions and sought submissions on them. We discuss what we were told in submissions and in Case Study 46 and make recommendations in relation to police charging decisions and costs.

8.6.2 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 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 20 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.

In the Consultation Paper, we suggested that, 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 20.

Corroboration – survivors' experiences

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 2.4, 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 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 investigated the following three matters for possible examination in the public hearing in Case Study 38. However, there was not time in the public hearing in Case Study 38 to examine the issue of police decision-making. These matters suggest that the issue of corroboration is significant in decisions about the laying of charges and that the absence of corroboration can be a significant barrier to laying charges. The third matter also illustrates steps police took to obtain corroborating evidence.

The experience of JBA – a decision not to lay charges in the absence of corroboration

JBA participated in a private session. After the private session, the Royal Commission obtained documents in relation to the response of the NSW Police Force to allegations of sexual abuse that JBA made.

The following information is taken from the information that JBA provided to the Royal Commission and the documents that the NSW Police Force provided. The Royal Commission consulted the NSW Police Force to ensure that the information is accurate within their understanding, particularly as recorded in the documents they produced to us.

JBA was an altar boy at a Catholic Church in northern New South Wales during the late 1960s and 1970s. JBA alleged that he was sexually abused by a priest, Father JBB, when he was aged between eight and 13.

In 2012 JBA made a complaint to police. The matter was investigated between 2013 and 2014.

Father JBB denied the allegations that he had indecently assaulted JBA.

JBA said that other altar boys had been present when he was being abused, but he was unable to name any particular altar boy as being present. JBA gave the police a list of names of the men he recalled having been altar boys at the time of the alleged offending.

JBA did not disclose the abuse at the time he alleged it had occurred. JBA told his wife of the abuse in 1985, approximately 10 years after the last abuse. JBA told his sister of the abuse in 2008.

JBA's mother made a statement about an incident involving Father JBB wrestling with JBA and attempting to pull his trousers off, although she did not provide any direct evidence that supported JBA's allegations.

Two men who had been altar boys at the same time as JBA made statements to police. Both stated that they could not recall anything inappropriate happening to them or witnessing anything inappropriate happening to other boys.

The police officer in charge of the investigation (the investigating officer) recorded that he had spoken to other men whom JBA identified as having been altar boys at the same time as JBA. The investigating officer stated that there was 'no direct supporting evidence obtained'. Other avenues of the police investigation were also pursued but did not yield any evidence to support JBA's allegations.

In mid-2014, the investigating office sought legal advice on whether there was sufficient evidence to charge Father JBB. The investigating officer referred to the absence of any direct supporting evidence from those men police spoke to who had been altar boys at the same time as JBA. The investigating officer indicated that he thought it would be difficult to establish a prima facie case on the evidence. The investigating officer's supervising officer endorsed the investigating officer's opinion, stating that 'there is little corroborating evidence to support a prima facie case in relation to the complainant'.

NSW Police Force lawyers provided legal advice. The advice noted the available evidence and that JBA's evidence was the only direct evidence in the matter. The advice concluded that there was insufficient evidence to justify the commencement of criminal proceedings against Father JBB.

In mid-2014, the police decided not to lay charges.

Shortly after the police made that decision, JBA attended the police station and was told that the police had decided not to proceed with the matter on the basis that there was insufficient evidence.

The response of the NSW Police Force provides an example of police deciding not to lay charges largely because of the absence of corroboration of the victim's allegations. The decision not to lay charges because of the absence of corroboration was made in circumstances where the victim's account suggested that there should be witnesses who could corroborate his allegations, but the potential witnesses who police spoke to did not corroborate his allegations.

The experience of JBJ – a decision not to lay charges in the absence of corroboration

JBJ participated in a private session. After the private session, the Royal Commission obtained documents in relation to the response of Victoria Police to allegations of sexual abuse that JBJ made.

The following information is taken from the information that JBJ provided to the Royal Commission and the documents that Victoria Police provided. The Royal Commission consulted Victoria Police to ensure that the information is accurate within their understanding, particularly as recorded in the documents they produced to us.

JBJ was a student at a public primary school with facilities for students with a disability in Victoria from the late 1980s to the 1990s.

JBJ travelled to and from school using transport organised by the school. The school organised vehicles and engaged drivers to drive students to and from school.

When JBJ was in grade 4 and grade 5, JBK was the only driver assigned to drive JBJ to and from school. JBK also drove two other students to and from school at the same time as JBJ.

JBJ alleged that during the period 1996 to 1998 she was sexually abused by JBK on the way home from school after the other two students had been dropped off. The alleged abuse involved him touching her on the outside of and under her clothing. JBJ did not disclose the abuse to anyone at the time it occurred.

In 2001, while volunteering at the primary school, JBJ saw the driver. JBJ told us that she then recalled the abuse.

In 2003 JBJ disclosed the abuse to a counsellor at the high school she was then attending.

In mid-2003 JBJ reported the abuse to police and made a statement. In late 2003 JBK attended the police station at the request of police and participated in a taped interview in relation to the allegations of indecent assault. He denied the allegations.

In late 2004 the officer in charge of the investigation (the investigating officer) prepared a memorandum to the officer in charge at the relevant Crime Investigation Unit (the CIU) recommending a non-authorisation of the brief in relation to the alleged offender.

The non-authorisation of brief file note written by the investigating officer states:

> The alleged offences occurred whilst [JBJ] was a passenger in [JBK's vehicle] on the way to school. There was no other person in the [vehicle] at the time. The allegations of [JBJ] can not be corroborated with other evidence. The witnesses that I have spoken to do not offer any evidence that would support the claims of [JBJ]. Without the support of any corroborative evidence that would assist in the successful prosecution of [JBK], I request that this brief of evidence be non-authorised.

No charges were laid in relation to JBJ's allegations against JBK.

In 2005 Victoria Police identified that a number of briefs that the investigating officer submitted, including the brief in relation to JBJ, had been wrongly marked 'not authorised' without the required approval of the officer in charge at the CIU. The briefs were reinvestigated.

In late 2005 and early 2006, the brief in relation to JBJ was reinvestigated. Again it was recommended that it not be authorised. The brief was not authorised and no charges were laid.

No action was taken in relation to JBJ's allegations between 2006 and 2015.

JBJ told us she had recently gone back to the police to have the matter reinvestigated. In 2015 JBJ made an additional statement to Victoria Police in relation to the alleged abuse.

This matter is ongoing with Victoria Police.

The response of Victoria Police in 2003 to 2006 provides an example of police deciding not to lay charges because there is no corroboration of the victim's allegations. The decision not to lay charges because of the absence of corroboration was made despite the fact that the victim's account of the abuse made clear that only the victim and the alleged perpetrator were present during the abuse, so there could not be any corroboration of the abuse itself.

The experience of JBE – a decision to lay charges having found corroborating evidence

JBE participated in a private session. After the private session, the Royal Commission obtained documents in relation to the response of the Queensland Police Service and the Queensland DPP to allegations of sexual abuse that JBE made.

The following information is taken from the information that JBE provided to the Royal Commission and the documents that the Queensland Police Service and the Queensland DPP provided. The Royal Commission consulted the Queensland Police Service and the Queensland DPP to ensure that the information is accurate within their understanding, particularly as recorded in the documents they produced to us.

JBE was a student at a state school in rural Queensland from the late 1980s to mid-1990s. JBF was a teacher at the school and a friend of JBE's family.

JBE alleged that he was sexually abused by JBF from when JBE was about five or six years old through to when he was 17 years old.

JBE first disclosed the abuse to his girlfriend when he was about 17 years old. JBE did not disclose the abuse more widely or report the abuse to police at that time.

In 2012, JBE was contacted by the Queensland Police Service. In 2011, another man, JBG, had made a complaint to police alleging that he had been sexually abused by JBF between 1983 and 1984. Shortly after making the complaint, JBG took his own life. Police investigations in relation to JBG's allegations revealed possible further victims, including JBE.

Police made attempts to contact other potential victims of JBF asking them if there was anything they wanted to speak to police about that had happened in their childhood.

JBE did not initially disclose to police the abuse he had suffered, as he wished to tell his family first.

JBE disclosed the abuse to police shortly after he had told his family. JBE made a statement to police in mid-2012. He told police about the abuse he had suffered and gave police information about other children who may also have been victims.

The police made enquiries with a number of other potential victims.

A man who had witnessed JBF fondle JBE in class when they were in grade 2 made a statement to police.

Family members and school friends of JBE also gave statements about the close relationship between JBE and JBF.

The presence of corroboration, particularly the witness to JBF fondling JBE in class, was a factor in the decision to lay charges.

JBF was charged by police with a number of child sexual abuse offences.

In early 2014, JBF pleaded guilty to 15 counts of sexual offending in relation to JBE. Two other counts were withdrawn. JBF was sentenced to a term of imprisonment. He received a head sentence of nine years, with each of the sentences to be served concurrently.

JBE told the Royal Commission that his experiences with the Queensland Police Service were positive. He told the Royal Commission he thought that they did a really good job.

The response of the Queensland Police Service in 2012 to 2014 provides an example of police efforts to locate potential victims or witnesses capable of giving corroborating evidence.

Corroboration – current approaches

We have heard that police attitudes to corroboration have changed in many jurisdictions in recent years. As discussed in Chapter 21, 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 DPPs in Australia have made a similar shift in approach.

The then 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.[1343] 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 require corroboration where none could be expected, we suggested in the Consultation Paper that 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

In the Consultation Paper, we stated that we had 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.[1344] We understood that the intention of these provisions was to indemnify defendants in matters where the charges are not made out.

However, unless there is some element of malevolence or negligence, we suggested that it was 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.

In its submission to the Consultation Paper, the Victorian Government provided further detail on the operation of section 401 of the *Criminal Procedure Act 2009* (Vic), which sets out the process for the award of costs to the defendant:

> Section 401 of the *Criminal Procedure Act 2009* provides an unfettered discretion to the Magistrates' Court to award costs in summary and committal proceedings before that Court. This section is based on a consolidation of sections 30(3) and 131 of the *Magistrates' Court Act 1989*, and clause 25 of Schedule 5 to that Act.

> The High Court has held that in ordinary circumstances, an order of costs should be made in favour of an accused who has secured the dismissal of a criminal charge brought against him or her, even if the police had reasonable grounds for commencing the proceedings.
>
> The imposition of costs in Magistrates' Court proceedings places a financial burden upon Victoria Police.[1345] [References omitted.]

The Victorian Government stated that section 401 of the *Criminal Procedure Act 2009* (Vic) applies only to the Magistrates' Court proceedings and that the award of costs against police in the Supreme Court and County Court is much more limited:

> Section 401 applies to Magistrates' Court proceedings, and does not affect the general practice that costs cannot be awarded against the Crown in trials on indictment. The *Criminal Procedure Act* gives the Supreme Court and County Court jurisdiction to order costs in trials on indictment in very limited circumstances, such as whether a party has caused delay or failed to comply with pre-hearing disclosure requirements.[1346]

In the Consultation Paper, we suggested that there might 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.[1347]

In its submission in response to the Consultation Paper, the New South Wales Government provided information on the awarding of costs against the state – whether represented by the police or the public prosecutor – in New South Wales.

In New South Wales, a defendant can apply for a certificate under the *Costs in Criminal Cases Act 1967* (NSW) if they have been acquitted or discharged after the commencement of proceedings. In order to grant a certificate, the magistrate or judge must be satisfied of both of the following elements:

- If the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings.
- Any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

If the defendant is given a certificate, they can apply to the New South Wales Department of Justice for payment of costs from consolidated revenue. The amount of costs to be paid is not determined in the certificate. Rather, it is determined by the Secretary of the Department of Justice in accordance with the legislation.[1348]

8.6.3 Possible principles for police charging decisions

In the Consultation Paper we suggested that, 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 early prosecution advice is sought where appropriate, in laying charges.
- In making decisions about whether 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.

8.6.4 What we were told in submissions

Police decision to charge

In its submission in response to the Consultation Paper, the New South Wales Government stated that the NSW Police Force has a number of processes available to help ensure the NSW Police Force lays appropriate charges:

- The NSW Police Force has issued guidance to police officers through its Aspects of Sufficiency in Child Sexual Assault Matters resource.
- Obligatory checks of briefs of evidence are carried out before those briefs are provided to the ODPP. These checks are carried out by team leaders who hold the rank of Sergeant.
- Police officers may seek legal advice from the NSW Police Force with regard to charge advice and sufficiency of evidence from the Police Prosecutions Command and the Operational Legal Advice Section.[1349]

The New South Wales Government also stated that the NSW Police Force may seek advice from the ODPP in relation to charging and the sufficiency of evidence and that this is done on a case-by-case basis.[1350] The NSW ODPP expressed its support for early police engagement with the ODPP in seeking advice for charges.[1351]

Victoria Police strongly endorsed the possible principles to inform police charging decisions and specifically acknowledged the benefit of investigators receiving early advice on charging decisions from prosecutors.[1352]

The Tasmanian Government expressed support for early police engagement with prosecutors and explained recent reforms in Tasmania to facilitate this engagement:

> The close working relationship between the Office of the Director of Public Prosecutions and Tasmania Police ensures that timely consultation is sought in relation to the prosecution of sexual charges. Notification is to be made to the Office of the Director of Public Prosecutions within 48 hours after a person is charged with a sexual matter. In relation to historical sexual offences, Tasmania Police seeks advice and approval where required from the Director of Public Prosecutions to authorise the institution of proceedings.
>
> In 2015, the Tasmanian Government amended the *Director of Public Prosecutions Act 1973* (Tas) to allow the Director of Public Prosecutions to issue guidelines to prosecuting authorities including the Commissioner of Police in relation to prosecutions, including offences or classes of offences that are to be referred to the Director for institution and conduct of proceedings. In so amending the Act, the Tasmanian Government recognised

> the importance of facilitating advice from the Office of the Director of Public Prosecutions at the commencement of a prosecution so that appropriate charges are laid.
>
> The amendment provided a legislative basis for an existing practice between the Office of the Director of Public Prosecutions and Tasmanian Police which allows police to seek advice in relation to the investigation and charging of sexual assault matters and requires the timely notification of the Office of the Director of Public Prosecutions when a person is charged with a sexual offence.
>
> The Tasmanian Government considers the current collaboration between the Office of the Director of Public Prosecutions and Tasmania Police as fundamental to the effective administration of justice.[1353]

The Tasmanian DPP, Mr Coates, submitted:

> It is important to ensure the charges are correct at an early stage. In difficult or complex matters advice from this Office to Tasmania Police at an early stage is preferable. This enables the prosecution to be commenced on a proper footing. It enables early advice in respect to obtaining further evidence. It also prevents false expectations being raised with complainants. That is why this Office offers early advice to Tasmania Police prior to charging.[1354]

The Victorian Commission for Children and Young People also supported greater cooperation and coordination between police and prosecutors in the decision to lay charges. The commission also supported coordinated efforts to generate nationally consistent statute and case law and procedure.[1355]

We also discuss cooperation between prosecutors and police in relation to charging decisions further in section 20.5.4.

In addition to expressing support for the possible principles, the submission from SAMSN and Sydney Law School recommended that:

- police inform the complainant about the charges that are laid
- police document the reasons for proceeding or not and for changing the charges
- police explain to the complainant the reasons for not proceeding or for changing the charges.[1356]

The South Australian Commissioner for Victims' Rights, Mr O'Connell, also highlighted the importance of effective engagement with victims and survivors in relation to charging decisions:

> In making decisions about whether or not to charge, police should not unnecessarily raise or dampen victims' expectations. Police should always treat the victim-complainant with respect, dignity and compassion, as well as honestly and with integrity.[1357]

We have discussed the importance of ongoing communication about the progress of police investigations in section 8.4.

Mr O'Connell also recommended that victims and survivors should be consulted in charging decisions in the context of a broader discussion supporting victims' participatory rights in the criminal justice system.[1358] In his subsequent submission, he gave further detail on this issue:

> I agree that the decision to charge is one of fundamental importance to victims seeking access to justice. The charge decision should be underpinned by a broad 'right to trial' for victims, which should guide decisions such as those on corroboration. Victims should not have the right to veto police or prosecutors charge decisions but they should have a right to request a review and there should be a commensurate obligation on police and prosecutors for such review independent of the person who made the initial decision.[1359]

We discussed the role of the victim in the criminal justice system in Chapter 3. We discuss prosecution responses, including review of charging decisions and charge negotiation, in Chapter 20 and DPP complaints and oversight mechanisms in Chapter 21.

Corroboration

Some submissions in response to the Consultation Paper expressed support for the possible principle that police should not expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available and that police should not rely on the absence of corroboration as a determinative factor in deciding not to charge in circumstances where there should not be any corroboration available, unless the prosecution service advises otherwise.

The Victorian Government submitted that Victoria Police endorses the proposed principle that corroboration should not be a determining factor in charging decisions for sexual crimes. It further submitted that, if this principle is recommended, consideration could be given as to whether it should also guide the decision-making of prosecutors.[1360] We discuss prosecution responses in Chapter 20.

The Tasmanian Government submitted that corroboration was only one of a number of factors that influenced decisions about the laying of charges:

> Tasmania Police ensures impartiality in determining charges through robust protocols. Investigations are based on numerous factors, inclusive of victim evidence, witness evidence, medical evidence, any corroborative evidence, admissions or circumstantial evidence and the advice of the Office of the Director of Public Prosecutions.[1361]

The Tasmanian DPP, Mr Coates, made a similar assessment:

> The mere fact that there is no corroboration is insufficient reason not to charge an offender. The credibility of the whole complaint must be considered and if the complaint, even though not corroborated, is considered credible it is proper to charge.[1362]

CLAN submitted that in their experience police have been reluctant to charge in cases of historical child sexual abuse:

> CLAN is aware that in the last 16 years that we have been supporting and advocating for Care Leavers, there is a general reluctance to charge and prosecute historical crimes. We understand that there is an increased difficulty in prosecuting these crimes due to the time factor but it many cases Care Leavers have been turned away with no hope of seeking the justice they are entitled to. Care Leavers are often told that it was too long ago or that there is not enough evidence. As you have outlined in your paper, there seems to be a presumption from many police and DPP's that in crimes where the only evidence can be the victim's word, there is an expectation that there should be more. This sort of illogical reasoning needs to stop, and perhaps DPP's and those working with them, also need to undergo training regarding historical crime especially that concerning child abuse and the particular features of these crimes which are unique challenges that SHOULDN'T affect willingness to prosecute.[1363] [Emphasis original.]

The NSW Law Society Young Lawyers Criminal Law Committee submitted:

> matters based on the complaint alone, without other corroborating evidence, should not be automatically classified as weak and viewed with scepticism. It is common in child sexual abuse offences for there to be a distinct lack of corroboration due to the historic nature of the offences and often only the perpetrator and the victim are present during the alleged commission of the offence. Training in this area would help prevent the reoccurrence of past failures by law enforcement to pursue reports, based on doubts as to their veracity and incorrect assumptions concerning the false claims.[1364]

Cost orders

Some submissions in response to the Consultation Paper addressed the issue of costs orders against police.

After acknowledging that the Victorian legislation imposes a cost burden on Victoria Police, the Victorian Government submitted that it balances that financial burden against a number of other policy considerations, which include the following:

- In criminal prosecutions the resources of the Crown are generally greater than those available to the accused. Costs awards to successful accused persons redress the imbalance in criminal proceedings in those instances where the prosecution is wholly unsuccessful.
- Costs awards are intended to compensate the accused for the costs incurred as a result of the prosecution, not to punish the prosecution. Where a prosecution has failed, it is ordinarily just and reasonable that a costs order be made to mitigate the financial consequences of an unsuccessful prosecution on the accused even if the prosecution was brought in good faith and on reasonable grounds.
- Liability for costs encourages prosecutors to make a careful assessment of the prospects of obtaining a finding of guilt and produces a more efficient prosecution process.
- If restrictions were imposed upon the power to award costs, Victoria Legal Aid, whose costs are commonly reimbursed through such awards, would suffer a commensurate loss of funds.[1365]

The Victorian Government submitted that, if the ability of the Magistrates' Court to award costs against police was to be removed or restricted, there would need to be a consideration of whether this should be a general reform or whether it should only apply to matters relating to sexual offences against children:

> Victoria Police suggests that there is merit in the Royal Commission considering whether the Magistrates Court should have the ability to award costs against the Chief Commissioner of Police. Specific consideration could also be given to whether the Magistrates' Court should only be able to award costs against police in certain circumstances, for example, where it can be demonstrated that a brief authorising decision was not made in good faith – that is, where it was not based on a reasonable prospect of conviction and in the public interest.
>
> However, in contemplating any changes made to the power to award costs, consideration should be given to the scope of such changes. In particular, consideration should be given to whether such reforms would be limited to matters involving sexual offences against children or matters prosecuted by police or public prosecution bodies.[1366]

The Victorian Government also submitted that the impact of any reform would be unclear in the absence of data:

> It is also noted that the impact of any changes to the power to award costs upon the exercise of the discretion to charge and prosecute is unclear, particularly given that the exercise of the discretion already has regard to whether police know or reasonably suspect that a person has committed an offence, and whether there are reasonable prospects of a conviction being obtained. There is a lack of empirical data about the impact of existing processes on decision-making and on the likely impact of any such changes, such as through cross-jurisdictional comparisons.[1367]

A number of submissions recommended the removal of the possibility for costs to be awarded against police. The Victorian CASA Forum submitted that costs should never be awarded against police.[1368]

PWDA also recommended the removal of awards of costs against police to ensure that people with disability are not disproportionately affected by cautious decision-making on the part of police. It submitted:

> The charging of police for costs in unsuccessful prosecutions has particularly poor impacts on people with disability. Few cases involving people with disability are recommended for prosecution. Some data suggests that this is because police believe that in court, a witness with disability will be understood to not be credible. Unfortunately, evidence given by Crown Prosecutors and Directors of Public Prosecutions during Case Study 38 also suggests that there is an unwillingness to make use of elements of evidence legislation that would enable access to the supports people with disability require in court; supports which may render that witness competent and credible in court.
>
> Police are no doubt aware of all of these factors when they decide whether to recommend a case for prosecution. In this context, decisions on the merits of the case in fact have more to do with systemic factors than with the individual case itself. Police may make conservative decisions regarding prosecution to ensure they are not unnecessarily exposed to costs, resulting in cases involving victims with disability being unlikely to even make it before a court to be heard.[1369]

CLAN expressed significant concern that the possible award of costs against police could hinder the pursuit of justice and may lead to the decision not to charge offenders. It submitted:

> After reading your paper CLAN is also more aware of the fact that many DPP's may be wary of having costs awarded against them and the police if the trial is unsuccessful. CLAN finds it deplorable that this can be done. It is the state's job and therefore the job of the DPP and police to attempt to achieve justice for true victims; this should not be hindered by the threat of costs having to be paid.
>
> This only works to counter the objective of putting historical sex criminals behind bars and not only will it prevent justice being attained for victims but it also creates the possibility of more criminals on the streets because the DPP thinks there is a chance they may not succeed. The fact that this is even possible is completely unbelievable and needs to end immediately.[1370]

The South Australian Commissioner for Victims' Rights recommended that costs against police should be capped. He also recommended that costs awarded against police should go to the funding of a public defender's office, as well as public funding for counsel to act on behalf of victims. He submitted:

> If costs can be awarded against police, costs should be capped. There should be a state-funded public defender's office for accused people that is staffed and subsidized by the costs awarded against the police. Legal counsel should be accessible to accused people. I hasten to add that public funds should be available also for legal counsel to assist victims dealing with the criminal justice system, as victims should not be bystanders but rather genuine participants in the system.[1371]

In the Consultation Paper we raised a possible approach where costs could be awarded against police but only in particular circumstances, such as those identified in section 117 of the *Criminal Procedure Act 1987* (NSW).

The Law Society of New South Wales supported the retention of these provisions.[1372] Legal Aid NSW opposed any further change to the existing provisions, noting that, in their experience, costs are rarely awarded against the police or prosecution in criminal proceedings for child sexual abuse offences.[1373]

The Australian Capital Territory Victims of Crime Commissioner expressed support for the provisions in the *Criminal Procedure Act 1987* (NSW). He stated that he did not support costs being imposed on police or the DPP unless negligence can be shown, as he submitted that allowing costs to be awarded adds an extra barrier to justice for victims of crime and may unduly affect decision-making by police and prosecutors regarding prosecutions.[1374]

The Tasmanian DPP, Mr Coates, supported the existing provisions in place in Tasmania. The *Costs in Criminal Cases Act 1976* (Tas) allows costs to be awarded to defendants but only in particular circumstances, similar to those that operate in New South Wales. However, the approach is slightly different in that the court in Tasmania has a broader discretion in awarding costs and it can consider a range of factors.[1375]

Section 4(2) of the *Costs in Criminal Cases Act 1976* (Tas) provides that, in deciding whether to grant costs and the amount of any costs granted, the court shall have regard to all relevant circumstances and in particular to the following:

(a) Whether the proceedings were brought and continued in good faith;

(b) Whether proper steps were taken to investigate any matter coming to, or within, the knowledge of any person responsible for bringing or continuing the proceedings;

(c) Whether the investigation into the offence was conducted in a reasonable and proper manner;

(d) Whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point;

(e) Whether the defendant is discharged from the proceedings because he established (either by the evidence of witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty.

Mr Coates indicated that he had not identified any concerns with the current costs provisions:

> In my experience costs are rarely given and only where it was unreasonable to proceed and/or the matter was not investigated properly. I have no difficulties with the costs provisions in Tasmania as they presently stand.[1376]

8.6.5 Conclusion and recommendations

The possible principles we suggested in the Consultation Paper in relation to police charging decisions, including in relation to corroboration, were well supported in submissions, and we are satisfied that we should recommend them.

We discuss issues in prosecution responses in Chapter 20. In recommendation 39, we recognise the need for prosecutors to provide early advice to police on appropriate charges to lay when such advice is sought by police.

The experiences of the survivors JBA, JBJ and JBE, discussed in section 8.6.2, illustrate that the presence or absence of corroboration may be relevant in charging decisions, but its absence should not be determinative where no corroboration would be expected given the victim or survivor's account.

The issue of the risk of costs being awarded against police is more difficult. We note the Victorian Government's submission in relation to the competing policy concerns. We particularly note the Victorian Government's submission that, if the power to award costs against police were to be restricted, Victoria Legal Aid would lose a source of funding.

Our concern is that the risk of the award of costs against police merely because there is an acquittal, and not because of any failure or wrongdoing by police, may discourage police from prosecuting. Such discouragement may carry particular weight in matters that are seen as more difficult to prosecute or less likely to lead to conviction. These matters might involve some of the other factors that we are concerned should not prevent prosecutions, such as issues about the complainant's credibility or a lack of corroboration.

On balance, we consider that it is generally preferable that costs only be able to be awarded against the prosecution – whether police or the DPP – where there has been some failure or wrongdoing on the part of the prosecution. We consider that this is particularly important in child sexual abuse matters because of the difficulties in prosecuting these matters and the comparatively low conviction rates for these offences. An acquittal in a child sexual abuse prosecution certainly does not necessarily indicate that the prosecution should not have been proceeded with.

We note that, apart from section 401 of the *Criminal Procedure Act 2009* (Vic), other legislation in Victoria and in other jurisdictions generally appears to allow the awarding of costs against the prosecution only in limited circumstances involving some form of failure or wrongdoing by police or the prosecution.

Given the competing considerations highlighted in the Victorian Government's submission, we are not satisfied that we should recommend that the power to award costs against the police should be revoked or restricted. Rather, we consider that the Victorian Government – and the government of any other state or territory that has similar provisions – should review the relevant provisions and consider amending them to restrict the awarding of costs if it appears that the risk of costs awards might be affecting police decisions to prosecute. If an effect is found, an alternative to restricting the award of costs might be to allow costs to be paid from consolidated revenue instead of directly by police.

We consider that a restriction only in relation to child sexual abuse matters could be supported given the particular difficulties in prosecuting these matters and the comparatively low conviction rates. However, the extent of the application of any restriction would be a matter to be considered in reviewing the relevant provisions.

Recommendations

10. Each Australian government should ensure that its policing agency makes decisions in relation to whether to lay charges for child sexual abuse offences in accordance with the following principles:

    a. Recognising that 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.

    b. In making decisions about whether to charge, police should not:

        i. expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available

        ii. 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.

11. The Victorian Government should review the operation of section 401 of the *Criminal Procedure Act 2009* (Vic) and consider amending the provision to restrict the awarding of costs against police if it appears that the risk of costs awards might be affecting police decisions to prosecute. The government of any other state or territory that has similar provisions should conduct a similar review and should consider similar amendments.

8.7 Police responses to reports of historical child sexual abuse

One of the areas in which police responses may differ is in responses to child sexual abuse that is reported when the victim is a child and to child sexual abuse reported by an adult complainant. As discussed in section 7.9.2, drawing on the Delayed Reporting Research, particularly in cases of 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 – and of particular importance to this Royal Commission.

In sections 7.9.3 to 7.9.10 we discuss how the current police response is provided in each state and territory. Apart from Victoria, states and territories generally focus their specialist response on children who report child sexual abuse. Adult reports of historical child sexual abuse are more often dealt with through general police responses.

Some submissions in response to the Consultation Paper and evidence in Case Study 46 suggested that some adults who report historical child sexual abuse may be less satisfied with the police response than children who have access to specialist responses.

In its submission to the Consultation Paper, ACT Policing raised the potential of a nationally consistent approach to policing assisting in the progression of historical and multi-jurisdictional investigations. The submission argued:

> Uniformed training and processes would ensure that all victims are dealt with the same way, regardless of where they make the report. Allowing statements or interviews made by a victim in any jurisdiction to be submitted in any Court in Australia as evidence would ease the burden on victims re-telling their story numerous times.[1377]

The Women's Legal Service NSW expressed concern that historical child sexual abuse reports do not get the same level of priority that police give to other sexual offending and that lengthy delays can arise at the police stage of the criminal justice system in these cases. Ms Janet Loughman, representing the Women's Legal Service NSW in the public hearing in Case Study 46, said:

> Our advice line takes calls from women around a whole range of different issues that they are having with the legal system, but they will ring us when they are perhaps having difficulties with the legal system or when they are ready to make a step to plunge into doing something like making a complaint about child sexual abuse. And it is the case that women will ring us, having made a complaint about historical child sexual abuse, and be concerned and distressed about delays that it takes for any progress to happen with that.[1378]

In answer to a question as to why there are these delays, Ms Loughman said:

> I think I could just draw from what I would see as the likely reasons for that, and I would say it would be a resourcing issue. It's likely to be the police prioritising what they see as more urgent, current matters. They are also quite difficult cases to prosecute, so there would, I imagine, be time taken in order to gather evidence.[1379]

As noted above in relation to police charging decisions, in its submission in response to the Consultation Paper, CLAN submitted that there is a reluctance to investigate or prosecute in relation to historical abuse:

> CLAN is aware that in the last 16 years that we have been supporting and advocating for Care Leavers, there is a general reluctance to charge and prosecute historical crimes. We understand that there is an increased difficulty in prosecuting these crimes due to the time factor but it many cases Care Leavers have been turned away with no hope of seeking the justice they are entitled to. Care Leavers are often told that it was too long ago or that there is not enough evidence.[1380]

In their joint submission in response to the Consultation Paper, SAMSN and the Sydney Law School raised a number of issues in relation to the police response to historical abuse:

> Research concerning delayed reporting with adult survivors in historical matters reporting to police some years or decades after the incidents suggests that adult survivors may be a selected group who are keen to see some justice and do persist.
>
> Some complainants said they were actively discouraged by police, with the message 'we don't want to do this, are you going to be able to hack it?['] What the police might see as being realistic can be experienced as a '"whack" or a "slap down"'.
>
> Managing people's expectations and providing information that allows them to make an informed decision is critical. This includes, as proposed, making it clear to 'victims (and their families or support people where the victims are children or are particularly vulnerable)' that they retain the right to withdraw at any stage and to decline to proceed further with police and/or any prosecution.
>
> One survivor at the time of first reporting, and on a number of occasions during the interview process over a number of months, indicated that he wanted some feedback about the likelihood of prosecution. He sought some reassurance that if he was to continue with further interviews that it was likely to proceed; otherwise he preferred not to undergo the stress involved in giving a lengthy statement. He was distressed by questions some months later that suggested that he was perhaps engaging in fantasy in relation to some parts of his story. The police then decided to halt the investigation but provided no adequate explanation for this decision. There should be a right to complain or seek a review of such decisions, as well as police and prosecution decisions to downgrade the charges.[1381]

Mr Steve Kinmond, the NSW Deputy Ombudsman, wrote to the Royal Commission in July 2016 following our public roundtable on reporting offences. Mr Kinmond's letter is published on the Royal Commission's website with the submissions in response to the Consultation Paper. Mr Kinmond wrote of the discussion at the roundtable about the need to improve the information provided to victims about what will occur if police are advised of their allegations and stated:

> With this is mind, since the roundtable we have had preliminary discussions with a number of parties about the viability of preparing a factsheet for adult victims of historical child abuse. From these discussions, it is apparent that the proposed fact sheet should cover, inter alia:
>
> - A reassurance to victims that, except in the most exceptional circumstances, their views regarding whether they wish to participate in any police investigation and criminal proceedings would prevail.
> - The right of victims to have a nominated police officer act as a support person for the purposes of providing them with regular updates on the progress of their matter and to address any relevant questions or concerns the victim might wish to raise; and
> - A specific commitment by police to work with the victim to address any concerns they might have for their own safety and/or the safety of others.[1382]

We understand that the NSW Ombudsman has worked with the NSW Police Force, NSW Health and other stakeholders to develop a draft 'guarantee of service' in relation to historical child sexual abuse.

We understand that the draft guarantee of service addresses a number of the matters that we have identified in previous sections of this chapter, such as:

- reassuring victims and survivors that, except in exceptional circumstances, their views about whether to participate in the police investigation will prevail
- undertaking to treat victims well and to refer them to appropriate support services, including providing some contact details for relevant government services
- recognising that victims and survivors may prefer to contact police through a support person or organisation rather than contacting police directly
- undertaking to keep victims and survivors informed.

In the public hearing in Case Study 46, Detective Superintendent Greig Newbery, Commander of the Child Sex Abuse Squad in the NSW Police Force, outlined the then status of the draft guarantee of service. Detective Superintendent Newbery told the public hearing:

> The Commissioner's office is currently in discussion with the Ombudsman in relation to the best way to achieve that. The NSW Police currently has a Charter of Victims Rights and has a customer service charter which encompasses a lot of the points that were raised in the guarantee of service.
>
> We're still in discussion in relation to that. I think that would be incorporated particularly in some of the training that we're looking at, or we're currently developing, in relation to the areas within that guarantee, particularly around how police first interact with victims of child sexual assault and adults reporting child sexual assault, and providing a lot of those guarantees within that education package to all police.[1383]

We sought a further update from the NSW Police Force as to the status of the guarantee of service. The NSW Police Force provided us with the following response:

> The New South Wales Police Force (NSWPF) is well advanced in the area of service delivery for victims of child sexual abuse.
>
> The efforts of the Office of the NSW Ombudsman to enhance victim support are commended. They are consistent with the efforts of the NSWPF in support of victim's rights.
>
> The NSWPF believes existing policy statements, procedures and guidelines are in place to guide interactions between police and historic victims of child sexual abuse. These include:
>
> - NSW Justice Charter of Victims Rights
> - NSW Code of Practice for the Charter of Victims Rights
> - NSWPF Police response to Victims of Crime
> - NSWPF Victims Policy Statement
> - NSWPF Customer Service Guidelines
>
> The NSWPF is committed to upholding the intent of these documents which give foundation to, and are complemented by, an internal intranet site which provides instructional materials and guidance to NSW Police Officers on all facets of victims support and customer service.
>
> The NSWPF is of the view their existing information and training materials meet their obligations to support adult survivors of child sexual abuse, which would obviate the need for any guarantee of service.

> While the NSWPF is aware the Royal Commission has indicated its support for a guarantee of service, the NSWPF believe little would be achieved in producing a document which duplicates procedures and guidelines already in existence.
>
> It is noted that during the Royal Commission, Detective Superintendent Newbery advised that policies are in place within the NSWPF which provide sufficient focus on the issue.[1384]

An approach such as that reflected in the draft guarantee of service appears to us to have considerable merit. We recognise that it is likely largely to cover ground already addressed in victims charters or other documents and, indeed, in our other recommendations in this chapter. However, it is clear to us that many adult survivors of child sexual abuse in an institutional context have particular needs for information, reassurance and support in relation to police responses. It seems likely that many adult survivors of child sexual abuse in other contexts may share some or all of these needs.

A document specifically addressed to victims and survivors reporting historical allegations of child sexual abuse can help to encourage and support those victims and survivors to make decisions about whether to report to police and whether to remain in the criminal justice process. Importantly, it can also serve as a reminder to the police officers who are involved in providing the police response about the particular needs of these victims and survivors. While such a reminder may not be needed in specialist responses, we are satisfied from what we have been told that it is likely to be of assistance when a police response is not provided by specialist police.

We have directed our recommendation to circumstances where the policing agency does not provide a specialist response to victims and survivors reporting historical child sexual abuse. This is because we consider that it is likely that the issues to be addressed in a 'guarantee of service' are already being addressed – and the requirements of the 'guarantee of service' are being exceeded – in a specialist response. However, we would not object to a 'guarantee of service' also being provided in the context of a specialist response to historical child sexual abuse.

Recommendation

12. Each Australian government should ensure that, if its policing agency does not provide a specialist response to victims and survivors reporting historical child sexual abuse, its policing agency develops and implements a document in the nature of a 'guarantee of service' which sets out for the benefit of victims and survivors – and as a reminder to the police involved – what victims and survivors are entitled to expect in the police response to their report of child sexual abuse. The document should include information to the effect that victims and survivors are entitled to:

    a. be treated by police with consideration and respect, taking account of any relevant cultural safety issues

    b. have their views about whether they wish to participate in the police investigation respected

    c. be referred to appropriate support services

    d. contact police through a support person or organisation rather than contacting police directly if they prefer

    e. have the assistance of a support person of their choice throughout their dealings with police unless this will interfere with the police investigation or risk contaminating evidence

    f. have their statement taken by police even if the alleged perpetrator is dead

    g. be provided with the details of a nominated person within the police service for them to contact

    h. be kept informed of the status of their report and any investigation unless they do not wish to be kept informed

    i. have the police focus on the credibility of the complaint or allegations rather than focusing only on the credibility of the complainant, recognising 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.

8.8 Police responses to reports of child sexual abuse made by people with disability

In its submission in response to the Consultation Paper, PWDA stated that children and adults with disability have substantial problems in seeking to report to police. It submitted that these must be addressed. It identified the issues as including:

- Refusing to take a report, which may be because an officer believes a person with disability to not be telling the truth, or that an officer believes it to be otherwise a waste of time (due to a low likelihood of conviction)
- Failing to ensure that the victim has adequate and appropriate support – both emotional and disability support – to make the report
- Taking the word of disability service providers above the word of a victim with disability
- Failing to put enough time and effort into investigation
- Failing to prioritise investigation of allegations made by people with disability
- Failing to recommend matters with people with disability as victims and witnesses for prosecution (this may be due to a correct or incorrect assumption that conviction is unlikely)[1385] [Reference omitted.]

Dr Jess Cadwallader, representing PWDA in the public hearing in Case Study 46, gave the following evidence about the difficulties faced by people with disability who may not be believed when they report abuse, including by police:

> But I think one of the big problems that people with disability face is that they are frequently not believed, either by people who might be supporting them or by police themselves. Sometimes reports aren't taken, and in other cases investigations may not be given the priority that they otherwise would. That's partly, I think, to do with the expectation that a case that involves a witness who is a person with disability may not ever make it to prosecution, so it doesn't look like a case that is worth investing time and energy in.[1386]

In its submission, PWDA expressed similar concerns in relation to the laying of charges in cases involving victims or survivors with disability:

> Few cases involving people with disability are recommended for prosecution. Some data suggests that this is because police believe that in court, a witness with disability will be understood to not be credible. Unfortunately, evidence given by Crown Prosecutors and Directors of Public Prosecutions during Case Study 38 also suggests that there is an

> unwillingness to make use of elements of evidence legislation that would enable access to the supports people with disability require in court; supports which may render that witness competent and credible in court.[1387] [Reference omitted.]

We addressed the issue of credibility in section 8.4 in relation to police responses and section 20.4.6 in relation to prosecution responses. In recommendation 7c, we recommended that police conduct investigations of reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principle:

> 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:
>
> i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record
>
> ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

However, this principle is intended to address credibility issues that can arise in part from the effects of the abuse on victims and survivors. For some adult survivors, by the time they are able to report the abuse to police, they have experienced substance abuse and mental health problems and they may have acquired a criminal record, at least in part because of the effect the abuse had on them.

The position for people with disability – whether children or adults – is quite different. The concern that PWDA raised is that the disability may cause police to doubt the victim or survivor's report, expend less effort on the investigation or doubt their ability to be a credible complainant.

A number of the other recommendations we make in this chapter are intended to apply to, or for the benefit of, all victims and survivors, including victims and survivors with disability. The following recommendations are particularly relevant:

- the recommendation in relation to initial contact with police (recommendation 3)
- the recommendation in relation to encouraging reporting, including working with survivor advocacy and support groups and support services – which should include groups and services that work with people with disability – and allowing victims and survivors to have a support person of their choice (recommendation 4)
- the recommendation in relation to investigative interviewing of children and other vulnerable witnesses – which should include children and adults with disability – being undertaken by police with specialist training and intermediaries being available to assist in police investigative interviews of children and other vulnerable witnesses – again including children and adults with disability (recommendation 9)

- the recommendation in relation to decisions about whether to lay charges, including in relation to not expecting or requiring corroboration where the victim or survivor's account does not suggest that there should be any corroboration available (recommendation 10).

We discuss in section 30.1 the higher risk of sexual abuse that children with disability may face in institutional contexts and the particular barriers that children and adults with disability face as complainants of child sexual abuse in the criminal justice system. Given these factors, we are satisfied that we should make a further recommendation in relation to the police response to victims and survivors with disability.

If our recommendations in Chapter 30 in relation to intermediaries and ground rules hearings are implemented, we anticipate that investigations and the laying of charges and prosecutions should become feasible in more cases involving complainants with disability than may be the case under current arrangements. We expect that police should take full account of any improvements that are implemented in responding to victims and survivors with disability to ensure that their prospects of obtaining a criminal justice response through to a trial are maximised.

Communication supports – in addition to or instead of intermediaries – may also enable people with disability to give their best evidence in the investigative interview. Communication supports include assistive technology designed to assist with communication or other supports, such as Australian Sign Language (AUSLAN) interpreters.

Recommendation

13. Each Australian government should ensure that its policing agency responds to victims and survivors with disability, or their representatives, who report or seek to report child sexual abuse, including institutional child sexual abuse, to police in accordance with the following principles:

    a. Police who have initial contact with the victim or survivor should be non-judgmental and should not make any adverse assessment of the victim or survivor's credibility, reliability or ability to make a report or participate in a police investigation or prosecution because of their disability.

    b. Police who assess or provide an investigative response to allegations made by victims and survivors with disability should focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant, and they should not make any adverse assessment of the victim or survivor's credibility or reliability because of their disability.

    c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to ensure that the victim or survivor is able to give their best evidence in the investigative interview.

    d. Decisions in relation to whether to lay charges for child sexual abuse offences should take full account of the ability of any available intermediary scheme, and communication supports, to assist the victim or survivor to give their best evidence when required in the prosecution process.

9 Police responses and institutions

9.1 Introduction

Many of the issues we discussed in Chapter 8 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 given the alleged perpetrator 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 and survivor advocacy and support groups 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.

9.2 Police communication and advice

9.2.1 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 Jonathan Lord, is a particularly relevant example. We discuss it in detail in section 9.2.2.

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 at the time of the hearing in March 2014.

In Case Study 12, we examined the response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009. We identified that in 2009:

- the then headmaster of the school had no guidelines to follow to ensure that he did not act in a way that may potentially undermine the police investigation
- the school had no procedures or guidelines about the release of information to a suspect, individual parents of alleged victims or the wider school community during a police investigation about child sexual abuse
- there were no written guidelines on the type of liaison that the school should have with police.[1388]

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 important for us to be able to give clear guidance to institutions on how they should respond to allegations of institutional child sexual abuse. In this report, we address what institutions should do in relation to interacting with police. We will address institutional responses more broadly in our final report.

This issue arises where 'current allegations' of institutional child sexual abuse – where the alleged perpetrator is or has recently been working or volunteering at the institution – are made. Where current allegations are made, 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 makes 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.

9.2.2 Case Study 2: YMCA NSW and Jonathan Lord

The matters most relevant to the issue of police communication and advice were 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, Lord joined YMCA NSW as a casual childcare assistant for its outside school hours care services in Caringbah in Sydney. 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, 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, Lord had been convicted of 13 sexual offences involving 12 children.

One of 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 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 New South Wales Department of Family and Community Services (FACS) helpline received a second notification about another child being abused by 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 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 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.

We 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 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 9.2.4.

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 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 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 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.

9.2.3 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.

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 the consultation paper, *Best practice principles in responding to complaints of child sexual abuse in institutional contexts: Consultation paper* (the Complaints Handling Consultation Paper), which we 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.[1389]

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.[1390]

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.[1391] 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.[1392]

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.[1393]

Ms Ladogna also told the roundtable that the implementation of the JIRT Local Contact Point Protocol (discussed in section 9.2.4) has facilitated the exchange of information, but it could be improved by having greater awareness that such protocols are in operation.[1394]

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.[1395] 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 ...[1396]

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.[1397]

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].[1398]

The NSW Deputy Ombudsman, Mr Steve Kinmond, spoke at the public roundtable about the NSW Ombudsman's reportable conduct jurisdiction and the assistance his office provides to police in helping institutions to manage their own response.[1399] 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.[1400]

Ms Beth Blackwood, Chief Executive Officer of the Association of Heads of Independent Schools of Australia, 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.[1401]

Limitations on disclosure

Privacy and defamation issues

In the Consultation Paper, we stated that we had 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.[1402]

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.[1403]

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.[1404]

In his submission in response to the Consultation Paper, the Australian Information Commissioner, Mr Timothy Pilgrim PSM, provided further information in relation to the *Privacy Act 1988* (Cth). Mr Pilgrim stated that institutions will need to consider whether the information they wish to disclose is 'personal information' within the meaning of the Act. He submitted:

> In the context of allegations of abuse, it may be possible for institutions to make broader notifications to parents and the community, without identifying the alleged perpetrator or victim. Whether an individual is reasonably identifiable by a communication will depend on the level of detail in the communication, such as how specifically the particular institution is identified, and whether or not any particulars are provided about the alleged incident(s). The number and type of recipients will also be a key consideration. Where information is made available to members of a small community, such as a school community, this information might more readily identify an individual.[1405]

Personal information can only be used or disclosed for the particular purpose for which it was collected unless an exception applies. Mr Pilgrim suggested that:

> if an institution has collected information from the police for the purposes of sharing that information with parents of children that are involved with the institution, it would be able to use or disclose it for that purpose, without having to rely on an exception.[1406]

Mr Pilgrim also stated that institutions should be clear as to the purposes for which they collect personal information and the purpose for which they wish to disclose it.[1407]

Mr Pilgrim outlined a number of exceptions that may allow disclosure of personal information by institutions when they are responding to allegations of child sexual abuse.[1408] For example, one exception is based on whether the individual would reasonably expect the institution to disclose the personal information for the secondary purpose for which it is disclosed (although additional requirements also apply). Mr Pilgrim suggested that:

> institutions could consider including in documentation that employees and volunteers sign upon commencement, that their personal information may be disclosed for child protection and investigative purposes if an allegation is made against them. This notification may assist in creating a 'reasonable expectation' that personal information may be disclosed for that particular secondary purpose.[1409]

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).[1410]

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.[1411] 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.[1412]

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.

In the Consultation Paper, we stated that it was not clear to us whether provisions prohibiting the disclosure of the identity of victims – or the accused – were 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 E.

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.[1413]

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).[1414]

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. For example, charges might not be laid where 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).

In its submission in response to the Consultation Paper, the New South Wales Government stated in relation to the NSW SOPS:

> The NSW SOPS forms a major point of intersection between an employer and the police in relation to the information and assistance police can provide to institutions where an allegation of child sexual abuse is made. The NSW SOPS also help to assist the employer manage the requirements of a police investigation with their reporting obligations to the NSW Ombudsman, the Office of the Children's Guardian with respect to working with children checks and as mandatory reporters under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).
>
> NSW notes the importance of ongoing cooperative and collegiate communication by the police and the relevant institution. NSW also notes the importance of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* in facilitating the exchange of information between prescribed bodies for the safety, welfare and well-being of children.[1415]

9.2.4 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 of abuse in an institutional context are made, 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 9.2.2 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.[1416]

Ms Blackwood of the Association of Heads of Independent Schools of Australia 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.[1417]

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.[1418]

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.[1419]

Current police approaches

The public roundtable heard information about police approaches to providing information to children and families involved with an institution after current allegations of institutional child sexual abuse are made.

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.[1420]

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.[1421]

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[Multi-Disciplinary Centre] 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.[1422]

Queensland

Acting Detective Superintendent Garry Watts, Child Safety and Sexual Crime Group, State Crime Command, Queensland Police Service, raised the importance of ensuring that parents do not directly discuss the abuse with their child:

> [So as] not 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.[1423]

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.[1424]

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.[1425]

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.[1426]

In Case Study 12, in relation to the response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009, allegations were reported to police in 2009. Detective Sergeant Troy Kendall (the police officer investigating the alleged offending) said in a statement that he had numerous contacts in person and over the telephone with the then headmaster, and the school's bursar. During the course of those discussions, both

the headmaster and the bursar sought advice on the release of information to parents of children enrolled at the school. Detective Sergeant Kendall said he requested that the school keep the details of the investigation broad. He also advised that the contact details of the Child Abuse Squad be provided to parents if they had any concerns about their children.[1427]

After he gave this advice, Detective Sergeant Kendall received information from sources outside the school that teachers were discussing the investigation among themselves and with parents. He expressed his concerns to the school bursar and advised the school that these discussions could jeopardise the investigation. [1428] The Western Australia Police emphasised to the school that the release of information to parents could undermine a successful prosecution.[1429]

As noted in section 9.2.1, Case Study 12 identified that, in 2009:

- the then headmaster of the school had no guidelines to follow to ensure that he did not act in a way that may potentially undermine the police investigation
- the school had no procedures or guidelines about the release of information to a suspect, individual parents of alleged victims or the wider school community during a police investigation about child sexual abuse
- there were no written guidelines on the type of liaison that the school should have with police.[1430]

In our report on Case Study 12, we stated that, in formulating an institution's policies and procedures to give guidance on the release of information, there is an obvious need to balance the preservation of the integrity of the investigation in order to assist the prospect of a successful prosecution and the welfare of other children who have had contact with the alleged perpetrator.[1431]

We noted that the school had since developed templates for letters that are sent to parents for any future police investigations. At the time of our report in June 2015, the school's procedure for the release of information to a suspect and liaison with police was that the headmaster will first seek advice from the police and/or the Western Australian Department of Child Protection on the appropriate action to take in respect of the alleged offender, the child and the child's parent(s)/caregiver(s).[1432]

In 2013, the Western Australia Police, the Western Australian Department of Education Services, the Training Accreditation Council Western Australia and the Teacher Registration Board of Western Australia agreed to develop a memorandum of understanding on the sharing of child protection information. The memorandum of understanding relates to information sharing in non-government schools. It was signed by all parties as of May 2014.[1433]

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 Brian Perkins (the perpetrator), despite being aware that other former students with intellectual disabilities and limited verbal capacity may have had contact with him.[1434] 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.[1435] [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 South Australian 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.[1436] It also recommended 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.[1437]

Mr Michael O'Connell APM, the South Australian Commissioner for Victim's Rights, told the public roundtable that:

> The Debelle Royal Commission actually came up with a number of recommendations, and one of those now has 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.[1438]

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.[1439] 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 F.

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.[1440]

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. JIRT and the institution make a collaborative decision to activate the protocol. 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.[1441] 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.[1442] [References omitted.]

In its submission in response to the Consultation Paper, the New South Wales Government gave the following overview of the operation of the JIRT Local Contact Point Protocol:

> In NSW, the JIRT LCPP [Local Contact Point Protocol] allows for information to be communicated to the parents of children who may be at risk. This is to ensure parents receive appropriate, accurate information about risk to their children, enabling them to take any necessary protective action to keep their children safe. The LCPP sets out the criteria for its use, how to establish a local contact point, guidelines for staff relating to the provision of information and support to parents, community members and other relevant stakeholders. The LCPP has been activated 18 times across NSW since it was implemented in March 2014.[1443]

The New South Wales Government also stated that the protocol has been extended to apply in circumstances where the person the subject of allegations is under 18 years of age:

The LCPP was first developed to be used if the person of interest in an investigation is aged over 18 years. As a result of feedback from the Royal Commission Roundtable on Multi-disciplinary and Specialist Policing Responses on 15 June 2016 and discussion around restricting its use to adults, this has now broadened to include persons of interest who are under the age of 18 years. To date, there has been one instance where the LCPP has been used in a matter involving allegations of sexual assault of a young child by older children at a school.[1444]

Communication with the media

At the public roundtable on multidisciplinary 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.[1445]

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 Sexual Offences and Child Abuse Investigation Team in the Victoria Police told the roundtable that they would seek the assistance of their media unit, which would prepare a media release.[1446]

9.2.5 Possible approach to police communication and advice

In the Consultation Paper, we suggested 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).

We also suggested that 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.

We suggested that 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.

In the Consultation Paper, we sought 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.

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

Limitations on disclosure

ACT Policing submitted that privacy laws and legislation complicate information sharing with other agencies in the Australian Capital Territory. ACT Policing recommended that an agreement that allows agencies to freely share information when it relates to an allegation of criminal behaviour should be developed. This would also relieve stress on victims, as they would no longer need to assist police to gather evidencefrom other agencies.[1447]

The Anglican Church of Australia (ACA) Royal Commission Working Group submitted that issues of privacy and defamation create challenges in communicating about investigative and disciplinary matters arising from allegations of child sexual abuse:

> The ACA has identified challenges in communicating the progress and outcomes of investigative and disciplinary procedures arising from complaints of child sexual abuse against churchworkers. In particular, issues of privacy and defamation have had to be considered when informing Anglican community members that a person has been stood down while allegations of misconduct are under investigation or thata person's employment has been terminated when disciplinary outcomes have been determined.

> The ACA has also identified challenges in communicating information on allegations or findings against current or former ACA churchworkers who are may be working with children in other institutions. The ACA considers it has an obligation to communicate relevant information in order for the other institution to undertake a risk assessment.[1448]

The submission stated that the ACA 'would support the introduction of some form of statutory protection for officers of institutions who communicate information of this nature made in good faith, similar to the protections in place for mandatory reporting'.[1449]

Mr Garth Blake SC, representing the ACA Royal Commission Working Group, told the public hearing:

> The experience in the Anglican Church has been that church workers, in some cases clergy and in other cases laypersons, who have been working with children have moved from the Anglican Church to other institutions, other churches in particular, and where that has occurred and there have been allegations against those persons, the issue arises: do we inform the other institution, the other church?
>
> Now, we have taken the view, and I think this is followed universally, that we will communicate that information. But we recognise it's a defamatory communication and could give rise to liability, although there may well be a good defence of qualified privilege, provided it was communicated to those with particular responsibilityfor protecting children.
>
> We are aware that with mandatory reporting, at least where that's done in good faith, there is a statutory protection for anyone who makes such a report, and we think it would strengthen the position of making those sorts of communications by having a similar statutory protection, provided always that the communication is made in good faith.[1450]

In its submission in response to the Complaints Handling Consultation Paper, the Truth Justice and Healing Council stated:

> There is a need to ensure privacy issues are addressed and support provided to all those directly involved in an investigation process. Communities, particularly small communities, can be quick to make judgments based on limited information. The public interest in release of information to a community would need to be balanced against considerations of whether information released in this way might add to the trauma being suffered by those involved.[1451]

knowmore commented on the importance of considering the victim's interests, particularly in relation to protecting the victim's privacy.[1452] However, knowmore also submitted that some victims want the institution to inform those concerned and the broader community. knowmore submitted:

> Where there are constraints on public disclosure (such as to avoid jeopardising a police investigation) appropriate support should be provided to the survivor and a sensitive approach be adopted in order to minimise a survivor feeling as if they are being silenced by the institution and/or the police.[1453]

The Law Council of Australia submitted that the position as set out in the Consultation Paper and explained by the NSW Privacy Commissioner and the Office of the Australian Information Commissioner at the public roundtable shows that privacy and defamation issues can already be addressed adequately. It stated that 'privacy and potential defamation issues arise in the course of premature and inappropriate disclosure as articulated in the social media example provided in the Consultation Paper'.[1454]

As discussed in section 9.2.3, the submission of the Australian Information Commissioner, Mr Pilgrim, contained an explanation of privacy limitations and exceptions and some suggestions for steps that institutions could take that might assist them to deal with privacy issues in relation to allegations of child sexual abuse.[1455] Mr Pilgrim submitted that:

> Privacy is often named as a barrier to sharing or accessing personal information, but upon closer inspection this may not be the case. One of the main impediments to information sharing can be a general reluctance to disclose personal information, due to a number of misunderstandings about obligations under privacy and other laws. …
>
> Rather than preventing the sharing of personal information, the Privacy Act places important limitations around the circumstances under which it can be collected, used and disclosed. For this reason, I suggest that any issues faced by institutions in deciding whether to disclose information be carefully assessed against applicable privacy legislation, including the Privacy Act, to determine whether that legislation is in fact an obstacle, and to identify any specific impediments that may need to be addressed via legislative change.[1456]

The South Australian Commissioner for Victims Rights, Mr O'Connell, referred in his submission to a number of measures in place in South Australia where obstacles raised by privacy issues have been overcome. He stated:

> Privacy and defamation laws do create difficulties for institutions in communicating within the institution, or with children and parents, the broader community or the media; however, instruments such as the South Australia Informational Sharing Guidelines, the exemption for the South Australia Offender Management Programme, and the Family Safety Framework programme suggest that the difficulties in South Australia at least are not insurmountable.[1457]

In its submission in response to the Consultation Paper, the New South Wales Government stated that police have recently changed the way that information is provided under the JIRT Local Contact Point Protocol so that it is now provided directly by police:

> There has been a recent change in the way that information is provided under the LCPP [Local Contact Point Protocol] to parents and people who have been directly exposed to the person of interest in a child sexual assault allegation within an institution.
>
> Originally, the information was sent by the institution after it had been vetted by the JIRT partner agencies. After consideration by the JIRT partner agencies and the NSW Ombudsman, it was decided that the information should come directly from police, due to the privacy and defamation protections afforded to police providing information for law enforcement purposes.[1458]

The Law Society of New South Wales and Legal Aid NSW raised concerns about police providing information to third parties in relation to child-to-child sexual abuse allegations, where the alleged perpetrator is under 18 years of age. Legal Aid NSW submitted:

> In NSW, legislation prohibits the publication or broadcast of information that might lead to the identification of a child who has been charged. Children who are being investigated but have not been charged deserve even greater protection.
>
> The NSW Police Force has Standard Operating Procedures regarding employment related disclosures. However, they do not provide guidance on how to deal with juvenile offenders. We suggest that this gap should be addressed.[1459]

The Law Society of New South Wales submitted:

> The Law Society considers that special consideration must be given to juvenile offenders to ensure their privacy is respected. We note that s 15A of the Children (Criminal Proceedings) Act 1987 (NSW) (CCPA) prohibits publication or broadcast where it might lead to the identification of a child who has been charged. We also note that children in conflict with the law, including those who are alleged as having committed an offence, must have their privacy fully respected at all stages of the proceedings, in accordance with article 40(2)(b)(vii) of the United Nations Convention on the Rights of the Child (CRC). We submit that those children who have not been charged deserve even greater protection.[1460]

Police communication and advice

The submissions of the Truth Justice and Healing Council and the ACA Royal Commission Working Group identified challenges that institutions face in relation to the investigation of current allegations.

The Truth Justice and Healing Council submitted that delays in obtaining information from police when police are responding to current allegations can cause difficulties:

> It is accepted that police and other child protection authorities need an opportunity to initiate and pursue investigations after complaints are received and institutions should avoid any communication that might interfere with a police investigation or undermine possible criminal proceedings. Under current processes, there are frequently delays and a lack of information available about steps being taken by the authorities in response to reports from institutions. The institution is often left waiting for extended periods for a response from police or child protection authorities. Schools in particular have to manage distressed children and parents, and employees against whom complaints have been made, in the absence of information from police or child protection authorities about the status of their investigation.
>
> The flow of information between authorities including police and the institution should be bidirectional as far as possible. There is a need for greater sharing of information between such authorities and institutions, to ensure that the institution can act effectively, including disclosing information if necessary to protect the safety and wellbeing of children.[1461]

The Truth Justice and Healing Council also submitted that institutions face difficulties in undertaking their own investigations after police investigations have been finalised when they do not have access to material gathered in the police investigation:

> In the experience of Church authorities it would be rare that state and territory police would provide material (records of interview, statements) to an institution where the police investigation was completed and did not result in the commencement of criminal proceedings. This leaves the institution, which will usually still have a responsibility to investigate from a disciplinary perspective, to 'start again', with the accompanying delay and risk that the additional process will re-traumatise those involved.[1462]

The ACA Royal Commission Working Group expressed its recognition of the need to avoid impeding or prejudicing any police investigation. However, it also identified that it may need to consider removing the alleged perpetrator if children might be at risk and that it would need to inform the person of the reason for placing any limitation on their activity within the church.[1463]

Although the ACA has revised its internal practices to remove the obligation to inform the person the subject of an allegation, it submitted that complying with police requests not to inform the person may conflict with the institution's decision that the person should be removed to ensure children are not at risk of harm. The ACA Royal Commission Working Group submitted:

> The original church legislation guiding the operation of [the National Professional Standards] Register required that any person listed on the Register following an allegation being made against them (the respondent) had to be advised within 30 days and was able to request access to the information recorded. In acknowledgement of the importance of supporting criminal investigation processes, this legislation has been amended and it is possible for a Director of Professional Standards to record details of an active police

> investigation which precludes the respondent being advised until further notice. Not informing the respondent also inhibits the extent of any internal investigation process as the respondent cannot be requested to provide a statement. More importantly, complying with a police request not to alert the respondent creates a conflict when the institution risk management process determines that person should be removed from situations which may put children at harm. The ACA is of the view that the protection of children should always take priority but recognises how taking action may hamper a criminal investigation.[1464]

Mr Blake, representing the ACA Royal Commission Working Group, gave the following evidence in the public hearing about removing the requirement to inform a person the subject of an allegation:

> Where a complaint is made against a person who no longer holds a position, and in some cases the police have asked those responsible for handling the complaint not to tell the person, we have a provision that will give permission for the director of professional standards, the person with responsibility for handling that information, not to disclose that information to the person until such time as the police finish their inquiries, with a time limit of – I think it's about two and a half years if it goes to its maximum.
>
> Those changes really came at the request of directors who had dealings with the police, who were concerned about alleged perpetrators being informed and that compromising an investigation.
>
> The issue is far more acute where the alleged perpetrator is currently working in a church or with children and, as we say in our paper, we think if there is a question of current risk to a child and the potential of compromising a police investigation, priority must be given to the protection of the child, recognising that may compromise the investigation.
>
> If there was a way of handling that in being able to achieve sort of both, that would be good, but at least in our context we can't see how we can comply with that request and, at the same time, take proper steps to protect the child, which may be standing the person down from their position, which necessarily will inform the person and the community that there is an issue.[1465]

In its submission in response to the Consultation Paper, the Victorian CASA Forum suggested that, even where a perpetrator has been removed or has left an institution, the institution may benefit from being kept informed by police so that it can support traumatised victims, families and the community. It submitted:

> Police are not required to provide any information to institutions in these circumstances, however, this is an opportunity for police to liaise more closely with the institution as one element of supporting the victim/s. If the relevant senior people at the institution were

> kept informed about what is going on with the charges and other legal processes, the institution would be in better position to provide the most appropriate response and day to day support to the child/children who have been abused. Working closely with the local CASA would definitely facilitate this process of support. CASAs have understanding of the system and processes, are able to liaise with police and are experienced and skilled in the provision of support to individual families and communities impacted by sexual assault advocacy.[1466]

Adequacy and appropriateness of current guidance

In its submission in response to the Consultation Paper, the Victorian Government outlined its general approach to providing information in the course of criminal investigations. However, it suggested that more specific guidance in relation to investigating current allegations of institutional child sexual abuse may be appropriate and that Victoria Police would consider the NSW SOPS and JIRT Local Contact Point Protocol. It stated:

> Guidance on external communications for Victoria Police investigators is currently provided through the Victoria Police Manual, which includes policies for notifying an alleged offender's employer or relevant regulatory authority, and for the release of information to the public and media.
>
> The Code of Practice also provides direction to investigators for keeping victims informed about an investigation. However, Victoria Police acknowledges that these policies do not specifically inform police responses to the needs of institutions, parents and families, and the broader community. As a result, Victoria Police has commenced work to develop specific communications and guidelines to address these needs. This work will build on existing Victoria Police policies, other Victorian Government initiatives that prevent institutional child abuse, and relevant work undertaken by the Royal Commission. Victoria Police will also consider the NSW SOPs and JIRT Local Contact Point Protocol for any learnings that are applicable to Victoria.[1467] [References omitted.]

The Tasmanian Government outlined Tasmania Police's approach to the provision of information to institutions and the broader community as follows:

> Tasmania is in a unique position due to its size both geographically and demographically which enhances the ability to develop and maintain close relationships between both government agencies and non-government service providers.
>
> In recent history, cases involving institutional child sexual abuse have informally involved a collaborative approach between Tasmania Police, Department of Education and Department of Health and Human Services. This has included Tasmania Police providing advice to institutions in relation to the release of information, and participation in crisis meetings conducted by the institutions.[1468]

In submissions and public hearings, we were also told about specific guidance in place or being developed in New South Wales:

- to assist institutions in relation to the release of personal information in the context of responding to reportable allegations under the reportable conduct scheme
- to assist staff in disability services to respond to serious incidents
- in relation to allegations against NSW Health employees.

In June 2016, staff of the Royal Commission attended a roundtable convened by the NSW Ombudsman to discuss the issue of public release of personal information in the context of the handling of reportable allegations under Part 3A of the *Ombudsman Act 1974* (NSW), which establishes the reportable conduct scheme in New South Wales. The roundtable focused particularly on government and non-government schools.

One of the actions arising from the roundtable was that police or FACS, rather than the relevant institution, should release information wherever possible and appropriate. Police's lead in releasing information has now been reflected in the JIRT Local Contact Point Protocol, as noted above.

As another action arising from the roundtable, the NSW Ombudsman undertook to prepare guidance for agencies (that is, institutions) to help them to ensure that they are acting in accordance with relevant privacy principles and other laws in relation to the release of personal information in the context of responding to reportable allegations under the reportable conduct scheme.

In relation to that guidance for agencies, Detective Superintendent Newbery, Commander of the Child Abuse Squad, told the public hearing in Case Study 46:

> Currently we're in discussion with the Ombudsman in relation to that. The Ombudsman has just developed some similar guidelines in relation to disclosures for people in the disability sector and we'll be working with the Ombudsman in relation to developing guidelines for those disclosures.[1469]

The NSW Ombudsman's Office provided information in relation to the guidance for disability services following the public hearing in Case Study 41 regarding responses of disability service providers to allegations of child sexual abuse. It stated:

> We are finalising guidance for staff in disability services on the initial and early response they need to provide to serious incidents, including a comprehensive resource guide, a quick guide, and a one-page flowchart. The resources were developed in consultation with a range of NSW agencies, including the NSWPF [NSW Police Force]. However, we are conscious that anything we develop in this area must have an eye to the national landscape. In this context, in November 2015 we convened a roundtable meeting in Melbourne to discuss the draft resource guide with key NSW, Victorian and Commonwealth parties, including representatives of NSW and Victorian Police.[1470]

In its submission in response to the Consultation Paper, the New South Wales Government identified specific policies that are in place, in addition to the NSW SOPS and JIRT Local Contact Point Protocol, in relation to responding to allegations related to children that are made against employees of NSW Health.[1471] It referred to the importance of a coordinated approach between different investigations as follows:

> The Child Related Allegations Policy also deals with concurrent FACS, NSWPF or JIRT investigations and emphasises the importance of maintaining an ongoing liaison to ensure that criminal, child protection and disciplinary investigations are coordinated effectively and that information is exchanged as required to assist in the ongoing assessment and management of risk.[1472]

In relation to the issues that should be addressed in procedures and guidelines more generally, knowmore submitted that they could cover:

- the assistance the institution can expect to receive from the police and other relevant agencies and the frequency of updates
- the establishment of designated contact and liaison points
- the information the institution can share with third parties, including the process for consultation with, and review by, the police or other relevant agencies of any communications prepared by the institution
- where information can be disclosed, the most appropriate way to do this (for example, having a community meeting, setting up a toll-free police number or sending out letters)
- the assistance/support that can be provided to the survivor, their family, concerned parents, staff and other community members by the police and other relevant agencies
- whether an internal investigation by the institution can be conducted and, if not, at what stage this can be commenced (where relevant) as well as the information that can be provided by the police to inform any internal risk assessment by the institution.[1473]

As noted above in relation to privacy issues, the Law Society of New South Wales and Legal Aid NSW raised concerns about police providing information to third parties in relation to child-to-child sexual abuse allegations where the alleged perpetrator is under 18 years of age. Legal Aid NSW submitted that this issue should be addressed in the NSW SOPS.[1474]

9.2.7 Discussion and conclusions

We remain satisfied that allegations of institutional child sexual abuse, particularly current allegations, are likely to require a different or additional police response. These allegations raise particular concerns for police and child protection agencies, the institution, the parents of children involved in the institution, and the broader community.

We are satisfied that the following general elements should inform police responses and responses by institutions:

- The police response should take priority. The institution should not take any steps in response, including in relation to the alleged perpetrator, without consulting police and attempting to agree with police on the appropriate approach. If institutions have immediate risk management concerns, they should discuss with police how these can best be addressed without interfering with the police investigation.
- Police should provide reasonable assistance to the institution, including in relation to identifying an appropriate contact officer and discussing with the institution what steps it should or should not take in responding to an allegation while the police are investigating. The institution should provide all appropriate assistance to the police as requested by the police. Subject to the needs of the police investigation, cooperation between the police and the institution should be ongoing as required throughout the police response.
- Police and institutions should recognise that staff and volunteers involved in the institution, children, parents and the broader community are likely to seek information about current allegations. Police and the institution should cooperate to ensure that communication with these groups is appropriate, giving priority to the needs of the police in conducting the investigation but also recognising the legitimate needs of these groups to know what is happening and to consider taking protective action in relation to other children.
- If the institution has legitimate concerns about its ability to communicate relevant information – for example, because of privacy or defamation concerns – the police (or the child protection agency if it is involved) should consider communicating the information if the communication is reasonably required for law enforcement or child protection purposes or is otherwise appropriate.
- Any communication, whether by police, child protection or the institution, should be done in compliance with any applicable laws, including any restrictions in relation to the disclosure of the identity of an alleged victim or offender.
- Once the police response is concluded, particularly if it does not result in the laying of charges, the institution may need to pursue its own investigatin of the allegations. In these circumstances, police should identify and discuss with the institution whether they are able to provide the institution with any information obtained in the police investigation that would assist the institution in pursuing its investigation. The ability of the police to share information with the institution may be affected by any information-sharing legislation in the relevant state or territory. We will make recommendations in relation to information sharing in our final report. Police and the institution should try to avoid the need for the institution to duplicate steps already taken by the police, particularly in relation to interviewing victims and other affected parties.

We are satisfied that police agencies should develop procedures and protocols to address these general elements in detail and as appropriate for the particular state or territory. We consider that such procedures and protocols are important to:

- make sure that the particular police officers involved in the police response to a relevant allegation are aware of the need to consider and address these issues
- make sure that any institution involved in a relevant allegation understands the need to avoid interfering with the police investigation and understands the assistance it can expect from police
- capture the experience gained by police agencies in responding to allegations, particularly current allegations, of institutional child sexual abuse so that police and institutional responses are as effective as possible for all affected parties, including the broader community.

We consider that the NSW SOPS and the NSW JIRT Local Contact Point Protocol form useful precedents for other states and territories to consider in formulating their own procedures and protocols.

We note that the experience in New South Wales demonstrates that procedures and protocols should be kept under review and should be updated, as experience demonstrates that they can be improved. We also note that the experience in New South Wales suggests that some particular sectors may benefit from the development of customised procedures and protocols, including to take account of regulatory requirements such as reportable conduct schemes. We will make recommendations in relation to reportable conduct schemes in our final report.

Recommendations

14. In order to assist in the investigation of current allegations of institutional child sexual abuse, each Australian government should ensure that its policing agency:

    a. develops and keeps under review procedures and protocols to guide police and institutions about the information and assistance police can provide to institutions where a current allegation of institutional child sexual abuse is made

    b. develops and keeps under review procedures and protocols to guide the police, other agencies, institutions and the broader community on the information and assistance police can provide to children and parents and the broader community where a current allegation of institutional child sexual abuse is made.

15. The New South Wales Standard Operating Procedures for Employment Related Child Abuse Allegations and the Joint Investigation Response Team Local Contact Point Protocol should serve as useful precedents for other Australian governments to consider.

9.3 Blind reporting to police

9.3.1 Introduction

As we discussed in the Consultation Paper, 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 alleged perpetrators 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 Part IV, we discuss and make recommendations about when 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, which we discuss in Chapter 16.

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 16.3.2.

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 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.

9.3.2 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'.[1475]

The commission described blind reporting as 'controversial' and stated that there are arguments for and against it.[1476] 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
- that 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
- that 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.[1477]

The commission concluded that, in general, blind reporting contravenes section 316(1) of the *Crimes Act 1900* (NSW) and that:

> Whether in a particular case of blind reporting a contravention of section 316(1) occurs 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.[1478]

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.

9.3.3 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 stated:

> 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.[1479]

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.[1480]

9.3.4 Current approaches

As we discussed in the Consultation Paper, in our public roundtable discussion on 20 April 2016, we heard from a number of parties 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 about some of the reporting options available in New South Wales.[1481] We discussed these in section 8.3.2.

Through the Sex Crimes Squad in State Crime Command, the NSW Police Force 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 G.

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.[1482]

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'.[1483]

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.[1484]

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.[1485]

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 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.[1486]

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.[1487] However, Mr Shoebridge said that the NSW Police Force protocols make it clear that, where there is a blind report, they do not investigate. Mr Shoebridge suggested that, if Local Area Commands have been told not to investigate a blind report, they will not commence an investigation when they get a blind report.[1488] 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.[1489]

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.[1490] We discussed these in section 8.3.2.

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.[1491]

In its submission in response to the Consultation Paper, the Victorian Government confirmed that Victoria Police does receive blind reports but noted that the preference of Victoria Police is to engage directly with victims and survivors:

Victoria Police acknowledges that blind reporting may have the advantage of providing a mechanism for victims to report crime and alert police to an alleged offender even when they do not feel able to personally engage with police for a criminal investigation.

Blind reporting does occur in Victoria – reports can be made through an anonymous Crime Stoppers report, whilst the Centre Against Sexual Assault operates the Sexual Assault Reported Anonymously (SARA) online reporting option which refers information on to police. Whilst police receive and assess these reports and make further enquiries where they can, investigators are often unable to pursue criminal investigations without further details from a victim or the person who made the report. As a result, police prefer to be able to communicate with a victim or reporter directly, so they can provide comprehensive advice about their options for reporting and how any investigation will be managed.[1492]

Current survivor advocacy and support group approaches

Representatives of a number of survivor advocacy and support groups told the roundtable of their approaches to blind reporting.

Dr Cathy Kezelman AM, representing the Blue Knot Foundation, gave the roundtable the following information about the foundation's approach.[1493] 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.[1494] 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.[1495] 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'.[1496]

Dr Wayne Chamley, representing Broken Rites, gave the roundtable the following information about Broken Rites' approach.[1497] 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.[1498] 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 16.2.2). 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.[1499] 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 Healing: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia protocol* (Towards Healing).[1500] 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.[1501]

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 16.3.3). However, Mr O'Brien was told that those who had come forward under Towards Healing had all been 18 years or older.

In Case Study 50 in relation to the Catholic Church authorities, Mr Mark Eustance, the Director of Professional Standards for the Catholic Church in Queensland, gave evidence that survivors will often allow the church to share their details with police with the indication that they do not want to be contacted about the matter. Mr Eustance said that they will not provide the survivor's name to police if the survivor does not want them to do so.[1502]

Mr Kinmond, the NSW Deputy Ombudsman, 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.[1503]

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.[1504]

In a letter to the Royal Commission regarding the public roundtable into reporting offences and blind reporting dated 13 July 2016, Mr Kinmond set out the views of the NSW Ombudsman and looked at circumstances when withholding relevant information from police should not warrant prosecution:

> As I indicated in my evidence at the roundtable, our view is that there would be benefit in a specific provision which relates to the failure by individuals connected with particular institutions to report to police child sexual offence allegations. The offence provision could be tied to another provision that imposed a general duty on those with knowledge of these types of allegations to provide all relevant information to the police. This position is consistent with the views that I expressed at the roundtable discussions.
>
> However, as I also indicated during the discussions, I believe that there will be circumstances when withholding relevant information from police should not warrant prosecution.[1505]

Mr Kinmond stated that the NSW Ombudsman is in discussions with NSW Police Force regarding internal processes for responding to reports of historical child abuse. The Ombudsman is proposing that the NSW Police Force develop a consistent label for those 'blind reports' which are processed by Local Area Commands for the purpose of monitoring the number of such reports; and the related responses to them by individual Local Area Commands.[1506]

9.3.5 Discussion in the Consultation Paper

In the Consultation Paper, we suggested that, 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, we suggested that 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.

We suggested that, if 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 groups 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 8.3, 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 deciding whether to report. This guide should also be readily available online.

In the Consultation Paper, we noted that a number of participants at the roundtable stated that very few survivors refuse to report to the police if they are well supported.[1507] 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.[1508]

As discussed in section 8.3, 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.

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 in the way that it could be for survivor advocacy and support groups.

Mr Shoebridge, 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.[1509]

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.[1510]

In circumstances where there remains no obligation to report, we suggested in the Consultation Paper that 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.

We gave the following approach as an example for institutions that are willing to blind report in accordance with survivors' wishes.

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.

We suggested that, 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.

We also suggested that there might be benefit in survivor advocacy and support groups developing and following guidelines for reporting to police. This would 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.

In response to this discussion, we sought the views of state and territory governments, institutions and other interested parties on the issue of blind reporting and its interaction with reporting offences. We discuss reporting offences in Chapter 16.

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

Survivor advocacy and support groups

We received a range of views from survivor advocacy and support groups in relation to blind reporting.

Some submissions referred to the importance of allowing blind reporting so that the wishes of the victim or survivor are followed, which they suggested is of particular importance for victims and survivors who have difficulties in feeling trust.[1511]

The South Eastern Centre Against Sexual Assault & Family Violence (SECASA) submitted that requiring the disclosure of victims' or survivors' details to police against their wishes could have significant consequences for the number of victims and survivors coming forward:

> People will not report if CASAs and other agencies become quasi government organisations. One of the reasons people come to see CASA's is the confidentiality guarantee. There are many reasons people do not report to the Police including not trusting the Police, wanting to keep control of their lives and wanting to move on from the trauma in counselling rather than in the criminal justice system. A final comment on this is that it is an absolutely dreadful idea and goes against everything CASAs have all fought for in the past 40 years.[1512]

Ms Carolyn Worth AM, representing SECASA, told the public hearing in Case Study 46 that, where the victim is older than 16 (when mandatory reporting requirements do not apply), SECASA will make an anonymous report if they receive more than two reports about an alleged perpetrator. She also referred to the Sexual Assault Reporting Anonymously (SARA) option, which they encourage survivors to complete and which is then provided to police.[1513] Ms Worth explained the value of the SARA option as follows:

> I initially thought that was just something that made us feel better, but I know the police have actually arrested people using our information, because sometimes they have got an actual report, but one, and not enough to pursue it, and then we've sent them one or two, which have given them the same mode of operation and the same name, and they have felt able to go back and interview the alleged offender. …
>
> We do tell our clients that we will do that [submit the blind report], and it's very clear on the SARA website that we will pass this information on – not that we will pass their identity on. And even though it says 'anonymous', 49 per cent of people actually put their contact details on it. And we do contact them and say, 'You understand we are passing it on? Would you be happy if the police contacted you?'[1514]

In response to a question as to whether police ask SECASA to engage with the victim or survivor to see if they are willing to speak to police, Ms Worth said:

> They have done, if we have any contact, because – well, it depends how the blind report comes in. If it comes in with a client then obviously we have an intake and all their data. If it comes into our SARA website we don't always have the information. When they have asked us with the SARA website and we do have the information, we actually go back and discuss with the person who has made the report would they be willing to talk to this police member, whichever state they are in.
>
> We have actually not had a direct 'no' – people have always been willing to. Because by then they have a name and we've talked to them. …

> We would make every effort to do that, and really because it is a matter of public safety. I think it's a difficult balance between public safety against individual rights to, you know, conduct their life as they will.[1515]

The Ballarat Centre Against Sexual Assault (CASA) Men's Support Group submission also raised concerns about the impact of reporting to police without the victim or survivor's consent, stating:

> Group members said that if this occurred they would no longer feel as if they could trust the institution or service and would not continue with it, and if they knew that this would occur, they would not access the service at all.[1516]

However, in response to a question about what they would do if it became apparent that other children may currently be at risk, Ms Shireen Gunn, representing the Ballarat CASA Men's Support Group, told the public hearing in Case Study 46:

> In the circumstances with these men, when we have become aware that there are children at risk, in those instances, the men have given their – they have sought support to report. So we haven't come across that with this group of men. But in other situations outside of that group, if we were aware that there was a child at risk, still at risk, we would break that confidentiality and report.[1517]

Mr Norm Tink, representing the National Association of Services Against Sexual Violence, expressed support for reporting in spite of the victim's views if there is a risk to the victim or others as follows:

> Well, at all times a victim should have a say in what happens. That's very important. But against that is the response and the duty of care that police must have if there is a significant risk to a person. In those cases, it is our view that that should be taken out of their hands where there is a risk to the community, the wider community, or a significant physical or sexual risk to the victim.[1518]

The Jannawi Family Centre submitted:

> Jannawi believes that consent be obtained from the victim/survivor prior to passing on identifying information to police. Clearly, any process depends on the relationship between the client and service provider. However, in building trust and honouring the importance of relationship, particularly for victims of childhood trauma, to pass on information without client consent is problematic. It is a process which can further exacerbate issues which mirror tactics abuse such as secrecy, powerlessness and lack of consent.[1519]

The Alliance for Forgotten Australians referred to the importance of consent but also the importance of support services working with survivors to help them report. It submitted:

> Some survivors feel they would be unable to report and discuss abuse if they knew the complaint was going to the police without their consent. Issues of power, trust and autonomy are at play here. To pass on information without consent can be seen as a breach of trust, as consent is an important element in maintaining 'empowerment of the individual'.
>
> One solution to this dilemma is the use of 'blind reporting' as described by the Royal Commission in its Final Report on Redress and Civil Litigation. However AFA's advice is that efforts need to be made by support services and staff to work through the issues and implications of not making a report, particularly if the alleged perpetrator is still alive. Many survivors have indicated that they may not be able to make a decision, on their own, to go to the police.[1520]

The Victim Support Service South Australia submitted that it is in favour of blind reporting.[1521] It described a model used in the United States for university students to record information about a sexual assault online. This model allows a record to be created as early as possible, but the information is not available to anyone else and it is not reported unless the student chooses to report.[1522]

The Victim Support Service also described with approval the approach taken in South Australia during the Children in State Care Commission of Inquiry (Mullighan Inquiry), where survivors were able to report anonymously to the police with the support of a government-funded support service, Respond SA. The Victim Support Service stated that the system was established in response to requests from survivors who only wanted to report to police if other survivors of the same perpetrator came forward. If the police received other reports in relation to the same perpetrator, they would contact Respond SA, who would consult the survivor and facilitate a meeting with police if the survivor wished to report.[1523]

A number of submissions distinguished between allegations of child sexual abuse that are either current or where other children might be at risk and allegations made when the victim or survivor is an adult.[1524] For example, the Centre Against Sexual Violence Queensland (CASV) submitted:

> in the case that an adult reports to an institution that they were sexual[ly] abused as a child and there is no known current risk of harm to other children, we believe that it should be the adult survivor's choice whether they would like to have the crime reported to Police. … Institutions should work with the survivor to connect them in with a professional trauma-informed sexual assault counselling service and provide the adult survivor with the choice to report their childhood sexual abuse to police. It is important that adult survivors are empowered and supported to make their own choices and decisions.[1525]

Similarly, Care Leavers Australasia Network (CLAN) submitted:

> Blind reporting is also a process that CLAN feels should continue for the sake of best practice and in the best interests of justice. CLAN does not believe however that blind reporting should be a standard practice for current children in care or concerning child abuse in the general population. If a child is abused and someone else in a position of authority is aware then this information should be passed on to the police in full. CLAN feels that blind reporting should only be a practice confined to use in historical crimes, or where the victim is no longer a child and therefore has made a decision themselves not to report their abuse.[1526]

Some submissions distinguished between what should be required of institutions and what support services should do.

For example, Micah Projects submitted that, while some participants in its consultation forum thought all crimes should be reported, other participants said that, in order to comply with the victim or survivor's wishes not to proceed, an allegation of child sexual abuse made to the institution could be reported to the police without the name of the victim but including the details of the offender. The submission stated it would be a different situation in relation to a disclosure made to a support service:

> In relation to a support services [sic] many expressed that to pass on information without consent would be a breach of trust, as consent is an important element in maintaining 'empowerment of the individual'. People should be informed of the need to report a crime and supported to assist going to police. Some people said if they wanted their complaint to go to police they would welcome the support of someone from a support service to accompany them as the best option.
>
> Some participants felt they would be unable to report abuse if the complaint was going to the police without their consent: 'Consent should always be given by victims, there should be a counsellor present if the complaint goes through to police'. Some commented that after being sexually abused 'you may not be able to make the decision to go to the police yourself'.[1527]

Institutions

In its submission in response to the Consultation Paper, the ACA Royal Commission Working Group referred to the benefits of blind reporting in that it provides law enforcement authorities with significant information while allowing the survivor to make decisions on the timing of reporting as part of the healing process. However, an assessment needs to be made as to whether there is a potential danger to children where an alleged perpetrator remains active in the community.[1528] The submission stated that the dioceses and agencies of the ACA currently adopt different reporting practices and that they would welcome a recommended policy on blind reporting.[1529]

In the public hearing in Case Study 46, Mr Blake, representing the ACA Royal Commission Working Group, was asked about the conflict of interest for institutions in blind reporting identified by Mr Shoebridge, Greens member of the Legislative Council in the New South Wales Parliament. Mr Blake said:

> I have to accept that there is a potential for a conflict. It depends how it's managed. Complaints of this nature normally will be dealt with by a contact person being assigned to the survivor, intended to provide support along the way and a chance to speak through issues.
>
> Commonly also a counsellor will be offered and also the opportunity to talk with a counsellor about those issues.
>
> If the survivor or complainant is a child, that is very clear; it needs to be reported. If, however, the survivor is an adult and doesn't wish the matter to be reported and has taken proper advice and that's supported by a counsellor, for example, that raises particularly difficult issues. As we've mentioned in our submission, there's a conflict within our church, a conflict of approaches. Some parts of the church will report, but it will be blind reporting. Others will report the identity of the survivor. There's no common view within the Anglican Church as to the appropriate way to handle that situation.[1530]

Mr Francis Sullivan, representing the Truth Justice and Healing Council, was also asked about conflicts of interest and blind reporting. Mr Sullivan told the public hearing:

> I think Mr Shoebridge is on to something there. I mean, we've often said that, as far as the Catholic Church is concerned, the days of it investigating itself or anything about that are over, because there is a perceived conflict of interest, and it can be said in the past that the interests of the institution helped determine how particular complaints were handled. So I can take that point. But certainly if you have a duty at law [to report], hopefully that overrides any conflict.[1531]

Governments

The New South Wales Government submitted that it was currently considering its approach to blind reporting in light of the ongoing work of the Royal Commission:

> NSW notes the different views on blind reporting canvassed by the Royal Commission in the consultation paper and expressed at the public roundtable discussion on 20 April 2016. NSW will give careful consideration to the recommendations of the Royal Commission and the views expressed by victims and survivors on this issue.[1532]

In its submission in response to the Consultation Paper, the Victorian Government stated:

> Victoria Police supports the Royal Commission's suggestion that institutions and advocacy and support groups adopt guidelines to deal with blind reporting for matters that fall outside of any mandatory reporting requirements.[1533]

The Tasmanian Government submitted that a blind report may not provide detailed information by which police can fully investigate allegations, but there is still intelligence value in a blind report:

> Tasmania Police acknowledges the importance of encouraging victims to provide information to Tasmania Police in any form including as a 'blind report', but acknowledges that 'blind reporting' may limit the type of response police can undertake. For example, police may not be able to investigate an allegation on the basis of a 'blind report' and a victim's expectations of the consequences of their report need to be clearly communicated and understood.
>
> Tasmania Police consider that a significant benefit of 'blind reporting' is the collection of intelligence from a number of sources that may not have been otherwise available. It is feasible that the collation of such intelligence could either assist in identifying potential offenders in the community who may pose a risk to other vulnerable people, or lead to secondary avenues of enquiry that still may result in proceedings being initiated against an offender. Tasmania Police considers it important to undertake the analysis of such information and an investigative approach is adopted where possible.[1534]

Legal bodies and representative groups

The Australian Lawyers Alliance submitted that blind reporting protects the institution and the perpetrator, not the victim:

> Blind reporting has been asserted as being desirable to encourage victims to disclose their abuse and often to meet their wishes that the abuse not be publicised.
>
> However, the evidence from Operation Protea and the subsequent NSW Police Integrity Commission (PIC) Inquiry in 2015 clearly implied that in many cases blind reporting was intended to protect the institution and the abuser, not the victim. Whilst there was evidence that contact persons were supposed to ask victims whether they want to go to the police, there was no evidence from contact persons or victims that this in fact occurred or what the response of victims really was.[1535]

It argued that the risk to other potential victims should override the wishes of a survivor not to report:

> In our view, the victim's sensibilities can be appropriately and delicately handled by properly trained police. The wish to avoid publicity can often be achieved. However, the wishes of a victim must be subordinated to the interests of other potential victims who may suffer from the abuse not being reported.[1536]

Dr Andrew Morrison RFD SC, representing the Australian Lawyers Alliance, explained to the public hearing in Case Study 46 the position that blind reporting should not be allowed as follows:

> It's a balancing exercise. Obviously it will deter some victims from disclosing. On the other hand, if the relevant information isn't provided to the police, then in many cases the perpetrator will continue on and other victims will suffer as a consequence. On balance, we take the view that blind reporting is highly undesirable and not in the public interest.[1537]

Dr Morrison said:

> Our preference is that the information go to police simply because the overwhelming weight of evidence in the public interest is that whilst it is stressful and traumatic for victims, the damage done to other potential victims is far more serious, and, balancing those two things up, we are inclined to the view that, on balance, the community interest and protection requires that that information be passed on in a form in which action can be usefully taken by police.
>
> Now, I accept that may deter some people. I accept that it may be a source of embarrassment if the disclosure is made before the warning is given. But when one looks at the consequences of what has occurred – and the Royal Commission has heard a great deal of evidence about the extent of abuse – the alternative is simply not ultimately acceptable.[1538]

In answer to a question about the Australian Lawyers Alliance's argument against blind reporting in order to protect the community, Mr Warren Strange, representing knowmore, told the public hearing:

> Oh, look, I completely understand that argument, but I think the reality is that if you don't have a blind reporting option, you won't hear from that category of survivors. I think the public interest is benefited by police having access to that information as intelligence. It may well inform other investigations. It may augment existing intelligence and help them get to a threshold of being able to undertake a successful investigation.
>
> If you don't allow it, then there is a portion of information that police will never hear about, because these people will not come forward and make a formal complaint.[1539]

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

> As set out in our submission to Issues Paper 8, in our experience, some knowmore clients have told us that they do not wish to make a report to the police and provide their personal details, but would still like to inform the police about an alleged perpetrator anonymously in the event that they are still working with children.[1540] [References omitted.]

knowmore argued in favour of blind reporting. It submitted:

> While we recognise that the ability of the police and other relevant agencies to follow-up on anonymous reports may be limited, allowing anonymous reporting by survivors may increase the flow of information to the police in circumstances where the survivor would otherwise not make any report. Further, as set out in our submission to Issues Paper 8, some police services and other government agencies, will still accept, register and in some instances pass on anonymous reports and these reports can 'still alert agencies as to children in need of immediate protection, or identify a person as a risk to children in certain types of employment'.[1541] [Reference omitted.]

Mr Strange also told the public hearing that blind reporting can encourage survivors to become sufficiently comfortable to make a full report:

> If the initial response by police to a survivor is appropriate and trauma informed and meets the survivor's needs, then their likelihood of continuing to participate in any investigative process is greatly increased. If the initial interactions and the early interactions are handled poorly, then that's a very significant contributing factor to people dropping out of the process.[1542]

In its submission in response to the Consultation Paper, Victoria Legal Aid recognised the need for blind reporting but submitted that survivors should be encouraged and supported to make a report. It stated:

> Respect for the victim's wishes and privacy must be balanced against the need to protect both them and other children from further offending by the perpetrator. We therefore support the position of victim advocacy and support agencies, such as Berry Street and Broken Rites, who will respect a victim's decision not to report but will actively encourage it by addressing some of the perceived barriers to reporting and supporting victims to make the report.[1543]

Victoria Legal Aid expressed concern that prosecutions based on blind reports can be unfair to the accused. It submitted:

> However, it is important for the Royal Commission to note that prosecutions that proceed on the basis of a blind report can impede the ability for an accused person to defend the allegations where, for example, the accused is unable to directly challenge the complainant if information about that person is concealed. Therefore, VLA recommends the introduction of minimum standards for police responses to blind reports to ensure that police conduct diligent investigations and that any subsequent prosecution meets the standards required by the criminal justice system for ensuring that the accused person receives a fair trial.[1544]

9.3.7 Discussion and conclusions

In Chapter 16, we recommend the introduction of a failure to report offence targeted at institutions. Our main concern in recommending such an offence was to require reporting without requiring knowledge or belief that abuse had occurred. We recommend that relevant persons associated with the institution be required to report where they know, suspect or should have suspected that an adult associated with the institution is or has sexually abused a child. We make detailed recommendations about when a report is required to be made.

We do not recommend requiring the reporting of all suspicions that have or should have arisen before the offence commences. Also, we do not recommend requiring the reporting of all suspicions that are or should be formed after the offence commences. We recommend linking the obligation to report to whether the victim is still a child, whether the alleged perpetrator is still associated with the institution or another relevant institution, and how recently the abuse is alleged to have occurred.

This is discussed in more detail in section 16.7.

If the failure to report offence we recommend is implemented, there were still be circumstances in which institutions and survivor advocacy and support groups receive allegations of institutional child sexual abuse that they are not obliged by law to report to police. Therefore, the issue of blind reporting remains relevant.

We consider that it is necessary to recognise the competing concerns that inform the different views that interested parties express on blind reporting. Making a blind report can enable an institution or survivor advocacy and support group to provide police with information while respecting the wishes of survivors and not discouraging them from coming forward to seek support. However, making a blind report can also leave institutions in particular open to criticism that they have discouraged survivors from consenting to police reports and that they have been motivated by a desire to protect the institution rather than to respect the wishes of survivors.

We do not want to see institutions or survivor advocacy and support groups adopting an approach that might discourage or prevent some survivors from coming forward to seek support. There is a risk that an absolute policy against blind reporting might do this.

However, we also recognise that the conflict of interest and power imbalance between an institution and survivor identified by Mr Shoebridge may make institutions reluctant to continue to make blind reports, preferring instead to report everything to the police so that they cannot face accusations of hiding abuse or discouraging reports by survivors.

Regardless of their views on blind reporting, we consider that institutions and survivor advocacy and support groups should:

- be clear that, where the law requires reporting to police, child protection or another agency, the institution or group or its relevant staff member or official will report as required
- develop and adopt clear guidelines for what the institution or group will do in relation to allegations, reports or disclosures it receives that it is not required by law to report to police, child protection or another agency.

The guidelines should be sufficient to inform staff and volunteers, victims and their families and police, child protection and other agencies about the approach the institution or survivor advocacy and support group will take.

If the relevant institution or survivor advocacy and support group adopts a policy of reporting survivors' details to police without survivors' consent – that is, if it will not make blind reports – it should consider providing information about any alternative avenues for a survivor to seek support if this aspect of the institution or group's guidelines are not acceptable to the survivor. For example, if an institution is not willing to make blind reports, it might be able to provide details of any survivor advocacy and support groups that will respect the survivors' wishes in terms of reporting so that those survivors for whom this is critical can still seek support.

We are encouraged by the experiences recounted by many interested parties that most if not all survivors have become willing over time and with support to have a full report made to police even if the report is made on the basis that the survivor does not wish to be contacted by police.

We are also encouraged by accounts of survivors being willing to speak to police if police inform their counsellor or other support worker that police are investigating the same alleged perpetrator or institution. This accords with our experience in private sessions that survivors who are otherwise reluctant to engage with police are often willing to come forward – with support – if they might assist other survivors who have reported to police about the same alleged perpetrator or the same institution.

If the relevant institution or survivor advocacy and support group adopts a policy that does not require full reporting to police, we consider that blind reporting is preferable to not reporting at all. Recognising that disclosure may involve a process rather than a one-off event, it might be appropriate to allow a period of time in which disclosure can occur with counselling and support to see whether the survivor is willing to report. If the survivor is not willing to report after this time, a blind report could then be made, with the possibility of making a full report if the survivor consents to do so at a later time.

Regardless of the relevant institution or survivor advocacy and support group's policy in relation to blind reporting, we consider that the institution or group should provide survivors with information to inform them about options for reporting to police. In section 8.3, we discuss and make recommendations about measures to encourage victims and survivors to report to police. We recommend that police should 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. That information should be in a format that allows institutions and survivor advocacy and support groups to provide it to victims and survivors. Institutions and survivor advocacy and support groups should provide such information to survivors. They should also offer to support survivors to make a report, to pursue more information about reporting or to make a report on the survivor's behalf.

Police should ensure that they review any blind reports they receive and that they are available as intelligence in relation to any current or subsequent police investigations. If it appears that talking to the survivor might assist with a police investigation (other than an investigation specifically in relation to the blind report), police should contact the relevant institution or survivor advocacy and support group that made the blind report to ask that the relevant survivor be approached and informed of the police's wish to speak to them. Police and the institution or survivor advocacy and support group should cooperate to try to find a way in which the survivor will be sufficiently supported so that they are willing to speak to police.

Recommendations

16. In relation to blind reporting, institutions and survivor advocacy and support groups should:

    a. be clear that, where the law requires reporting to police, child protection or another agency, the institution or group or its relevant staff member or official will report as required

    b. develop and adopt clear guidelines to inform staff and volunteers, victims and their families and survivors, and police, child protection and other agencies as to the approach the institution or group will take in relation to allegations, reports or disclosures it receives that it is not required by law to report to police, child protection or another agency.

17. If a relevant institution or survivor advocacy and support group adopts a policy of reporting survivors' details to police without survivors' consent – that is, if it will not make blind reports – it should seek to provide information about alternative avenues for a survivor to seek support if this aspect of the institution or group's guidelines is not acceptable to the survivor.

18. Institutions and survivor advocacy and support groups that adopt a policy that they will not report the survivor's details without the survivor's consent should make a blind report to police in preference to making no report at all.

19. Regardless of an institution or survivor advocacy and support group's policy in relation to blind reporting, the institution or group should provide survivors with:

    a. information to inform them about options for reporting to police

    b. support to report to police if the survivor is willing to do so.

20. Police should ensure that they review any blind reports they receive and that they are available as intelligence in relation to any current or subsequent police investigations. If it appears that talking to the survivor might assist with a police investigation, police should contact the relevant institution or survivor advocacy and support group, and police and the institution or group should cooperate to try to find a way in which the survivor will be sufficiently supported so that they are willing to speak to police.

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Child sexual assault offences include all aggravated and non-aggravated sexual assault offences that are prosecuted in New South Wales courts (including under Commonwealth Acts) where the fact that the victim is under 18 is an element of the offence.
The data includes matters that are resolved by way of a guilty plea and also those that are determined following a defended hearing. Defended hearings include matters where the appearance was finalised through a finding of guilty or not guilty rather than via a guilty plea.
'All matters' includes appearances that were finalised through a guilty plea, the matter being dismissed due to mental illness, and where the matter was withdrawn by the prosecution, as well as the outcomes from defended hearings.
The data is also presented both aggregated, and for the different court jurisdictions in New South Wales. Children's Courts deal only with defendants under 18. The Local Court deals with the least serious matters and does not use juries. The District Court hears more serious matters and, unless the matter is heard before a judge sitting alone, a defended hearing will be before a jury. The Supreme Court only hears the most serious offences and hears relatively few matters compared with the other Courts.
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