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Royal Commission into Institutional Responses to Child Sexual Abuse Final Sitting

14 December 2017

On 12 November 2012 Prime Minister Julia Gillard announced the creation of The Royal Commission into Institutional Responses to Child Sexual Abuse. It was to be a national commission held jointly with each of the States and Territories. The announcement was supported by the Hon Tony Abbott who was then the leader of the opposition in the Australian Parliament.

On 11 January the following year the Prime Minister announced that the Governor-General had agreed to establish the Royal Commission and the Letters Patent were issued.

On that occasion the Prime Minister said that she “believed our nation needs to have this Royal Commission. Child sexual abuse is a hideous, shocking and vile crime. And it is clear from what is already in the public domain that too many children were the subject of child sexual abuse in institutions. That they've had to live with the trauma of that child sexual abuse for the rest of their lives; that they weren't provided with a safe childhood and a safe place to be. And that too many adults who could've assisted them turned a blind eye so that they didn't get the help that they needed.”

The Prime Minister spoke of her hope that the Royal Commission will bring about the systemic change that people have been wanting for such a long time. She spoke of their need for redress and support and for some the need for treatment. She also anticipated that, although initially the Royal Commission would be required to report within three years the end date could be extended if necessary.

Finally the Prime Minister emphasised the potential for the Royal Commission to make sure that the terrible wrongs that have been done in the past to children in our country, to the greatest extent, never happen again.

The Royal Commission held its opening sitting in Melbourne on 3 April 2013. On that occasion I spoke of the intention of the government to seek an amendment of the Royal Commission Acts to enable the Royal Commission to receive the personal stories of individuals in what have become known as private sessions. As the government anticipated private sessions have been one of the fundamental tasks of the Royal Commission. On that day we also opened our telephone call centre to enable survivors to make contact with us to report allegations of sexual abuse in an institutional context and make arrangements to attend a private session.

In all more than 15000 people who we have confirmed to be within our terms of reference have contacted the Royal Commission.

Just over 8000 people have come and spoken with a Commissioner in a private session. For many of those people it has been the first time they have told their story. Most have never been to the police or any person in authority to report the abuse. More than 2500 allegations have been reported by the Royal Commission to the police. Many of these matters came to

our attention in a private session. So far 230 prosecutions have been commenced. Although hundreds of matters are at different stages of investigation throughout Australia, it is inevitable that some alleged offenders will have already died.

In addition to private sessions, more than 1100 survivors have provided us with a written account of their experiences. We have also heard from parents, spouses and siblings about allegations of the abuse of their relatives, many of whom have died, sometimes through suicide.

For victims and survivors, telling their stories has required great courage and determination.

Most are stories of personal trauma and many are of personal tragedy. It is impossible not to share the anger many survivors have felt when they tell us of their betrayal by people they believed they were entitled to trust.

For many survivors talking about past events required them to revisit traumatic experiences that profoundly harmed them. Many spoke of having their innocence stolen, their childhood lost, their education and prospective career taken from them and their personal relationships damaged. For many sexual abuse is a trauma they can never escape. It can affect every aspect of their lives.

We also witnessed extraordinary determination and resilience. We spoke with many people who, with professional help and the support of others, have taken significant steps toward recovery.

The Commissioners thank each of the survivors who told us their story. They have had a profound impact on the Commissioners and our staff. Without them we could not have done our work. Each survivor's story is important to us. Their stories have helped us to identify what should be done to make institutions safer for children in the future. It has been a privilege for the Commissioners to sit with and listen to survivors. The survivors are remarkable people with a common concern to do what they can to ensure that other children are not abused. They deserve our nation's thanks.

Many survivors have been assisted by organisations whose purpose is to support them and advocate on their behalf. Early in our work we met with the leaders of these groups and we continued to work with them throughout the Royal Commission. They helped us to develop an appropriate private sessions process and worked with our counsellors to ensure the wellbeing of all survivors we heard from. Supporters and advocates assisted in the preparation of written accounts, attended as support persons in private sessions and assisted witnesses in our public hearings. They have our great respect for the remarkable work they do, often with limited resources.

The Royal Commission conducted a total of 57 case studies, resulting in 44 separate reports to government. Because of ongoing criminal investigations and prosecutions, we have recommended that our case study reports, concerning Catholic Church authorities in Ballarat

and Melbourne and some events in New South Wales and the Anglican Diocese of Newcastle, should be suppressed in whole or in part until the criminal process has been concluded. Although I know this will be disappoint some people it is important that nothing should occur that might compromise any criminal proceedings.

To gain an understanding of past events and develop recommendations to bring effective change across a broad range of complex issues we needed the cooperation of many people and institutions. Although this was not always the case, many institutions and government agencies accepted that they had failed and engaged constructively with us in discussions about how they should change. The Commissioners thank the governments and all of the institutions and individuals who participated in our various consultation processes, including our many roundtables, that have assisted in developing our recommendations.

We also thank the media organisations for their interest in and comprehensive reporting of the Royal Commission's work. Many media outlets provided extensive coverage. The ABC reported every case study on television, radio and online almost every sitting day.

The work of the Royal Commission in many areas was led by Ms Gail Furness SC, Senior Counsel Assisting. Together with a number of other counsel, she was responsible for the multiple forensic tasks required of the Royal Commission. However, her contribution to the inquiry extended well beyond those tasks. She played a significant role in the development of our recommended policy responses in many areas.

More than 680 people worked for the Royal Commission during its life, across the varied range of our activities. The Commissioners thank each of them. Although the work was stressful and often confronting, they came to the Royal Commission intent on seeing change to improve the safety of children and a just response for survivors.

A number of aspects of our work were unique, particularly our engagement with survivors and the wider community. Our research and policy development covered a broad range of issues. Our public hearings required intense and comprehensive preparation. The development of our conclusions, recommendations and reports involved input from staff across the organisation. Our senior management team, together with the Chief Executives, ensured that the Royal Commission completed our task in a timely manner and within budget. We are particularly appreciative of the contribution of Chief Executive Mr Philip Reed to the Royal Commission's effective operation.

More than 4000 individual institutions have been reported to us as places where abuse has occurred. While some institutions have ceased to operate, others continue to be actively engaged with children and young people. The most effective use of our resources, and the risk of prejudicing criminal investigations or prosecutions meant that we could not publically examine or report on many institutions in which survivors told us they had been sexually abused and that the response to their allegations was inadequate.

The failure to protect children has not been limited to institutions providing services to children. Some of our most important state instrumentalities have failed. Police often refused to believe children. They refused to investigate their complaints of abuse. Many children who had attempted to escape abuse were returned to unsafe institutions by police. Child protection agencies did not listen to children. They did not act on their concerns, leaving them in situations of danger. Our criminal justice system has created many barriers to the successful prosecution of alleged perpetrators. Investigation processes were inadequate and criminal procedures were inappropriate. Our civil law placed impossible barriers on survivors bringing claims against individual abusers and institutions.

Many institutions we examined did not have a culture where the best interests of children were the priority. Some leaders did not take responsibility for their institution's failure to protect children. Some leaders felt their primary responsibility was to protect the institution's reputation, and the accused person. Many did not recognise the impact this had on children. Poor practices, inadequate governance structures, failures to record and report complaints, or understating the seriousness of complaints, have been frequent.

The greatest number of alleged perpetrators and abused children, in Church managed facilities that we are aware of, were in Roman Catholic institutions. In many religious institutions, in particular but not only the Catholic Church, the power afforded to people in religious ministry and the misplaced trust of parents combined with aspects of the culture, practices and attitudes within the institutions to create risks for children. Alleged perpetrators were often allowed to have access to children even when religious leaders knew they posed a danger. Alleged perpetrators were often transferred to another location where they had access to children but were never reported to police.

It was obvious to the Commissioners early on in our work that in many institutions there were structural and cultural problems which had allowed and in some cases facilitated the sexual abuse of children. Some of those problems had the consequence that, when the abuse was brought to the notice of the institution, the response was inadequate and in many cases unjust. It may have been because of the exalted role of the abuser, the desire to protect the reputation of the institution or just to protect an abuser who was also a friend. In some cases, the aggressive hand of the lawyer was engaged, ensuring that an appropriate and just response to a survivor was impossible.

The sexual abuse of children is not just a problem from the past. Child sexual abuse in institutions continues today. We were told of many cases of abuse that occurred in the last 10 to 15 years in a range of institutions, including schools, religious institutions, foster and kinship care, respite care, health and allied services, performing arts institutions, childcare centres and youth groups. We heard in private sessions from children as young as seven years of age who told us they had been recently abused. In some case studies into schools the alleged abuse was so recent that the children are still attending school.

The conjunction of events which the Royal Commission has examined can only be described as a national tragedy. Across many decades many institutions failed our children. Our child protection, criminal and civil justice systems let them down. Although the primary responsibility for the sexual abuse of a child lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and the mechanisms which were available to regulate and control aberrant behaviour failed.

You may be aware that the Royal Commission has already provided three policy reports to government. Working with Children Checks, Civil Litigation and Redress, and Criminal Justice. The final report, which will be given to the Governor-General tomorrow, apart from detailing our conclusions and recommendations, will cover a broad range of issues relating to both government and institutions.

There may be leaders and members of some institutions who resent the intrusion of the Royal Commission into their affairs. However, if the problems we have identified are to be adequately addressed, changes must be made. There must be changes in the culture, structure and governance practices of many institutions.

The Royal Commission has been concerned with the sexual abuse of children within institutions. It is important to remember that, notwithstanding the problems we have identified, the number of children who are sexually abused in familial or other circumstances far exceeds those who are abused in institutions.

The sexual abuse of any child is intolerable in a civilised society. It is the responsibility of our entire community to acknowledge that children are being abused. We must each resolve that we should do what we can to protect them. The tragic impact of abuse for individuals and through them our entire society demands nothing less.

There is one final act that we must perform today. Every person who attended a private session was invited to send to us a short written message. Strictly anonymous, they were told that their message, which we have called a Message to Australia, would be bound in a large book which will carry that name. The National Library of Australia has kindly accepted the role of custodian of the Message to Australia Book. I am going to ask Counsel Assisting the Commission Gail Furness SC to explain a little more of the context of the Book. Unfortunately the Director-General of the National Library could not join us today but the NSW State Librarian & Chief Executive Dr John Vallance is with us to receive the Book and speak on behalf of Dr Marie-Louise Ayers, the Director-General of the National Library.

Centre for Forensic Behavioural Science Seminar

'Rights' and 'Wrongs' - Melbourne, Victoria

14 November 2017

To study history is to study change. Sometimes the changes are violent, they are often abrupt. Some are motivated by a desire for greater national or personal wealth. Others are the result of a conjunction of natural events. Many are the product of personal ambition often expressed through government or institutional power. On occasions the events are motivated by a coherent political philosophy. At other times they descend to a chaotic pursuit of power in which individual lives are damaged and lost.

Many historical events are an expression of the common or competing values of the participants. Those values can change with time. Human history reflects those changes. Whatever the issue political, social or economic our understanding of past events and their contribution to contemporary societal values can also change with time. What appeared to be true yesterday may be doubted tomorrow and discarded in a few years time.

The tragic horror of war can be followed by rapid and sometimes violent changes in the communities involved. A violent revolution or civil war may be the vehicle for a reordering of generally accepted political philosophies. The contemporary social order may be challenged. The disposition of power and wealth may change.

The second world war, as with World War 1, was the result of the ambition of some nations, or at the least their leaders, for a dominant role in world affairs. It resulted in a catastrophic and reckless pursuit of power to which those nations were never entitled and could never have sustained. It is marked by Hitler's determination to exterminate the Jewish people – the holocaust. Apart from its direct and tragic impact on the lives of millions, the War was followed by changes in national boundaries and the redistribution of political, military and economic power. Populations were displaced. The rate of European migration to Australia and other countries accelerated. It motivated many nations to come together to seek consensus in the restoration of world peace and the maintenance of the wellbeing of all mankind.

The Universal Declaration of Human Rights has its origin in the statement of freedoms adopted by the Allies during World War 2. The Charter of the United Nations that was created following the war confirmed the acceptance of fundamental human rights and freedoms for all people. They find ultimate expression in the Universal Declaration to which Australia is a signatory. Our country played a significant role in its adoption. Although not enforceable under Australian law (I leave to others the debate as to whether it comprises part of the body of customary international law) it stands as the most important set of principles to both inform and evaluate government and institutional conduct in Australia.

The Universal Declaration was finally adopted in 1948. Article 1 reads 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

Article 3 reads: 'Everyone has the right to life, liberty and security of person'.

The words are of course plain, their meaning clear. The expressed rights may be readily accepted. However history confirms the difficulties many nations have experienced in meeting the expressed expectations.

The Universal Declaration of Human Rights was followed more than twenty years later, in 1989 by the Convention on the Rights of the Child. The first limb of Article 3 of the Convention reads:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Again the words are plain but their relevance to particular issues and their acceptance as a relevant principle for conduct in particular circumstances may be contested. Sometimes that contest reflects a clash with political or institutional ideals.

Although Britain and its military capacity were a significant force in the Allied response during the Second World War, the war marked a change in Britain's international power and influence. The Empire was crumbling and the desire for self determination of many nations accelerated. But the British still saw themselves as a major power in world affairs. In response to the development of nuclear weapons by other nations Britain believed it was necessary to arm itself with the "bomb" to repel any nuclear threat to its homeland or territories.

Denied access to American nuclear knowledge or American atomic weapons testing facilities the British looked on home soil for a suitable place to establish a nuclear testing ground. The closest they came was a remote and inhospitable island off the coast of Scotland. That idea was discarded as too dangerous and so Australia was approached. Our government was a willing host to the British Nuclear Testing Program.

The initial explosions took place in 1952 at the remote Monte Bello Islands off the coast of Western Australia. The first blew an old destroyer apart. It was a relatively small atomic bomb. The tests at Monte Bello were followed by a series of explosions at Emu Field and Maralinga in central South Australia.

Although the Atomic tests were conducted after the Universal Declaration of Human Rights had been adopted they took place many years before the decision of the High Court in Mabo and well before the 1967 referendum authorised the inclusion of Aborigines in the Australian population. It was a time when the health risk from exposure to ionising radiation was well

understood. However the imperative to prevent Australians and people of other nations from exposure through dispersion in the atmosphere was not acknowledged. As it happened it was also a time when our approach to environmental hazards was unsophisticated, if not crude.

Those responsible for the testing program at Maralinga were aware that Aboriginal people (they did not know how many) were living on the land and would be endangered by the proposed explosions. Although they understood that the Pitjantjatjara and Yankunytjatjara people occupied the land they almost certainly had no understanding of the spiritual and cultural significance they attached to it.

To facilitate the tests the Aboriginal people were abruptly removed from their land, many put on the next train west, causing profound and long lasting trauma. Their social structure broken and their attachment to the land lost the tragic consequences have been felt by multiple generations of the Aboriginal people.

Once removed from their land the future movements of the Aborigines were largely unknown. Against the possibility that they might reenter dangerous locations one man, the Patrol Officer, was assigned the task of patrolling the large area of the testing ground. His was a hopeless task.

In the report of the Royal Commission into British Nuclear Tests in Australia, in words undoubtedly written by the President the Honourable James McClelland, the Commission said of the approach of the testing program to the safety of Aboriginal people, that attempts to remove Aboriginal people were riddled by "ignorance, incompetence and cynicism". The report concluded "overall the attempts to ensure Aboriginal safety during the Buffalo series demonstrate ignorance, incompetence and cynicism on the part of those responsible for their safety. The inescapable conclusion is that if Aborigines were not injured or killed as a result of the explosions, (and I interpolate the Royal Commission was, given the circumstances, unsurprisingly not able to reach a definitive conclusion) this was a matter of luck rather than adequate organisational management and resources allocated to safety."

The testing program was detailed and complex. It was believed necessary to not only successfully initiate nuclear explosions but to also understand the impact on humans, particularly military personnel if atomic weapons were used in war. At the time it was anticipated that nuclear weapons would be used in battlefield situations making it essential that the likely impacts were identified and effective responses developed for those who may encounter them in combat. This required soldiers and airmen, in particular, to be exposed to radiation. Pilots were required to fly through the mushroom cloud. Aircrew were required to fly with and track the nuclear cloud as it moved across Australia.

Apart from the major detonations the program included many other explosions known as minor trials. These were designed for different purposes, including to test initiation devices for hydrogen bombs. A number of the explosions dispersed plutonium, often attached to fragments of metal, over a wide area.

When the testing program was concluded a clean up program was initiated. It was crude and modest in cost. Although grossly inadequate it presumably reflected the limited understanding of the issues at that time.

To make the area "safe", apart from collecting the more obvious metal fragments and placing them on the ground surface in an area enclosed by a barbed wire fence, the plutonium was dispersed by bulldozers and other heavy machines. The purpose was to create a "safe" level of residual contamination in the soil. It was rightly anticipated that some Aboriginal people would seek to return to their lands. Apart from the fact that the fenced area was not made secure from burrowing animals, which could enter and leave as they pleased, carrying plutonium particles with them, there is no "safe" level for dispersed plutonium. The risk to the Aboriginal people and others who might pass by was not realistically factored into the operation.

There are multiple questions raised by the British Nuclear Testing Program. Whatever our individual response to the question was the testing program necessary, I doubt that it could be carried out today, at least in the location and the manner in which it occurred. I doubt that the general community would tolerate the indiscriminate removal of Aboriginal people from their land. Atmospheric testing of nuclear weapons would not be acceptable today. Deliberate exposure to significant radiation doses would not be allowed. The method used to "clean-up" the plutonium contaminated land would be rejected as unsafe.

Some of you may know that I was counsel assisting the Royal Commission into British nuclear tests in Australia. I am of course Chair of the Royal Commission into Institutional Responses to Child Sexual Abuse. Although the factual issues of concern to each Royal Commission are quite different they have some common themes.

Both Royal Commissions have gathered evidence with respect to social issues and attitudes of Australians in the 1950s and 1960s. Of course the Child Abuse Royal Commission extends beyond that time to the present day. But the starting point for both are the circumstances and prevailing social attitudes after World War Two.

Following the war there was a significant movement of people across multiple nations. Australia accepted a role in resettling migrants, particularly from Britain and other European countries. The migrant population in Australia included significant numbers of children, unaccompanied by adults, who, sponsored and supported by various charities and churches lived in 'hostel' type facilities in different parts of Australia. Many were described as "orphanages". In truth many of the children had been "taken" from or abandoned by their parents rather than their parents having died. Many were proffered the prospect of a "better" life in a new country.

Children's homes, again in the nature of hostels, were also the accepted method for the housing of children from Australian families where the family had broken down or the child had ended up in trouble. They were taken into care.

By this time an organised program to remove Aboriginal children from their families, which had commenced in the early 20th century, had resulted in many of them being placed in institutions. It continued until the 1970s. They are known today as the stolen generations.

With only minimal resources and rudimentary accommodation many children in the "orphanages" suffered great hardship. They lacked a proper diet and were given inadequate clothing, often going without shoes. Education opportunities for some were modest and for others non-existent. They suffered the loneliness that comes from the loss of parents and other family. Siblings who were "taken into care" together were often separated. Many report that it was often years, many years, before they saw their siblings again.

Aboriginal children carried additional burdens. Not only did they lose their family, they lost their connection to their traditional land and culture.

Apart from the harsh physical conditions many of the orphanage children suffered terrible physical and emotional treatment from those who were their carers. For some "carers", particularly from some religious denominations, there was a belief that physical violence and emotional deprivation were necessary to help a child to "grow" and mature into a responsible adult. For some institutions the accepted wisdom was that physical punishment was necessary to remove the "devil" from the naughty child. In other institutions some carers appear to have found perverted gratification from the physical abuse of children.

The inevitable conclusion is that the treatment of the children placed in orphanages was heartless and cruel. But for many children their circumstances were even worse. We now know that many thousands of children were sexually abused in these institutions. They often suffered both violence and sexual abuse.

Governments have a variety of mechanisms available to them when confronted by complex issues. The most powerful being a Royal Commission. They have been utilised to examine both specific issues, why did a particular event happen but also to consider issues which may have consequence for many people in our community.

A glance at a list of Commonwealth Royal Commissions confirm their utility for government across a broad range of social policy issues. Many of course were born of a political controversy. The first Royal Commission was in 1902 which examined the transport of troops from South Africa in the SS Drayton Grange – the most recent being the protection and detention of children in the Northern Territory.

When the Australian governments created the Child Abuse Royal Commission they defined a task of a breadth and complexity faced by few Royal Commissions. No doubt many Australians were aware of some of the problems. "Altar boy" stories were around when I was a schoolboy in the 1950s and 1960s. I knew that there were "migrant children" in homes in Australia but had no idea that they may have been the source of abuse. The cane or the thrown chalk board

duster were still the preferred methods of discipline. The continuing possibility of another World War and the impact of the Great Depression pervaded the community's approach to social order and national politics. Children's rights were rarely if ever mentioned.

We now know that tens of thousands of children have been sexually abused in many Australian institutions. We will never know the true number. Whatever the number it is a national tragedy, perpetrated over generations within many of our most trusted institutions.

The sexual abuse of children has occurred in almost every type of institution where children reside or attend for some educational, recreational, sporting, religious or cultural activity. Some institutions have had multiple abusers who sexually abused multiple children. It is not a case of a few 'rotten apples'. Society's major institutions have seriously failed. In many cases those failings have been exacerbated by a manifestly inadequate response to the abused person. The problems have been so widespread, and the nature of the abuse so heinous, that it is difficult to comprehend.

The sexual abuse of a child is a terrible crime. It is the greatest of personal violations. It is perpetrated against the most vulnerable in our community. It is a fundamental breach of the trust which children are entitled to place in adults. It is one of the most traumatic and potentially damaging experiences a child could have.

Over 15,000 survivors or their relatives have contacted the Royal Commission. By the time we conclude our work we expect to have heard more than 8,000 of their personal stories in private sessions. Over 1,000 survivors provided a written account of their experience, which has been read and responded to by a Commissioner. For victims and survivors, telling their stories has required great courage and determination. We have also heard from parents, spouses and siblings about the abuse of their relatives, many of whom have died, sometimes through suicide.

Most are stories of personal trauma and many are of personal tragedy. It is impossible not to share the anger many survivors have felt when we understand that they were so deeply betrayed by the people they were entitled to trust.

For many survivors talking about past events required them to revisit traumatic experiences that profoundly harmed them. Many spoke of having their innocence stolen, their childhood lost, their education and prospective career taken from them and their personal relationships damaged. For many sexual abuse is a trauma they can never escape. It can affect every aspect of their lives.

The prevalence of child sexual abuse is difficult to measure. It is believed that as many as 60% of victims never disclose their abuse and only 5-6% ever report to the authorities. When victims do disclose their abuse, it is often after significant delay, sometimes taking more than 20 years and sometimes many years more. Males are less likely to disclose their abuse, and are likely to take longer to disclose than females.

The assumption that various criminal codes and law enforcement agencies, including the judiciary, and I suspect the majority of the community, make is that sexual abuse with penetration leads to the worst outcomes for victims. The true picture is far more complex. The research evidence as well as the experience of mental health professionals finds conflicting support for the assumption that penetration leads to more severe impacts for victims.

One study found that children who had been touched in a sexual way without penetration were more anxious than those who had experienced penetrative abuse. Other research indicates that penetration can be a particular risk factor for later developing severe mental disturbance. The research also suggests that penetration is only one factor affecting the outcome of abuse. Other factors include the betrayal of trust, the amount of violence, and the resulting psychological coercion.

Abuse that is accompanied by other forms of maltreatment such as physical and emotional abuse and neglect tends to be related to worse outcomes for victims.

The sense of betrayal when a child is abused, even abuse which we would categorise as being at the low end of the scale of criminality, by a person who they may have trusted and the shock accompanying that betrayal can be the trigger for significant and sometimes catastrophic psychological trauma.

It is also important to appreciate that not all children who experience sexual abuse go on to experience poor outcomes in the short or long term. Recent reviews suggest that up to 50 percent of survivors do not experience clinically significant symptoms.

The long-term psychological impacts of abuse are the most commonly studied. This research consistently points to a strong relationship between child sexual abuse and poor mental health in later life. Victims of child sexual abuse are almost four times more likely to have contact with a public mental health facility compared with people in the general community. The emergence of symptoms may be significantly delayed. Many victims do not experience psychological problems until an event in their middle life or older ages triggers psychiatric illness which is conclusively diagnosed as being the consequence of their abuse as a child.

The most commonly reported impacts of child sexual abuse are post-traumatic stress disorder, sexualised behaviours and suicidality and self-harm. A recent study reported the prevalence of PTSD among a sample of sexual abuse survivors to be almost 50 per cent.

Other research suggests that victims of child sexual abuse are 18 times more likely than people in the general population to die as a result of self-harm, and almost 50 times more likely to die as a result of accidental drug overdose.

Child sexual abuse is associated with increased levels of neurological dysfunction. Exposure to abuse or neglect in childhood can modify regions of the brain as a consequence of excessive exposure to stress hormones and over-activation of neurotransmitter systems, especially if the exposure occurs during a key developmental period.

Victims of child sexual abuse are more likely to abuse alcohol and other drugs.

Guilt, shame and anger are commonly reported symptoms among victims of child sexual abuse. This is not surprising given the betrayal of trust and violation of personal boundaries involved in sexual abuse. These early experiences can affect the way children and then adults understand the motives and behaviours of other people and how they handle stressful life events. The affects can be life-long.

Research suggests that children who have been sexually abused are at a greater risk for behavioural problems, running away, vandalism and juvenile offending than those who have not been abused. Running away also makes children more likely to commit survival crimes including stealing and becoming prostitutes.

An often unrecognised impact of child sexual abuse is the adverse effect it can have on the human capital of victims and survivors. While there has been comparatively less research in this area, there is some evidence to suggest that victims of abuse experience poorer academic achievement: they are less likely to achieve secondary school qualifications, gain a higher school certificate, attend university and gain a university degree. Maltreatment more broadly has been shown to affect later earnings, with victims of child maltreatment more likely to have very low incomes (less than \$12,000 per year) compared with non-maltreated groups.

Each of the personal stories we have heard in private sessions has had a profound impact on the Commissioners and our staff. Without them we could not have done our work. Each survivor's story is important. These stories have allowed us to understand what has happened. It has been a privilege for the Commissioners to sit with and listen to survivors. The survivors are remarkable people with a common concern to do what they can to ensure that other children are not abused. They deserve our nation's thanks.

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agencies did not listen to children. They did not act on their concerns, leaving them in situations of danger. Our criminal justice system has created many barriers to the successful prosecution of alleged perpetrators. Investigation processes were inadequate and criminal procedures were inappropriate. Our civil law placed impossible barriers on survivors bringing claims against individual abusers and institutions.

Many institutions we examined did not have a culture where the best interests of children were the priority. Some leaders did not take responsibility for their institution's failure to protect children. Some leaders felt their primary responsibility was to protect the institution's reputation, and the accused person. Many did not recognise the impact this had on children. Poor practices, inadequate governance structures, failures to record and report complaints, or understating the seriousness of complaints, have been frequent.

The greatest number of alleged perpetrators and abused children, in Church managed facilities of whom we are aware, were in Roman Catholic institutions. In many religious institutions, in particular but not only the Catholic Church, the power afforded to people in religious ministry and the misplaced trust of parents combined with aspects of the culture, practices and attitudes within the institutions to create risks for children. Alleged perpetrators were often allowed to have access to children even when religious leaders knew they posed a danger. Alleged perpetrators were often transferred to another location where they had access to children but were never reported to police.

The failure to understand that the sexual abuse of a child was a crime with profound impacts for the victim, and not a mere moral failure capable of correction by contrition and penance (a view held, at least in the past by a number of religious leaders) is almost incomprehensible. It can only be explained by acknowledging that the culture of some religious institutions prioritised alleged perpetrators and institutional reputations over the safety of children.

In past generations the trust placed by some parents in institutions and their members meant that abusers were enabled and children's interests were compromised. The prevailing culture that 'children should be seen and not heard' resonated throughout residential care, religious institutions, schools and some homes. Their complaints of abuse either ignored or rejected, many children lost faith in adults and society's institutions.

It was obvious to the Commissioners early on in our work that in many institutions there were structural and cultural problems which had allowed and in some cases facilitated the sexual abuse of children. Some of those problems had the consequence that, when the abuse was brought to the notice of the institution, the response was inadequate and in many cases unjust. It may have been because of the exalted role of the offender, the desire to protect the reputation of the institution or just to protect an abuser who was also a friend. In some cases, the aggressive hand of the lawyer was engaged, ensuring that an appropriate and just response to a survivor was impossible.

Apart from the institutional imperative to protect individual perpetrators and thereby sustain the reputation and authority of the institution the Royal Commission received evidence that at least in Sydney and Melbourne there was for many years an understanding that the police would protect members of the church who may have offended. It reflected a more general community attitude that it would be detrimental to the entire community if "its pillars" were exposed as criminals. Assumed stability of society was seen to be more important than the protection of the child or justice for children through the prosecution of offenders.

The conjunction of events which the Royal Commission has examined can only be described as a national tragedy. Across many decades many institutions failed our children. Our child protection, criminal and civil justice systems let them down. Although the primary responsibility for the sexual abuse of a child lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and the mechanisms which were available to regulate and control aberrant behaviour failed.

The sexual abuse of children is not just a problem from the past. Child sexual abuse in institutions continues today. We were told of many cases of abuse that occurred in the last 10 to 15 years in a range of institutions, including schools, religious institutions, foster and kinship care, respite care, health and allied services, performing arts institutions, childcare centres and youth groups. We heard in private sessions from children as young as 7 years of age who had been recently abused. In some case studies into schools the abuse was so recent that the abused children are still attending school. We have learned that cultures and practices in some institutions allowed abuse to occur and continue.

The risks to children in different institutional contexts vary. The misuse of the internet has created significant risks to children that could never have been imagined 20 years ago. The incidents of adolescent sexual assault either in or in association with a school environment are increasing. There is a need for continuing development of effective government regulation, improvement in institutional governance and increasing community awareness of the problem. There is a need for the education of the community with respect to the risks to children. We must also develop our understanding of the needs of those who have been abused and be prepared to respond to those needs.

The Royal Commission has been concerned with the sexual abuse of children within institutions. It is important to remember that, notwithstanding the problems we have identified, the number of children who are sexually abused in familial or other circumstances far exceeds those who are abused in institutions.

Valuing children and their rights is the foundation of all child safe institutions. Improving child safe approaches in institutions will reduce the risk of sexual abuse. The best interests of children must be a primary consideration.

There may be leaders and members of some institutions who resent the intrusion of the Royal Commission into their affairs. However, if the problems we have identified are to be adequately addressed, changes must be made. There must be changes in the culture, structure and governance practices of institutions.

A failure to act will inevitably lead to the continuing sexual abuse of children, some of whom will suffer life-long harm. That harm can be devastating for the individual. It has a cost to the entire Australian community. Many survivors will require help with health, particularly mental health, housing and other public services.

Child sexual abuse in an institutional context has been and still will be committed in institutions which lack a healthy culture, where children have no rights, and adults are afforded protection by reason of their power, status or any theological practice.

You may be aware that the Royal Commission has already provided three policy reports to government. Working with Children Checks, Civil Litigation and Redress, and Criminal Justice. The final report, which will be given to the Governor-General on 15 December, apart from detailing our conclusions, will cover a broad range of issues relating to both government and institutions.

Both the Maralinga testing program and the sexual abuse of children in institutions raise questions about the fundamental values of our society. Can it be said that the nuclear testing program was consistent with the Universal Declaration of Human Rights. Was it consistent with the right to life, liberty and security of person that the Aborigines were removed from their land, their traditional culture and social fabric ignored and the health of some put at risk. Was their treatment consistent with a value that acknowledged that all humans are born free and equal in dignity.

There may be some who will ask whether these questions are relevant. They may say that it was imperative that Britain could contribute to the maintenance of world peace justifying the testing regime and its impact on the land and people. This was of course the accepted wisdom of the 1950s and 1960s although I doubt that those responsible for the tests assessed their compatibility with the Declaration of Human Rights.

The Maralinga experience also reminds us that our understanding of appropriate national values reflected in social policy may not lend itself to absolutes. They may vary over time. There was little, if any evidence, given to the Maralinga Royal Commission that the treatment of the Aboriginal people was considered inappropriate at the time. In a world where 'terra nullius' was the prevailing doctrine it was not difficult to decide that the Aboriginal lands should be appropriated for the good of the Commonwealth and the traditional owners displaced.

The Declaration of Human Rights was borne from the desire of many nations to embrace common values that underpin human life. The catastrophe of war and the horror of the holocaust made it imperative to attempt to bring order from chaos. I again pass by the question of enforceability. However as social attitudes evolve and change and scientific knowledge increases we must continually assess whether the actions of government, institutions and individuals accord with the generally accepted values of civilised nations. Those values find common expression in the Declaration.

The Report of the Child Sexual Abuse Royal Commission will describe the mistakes made by many institutions. Many of those mistakes are already documented in the case study reports previously provided to government. There will be 44 case study reports in all. They reflect a fraction of the occasions where some governments, institutions and individuals acted contrary to the "rights" afforded to children under the Convention on the Rights of the Child.

The history of both Maralinga and Child Abuse in Australia make plain that "rights" matter. Fundamental rights once identified and adopted by a community cannot be easily cast aside. We cannot expound the virtues of a free and just society and express them through a statement of accepted "rights" if we do not endeavour to ensure that the actions of government and our many institutions are consistent with those "rights".

Australia and New Zealand Association of Psychotherapy 30th Year Anniversary Conference

Sydney, New South Wales

30 September 2017

The sexual abuse of a child is a terrible crime. It is perpetrated against the most innocent in our community. It is the gravest of personal violations.

Countless thousands of children have been abused in many institutions in Australia. Many institutions have had multiple abusers who sexually abuse children. We must accept that it has been occurring in every generation. We know that the risk to children remains today. Although as our institutional structures evolve, and our means of social interaction change, the circumstances of risk may vary, it is a mistake to assume that abuse in institutions will not occur. There is a need for continuing development of effective government regulation, improvement in institutional governance and increasing community awareness of the problem. There is a need for the education of the community with respect to the risks to children. We must also develop our understanding of the needs of those who have been abused and be prepared to respond to those needs.

Over the past three decades there have been many inquiries in Australia which have been concerned with the sexual abuse of children. Inquiries have looked at institutional care, foster care, child migration, the child protection system in some of the states and territories as well as issues in Indigenous communities.

At least 80 previous inquiries have looked at issues directly relevant to the Royal Commission's work. That number reflects the difficulty the community and its institutions have in confronting and dealing with these issues.

The Royal Commission which I chair is the first inquiry to investigate institutional responses to child sexual abuse at a national level. Our work has been conducted through three pillars: private sessions, public hearings and policy and research.

As many of you would be aware, a Royal Commission typically works through a formal hearing process and commonly receives evidence in public. Conscious of the trauma and suffering associated with child sexual abuse and the difficulties many survivors have in telling their stories, the Commonwealth Parliament amended the *Royal Commissions Act 1902* to create a process called a private session.

Through this process a Commissioner receives the story of a survivor in private. It allows the Commissioner to bear witness on behalf of the community to the abuse the survivors suffered and the consequences in their lives.

By the time we finish in December this year we expect to have heard from about 8000 survivors in private sessions. For some survivors, the private session is the first time they have disclosed their abuse. For others, it is the first time in their life their story has been accepted. Many have been re-traumatised in seeking acknowledgement, justice or redress from the institutions in which they were abused. For many survivors, a private session is a powerful and healing experience.

It will be obvious to this audience that sharing their story of abuse has the potential to re-traumatise a survivor. For that reason, we were careful in developing our approach to private sessions. We sought professional advice from psychiatrists and psychologists on the likely impacts to survivors of telling their stories.

The initial contact with the Royal Commission is generally by telephone. The recipient of the call has been trained in responding to the survivor and our support processes are then engaged to assist the survivor. It is of primary importance that survivors clearly understand the steps involved in sharing their story. Sessions are tailored to meet individual needs. Privacy and confidentiality is ensured for all attendees.

Survivors can bring a support person with them to their session. They may opt for someone to speak on their behalf. They are invited to tell their story in a way that suits them, with minimal questioning or interruptions.

Our counsellors are available to work with people who need assistance to prepare for their private session. After the session, a counsellor is available to provide a debrief for all attendees. They check in again with the survivor a week after the session. If necessary counsellors will refer survivors and their families to external support and counselling services.

The Commission has now concluded its public hearings. We have conducted 57 in all. They have been extensively covered in the media and you will be aware of many of them. They have been important in allowing Commissioners to explore institutional and systemic issues. They are also the means by which the community can gain an understanding of the failures of the past and the challenges presented into the future.

The Commission's research and policy program has also been completed. We have published 50 research reports. The research explored many subjects, ranging from preventing institutional child sexual abuse to improving responses to victims and survivors. The reports are a resource which I hope other researchers will build upon in future years.

As many in this audience will know, the impacts of child sexual abuse can be profound and lifelong for survivors, their families, and communities. These issues do not necessarily develop immediately. Problems may emerge at later stages in life, and be triggered by significant life events.

The most commonly reported impacts described by survivors attending private sessions concern behaviour and mental health functioning. Many people report experiencing post-traumatic stress disorder, depression and anxiety. Some survivors have experienced episodes of dissociation during their private sessions with us. Other diagnosed disorders and symptoms such as nightmares, sleep disturbances, flashbacks, and dissociation, were frequently mentioned by survivors.

Survivors may use alcohol and other drugs to cope with the trauma of abuse. Substance abuse can cause other issues such as physical illness, relationship breakdown, problems with employment, and criminal behaviour. Some survivors described other addictive behaviours, including high levels of gambling as adults.

Survivors told us about episodes of self-harm, suicidal ideation and suicide attempts. Family members and partners spoke of a number of victims who had died by suicide.

Many survivors spoke about how abuse had impacted on the way they thought about their sexuality. Some survivors said it had interrupted their process of understanding their gender identity.

Research suggests that child sexual abuse may have impacts on the sexual behaviour of victims, both at the time and as adults. As well as having difficulties with physical intimacy, some survivors have told us that as a result of abuse they became sexually active early, engaged in unprotected sex, had multiple sexual partners, or exchanged sex for money, accommodation or drugs.

It will come as no surprise that sexual abuse may negatively affect not only survivors but their family members, partners, and others in the community.

Parents who learn that their child has been abused may be shocked and confused, and feel guilty for placing them in the care of the institution. It may affect their relationship with the child or partner, confidence in parenting, mental health, social connection, trust, and faith. In some cases it brings up memories of abuse they themselves experienced as children.

Many survivors told us their first disclosure was to their partner, who then became a primary source of strength and support. Partners can feel shock, grief, and distress, and the disclosure may cause insecurities in the relationship. A survivor's reluctance or refusal to participate in physical and sexual intimacy can also cause tension. In some cases relationships may become strained or break down.

Child sexual abuse can also have intergenerational impacts, affecting victims' children and grandchildren. We have been told how fears for their own children led to overprotective behaviours, and of concerns about their ability to parent. Some male survivors express concern about physical contact with their children, fearing they may become perpetrators themselves.

People abused in institutions may become distrustful and fearful of authority, including schools, police, welfare and government institutions.

Abuse may have long-term negative impacts on education, employment and economic security. Particularly if abuse happened at school, children may play truant, find it hard to learn, and leave school early. This lack of educational achievement can discourage or prevent them from pursuing other study or training.

Survivors may have trouble maintaining employment because of mental and physical health issues, problems with addiction, or trouble working under authority or with other people.

Mental health impacts, substance abuse, and poor education have led survivors to financial hardship and problems with housing. Some have experienced homelessness after running away to avoid abuse.

We have been told by Aboriginal and Torres Strait Islander survivors, and some survivors from culturally and linguistically diverse backgrounds about the impacts of child sexual abuse in an institutional context on their knowledge and practice of culture.

Child sexual abuse can be associated with a decline in faith or spirituality. This is particularly the case if the abuse occurs in a religious context, and in many cases will result in spiritual disengagement.

Speaking about sexual abuse, whether at the time it is happening or as adults, can be difficult for victims and survivors. The most common barrier mentioned by survivors in private sessions was feelings of shame and embarrassment. Victims may feel guilty and responsible for what happened to them. Other negative emotions such as fear, low self-esteem, humiliation, confusion, anger, hate, disgust, and rage may prevent both children and adults from speaking about abuse.

Young children may lack the knowledge or capacity to understand the abuse as being wrong or reportable. Low levels of education and knowledge about sex, sexuality and sexual abuse may also cause victims to doubt the nature of the abuse. For some victims this uncertainty may last into adulthood.

Children may not possess the skills to communicate abuse for a number of reasons, including age and having limited English language skills.

Decisions around disclosure may be further complicated for victims with disability. Problematic attitudes and myths may position people with disability as asexual, promiscuous, and likely to exaggerate. They may also be thought of as unable to give reliable and credible accounts, and as unlikely victims of sexual abuse.

Attitudes towards sexuality and gender may also affect disclosure. Beliefs about female sexuality, including expectations and limitations on sexual activity, may act as a barrier to disclosure for girls and women. The victim may be blamed for the abuse, and for disgracing themselves and their families. The loss of virginity may cause the girls and their families a loss of prestige and prospects.

Cultural norms around masculinity may impact on how boys view sexual abuse. Male victims have told us they feared that disclosing their abuse would lead others to think of them as feminine, subordinate and weak.

Both male and female victims who were abused by a perpetrator of the same gender may fear being labelled as homosexual and experiencing homophobia if they disclose, regardless of their actual sexual orientation. Some male victims who were abused by women feared the abuse may be mistakenly viewed as desirable or unlikely, and so minimised or denied.

Victims often assess the potential risks and benefits of disclosure before speaking about their experiences. They may not expect to be believed, or that disclosure will have negative consequences for them, their families and communities. Generational or societal views about children being predisposed to lie may lead victims to expect their account to be rejected.

Perpetrators may play on these fears, or manipulate children into thinking that other adults in their lives know of the abuse already and approve or condone it. A decision against disclosing may be made to protect parents from feelings of guilt or hurt, or fearing that the parent will act violently towards the perpetrator.

Sometimes perpetrators threaten to harm the child or their loved ones. They may use grooming tactics, including establishing an emotional connection and building trust with victims and their families, or giving gifts and privileges.

Frequently perpetrators will isolate or alienate the child from others, establishing a barrier between them and people they may otherwise disclose to or that could notice that something was wrong. They may also overtly blame a victim for the abuse, or promote a sense of shared responsibility or complicity with the victim.

In institutional settings perpetrators often hold a position of power and authority. In religious contexts perpetrators may be perceived as receiving their authority directly from God.

Institutions that have cultures that are violent, where physical and sexual abuse are pervasive, or that are isolated from the broader community, can inhibit disclosure. Victims may not be aware of how to report abuse. In some case the perpetrator is also the person responding to complaints.

Some survivors told us that sexual abuse was so prevalent and visible that they thought of it as part of life, and so did not report it. Many said that if they did disclose they were physically punished.

A culture that gives priority to the reputation of the institution over that of the safety of children in its care creates barriers to disclosure for victims and bystanders. For some victims knowing the sacrifices their families had made to send them to a prestigious institution left victims unwilling to report abuse there.

A victim's prior negative interactions with police and other authorities may inhibit them from disclosing. For Aboriginal and Torres Strait Islander people the history of the forced removal of children under protectionist legislation may influence subsequent interactions with child protection services. Many people in recently arrived communities, including asylum-seekers, may fear an authority's power to review their residency status.

These are only some of the barriers encountered by victims and survivors. Simply educating children to recognise abuse and instructing them to report it are not enough to mitigate these barriers.

Children need to have access to adults they can trust with sensitive issues. In some cases victims may disclose to their peers, and so children may require education and support regarding how to react to these disclosures.

Studies reinforce the need for institutional cultures where children, parents, carers and staff are alert to, and identify at an early stage, behaviours that are inappropriate or cause discomfort to children.

In case studies we learned of many instances of institutional employees and authorities not noticing a colleague's potentially concerning behaviour. In some examples where such behaviour was noticed, the possibility of grooming or sexual abuse was not considered.

Indicators of sexual abuse may go unrecognized or unquestioned for numerous reasons. Good institutional culture recognises the possibility that harm may occur and fosters a good environment in which vigilance, good practice, respectfulness and truth seeking are embedded goals.

Disclosure as adults may be triggered by events such as hearing media reports about the institution or perpetrator, the birth of a child, or a relationship breakdown. A number of survivors waited until their parents passed away. Others noticed they were not coping well emotionally and felt the need to speak about the abuse.

Many adults first disclosed after hearing about other victims, wanting to contribute to a safer future for children. Learning about other instances of child sexual abuse may help survivors identify their experiences as abuse, and challenging the belief that they are the only person it has happened to.

The process of disclosure varies between individuals. Victims may make partial disclosures over a period of time, revealing greater or lesser detail to different people in different periods. Even after making an initial disclosure many victims find it difficult to talk about these experiences.

Disclosure of child sexual abuse ought to be understood as a process rather than a single event. Many victims will continue to face decisions about disclosure for the rest of their lives.

The Royal Commission's terms of reference require us to address the issue of justice for victims. In our recently released Criminal Justice Report we examined the criminal justice system's response to child sexual abuse.

A comprehensive and informed understanding of child sexual abuse, its impacts, and factors influencing disclosure and reporting, is essential if the justice system is to respond effectively to victims.

Police, judges, and others involved in the judicial process will often apply their own knowledge which may be a less than complete understanding of the issues. It is important that the available knowledge be disseminated and understood. Professional knowledge from a wide variety of disciplines outside the law is essential.

Child sexual abuse offences are usually committed in private, without eyewitness or other evidence. As a result, unless the perpetrator confesses, which does occur, the complainant's account is the only direct evidence of the abuse.

It is critical to any investigation and prosecution of any sexual offence that the complainant is able to give clear and credible evidence. The quality of this evidence is dependent on how the survivor remembers the abuse, and how they are able to make sense of and articulate their memories.

Some adult survivors cannot recall the abuse they experienced as children in detail, or even at all. A lack of detailed memory of the abuse can present problems when reporting to police or other authorities such as compensation and redress schemes.

Understanding how human memory works in a general sense, and more specifically how memory may be affected for both child and adult survivors of child sexual abuse may inform the ways in which survivors are questioned, and help discern what they could reasonably be expected to remember of the event.

It can help in evaluating whether particular features, such as inconsistencies in accounts given over time, are a good indicator of unreliability. It may assist with deciding what assistance juries should be given in relation to assessing a complainant's evidence.

At each stage of the criminal justice process, the reliability of a victims' memory is assessed by people from diverse backgrounds including police officers, legal practitioners, judges and juries. Quite often, those involved in this process have a limited understanding of how memory works.

In our consultation paper on criminal justice, the Royal Commission highlighted areas where legal expectations seemed at odds with victims' memory capabilities. It became apparent to us that there was no clear and readily available research material summarising the contemporary psychological understanding of memory relevant to our work particularly with respect to criminal and civil justice.

For that reason, we commissioned a research project in relation to memory and the law. [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)] The report is available on our website. We also convened a public roundtable to discuss a complainant's memory of child sexual abuse and the law earlier this year.

The aim of this Memory Research was to inform readers outside the discipline of psychology about contemporary scientific research in relation to memory. It is an area of some controversy.

The research identifies two main ways of thinking about memory. The first is the 'common-sense memory belief system', built on casual observation and conceptions about memory. The second, the 'scientific memory belief system', is based on empirical research and a scientific understanding of memory^[1].

More often than not, when survivors engage with the criminal justice system it is the 'common sense' approach which is engaged. This is generally the case when victims deal with police, lawyers, juries and judges.

Judges spend many hours observing human behaviour. Inevitably, they form assumptions about complainants' behaviour and how memory works. These assumptions will generally have a 'common sense' foundation rather than be derived from research or scientific rigour.

It is easy to see how misconceptions about memory can influence outcomes in child sexual abuse cases.

Victims and survivors of child sexual abuse often find it difficult to provide adequate or accurate details in relation to the offending.

There are a number of reasons for this. The first is that 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.

Second, the delay in reporting may cause events to be wrongly attributed to a particular time or location when they in fact occurred earlier or later, or at another location.

Thirdly, the abuse may have occurred so often and in such similar circumstances, that the survivor is unable to describe specific or distinct occasions on which they were offended against.

These circumstances are common. But they do not indicate memory impairment or dishonesty.

Many of you here today will know more about memory than I do. Our memories are dynamic – we construct them, reconstruct them and retrieve them. It is not surprising then that they change over time. Our research identified three main cognitive processes that will affect survivors' memories and their ability to give evidence.

The first is encoding – a process that turns physical, sensory information into representations to be stored in memory. For information to be encoded, it must first have been experienced.

The second is retention or consolidation. This process involves the formation of long-term memories. It is an ongoing cycle, where memories are constantly refined and reconsolidated to form long-term memories.

The third is retrieval or recall. This process involves actively constructing information that has been previously encoded. Importantly for us, this retrieval is influenced by a person's language ability, how they attribute meaning to their experience over time, their emotions and motivations. Rehearsing a memory can make them stronger and easier to retrieve. Often people remember more information with each subsequent recall of a particular memory.

The interplay between these three processes will have a significant bearing on a survivor's pursuit of justice at each stage of the criminal justice process. From reporting the crime through to giving evidence, the way they encoded their original experience, consolidated and reconsolidated it and finally their circumstances when retrieving it will greatly influence the outcome.^[2]

Although often contrary to our 'common sense' understanding of memory, research has established a number of important propositions about a child's memory.

From an early age, children are able to establish reliable memories. The research indicates that from around the age of two they are able to re-enact singular events that they do not yet have the language skills to express. Children and teenagers are more likely than adults to be able to remember events that occurred between the ages of five to seven years.

Our research also suggests that a number of factors influence survivors' capacity to provide a coherent narrative about the sexual abuse they experienced as children. These include:

- the strength of their parental attachment
- their level of maturity and cultural background
- their coping style and the presence of psychopathology.^[3]

While most victims of child sexual abuse have ongoing memories of the experience, abuse memories – like other memories – are subject to forgetting and unconscious updating to fill in gaps with details either forgotten or not encoded.^[4]

Our research also tells us that children have a remarkable ability to recall a great deal of information – even a long time after the information was first encoded.

A child may only acknowledge the abuse they experienced at a very young age when they are older. Older children may have memories of sexual abuse but may be hesitant to disclose it. As the delay between the investigative interview and the case reaching court increases, children may experience external and internal pressures to recant or they may be exposed to misinformation.^[5]

Recent research findings show how stress and trauma can influence the features of retrieved memory. Key findings noted that not all abuse produces trauma, and not all trauma has deleterious effects on memory. How a victim coped, was supported and was skilled at autobiographical memory – and the nature of their traumatic symptomology – are all factors that can have a subtle impact on the apparent credibility and reliability of memories. Another important factor will be the nature of the support or stress a victim experienced while remembering the abusive events during an investigative interview or in court.^[6]

An important development now available in some jurisdictions to assist the court to receive effective evidence from a child is the use of intermediaries.

Intermediaries can be used to assist vulnerable witnesses at both the investigative stage and in preparation for a trial. The intermediary is generally a professional with expertise in the communication difficulties that have been identified with respect to the witness. They conduct an assessment of the communication skills of the witness and recommend to police, and later to the court, the appropriate communication style for that witness.

Complainants may be uniquely challenged by the court process. The advantage of an intermediary is that the judge is able to understand the capacity, including any relevant disability, of a particular complainant and is informed of the challenges that that complainant will face in the courtroom. It allows the intermediary to assist not only the judge, but the parties to ask questions that will best assist the complainant to give effective evidence. This objective is fundamental to any system of justice.

Both New South Wales and South Australia have commenced intermediary schemes that draw, to some extent, on the experience of the scheme in England and Wales.

The function of intermediaries is to improve the quality, including the reliability, of the evidence given to the court. This function is entirely consistent with the objective of making the criminal justice system accessible to children and increasing its capacity to produce safe convictions in child sexual abuse cases.^[7]

'Justice' for survivors is not confined to criminal convictions. It encompasses far more than that.

We realised early in our work that the issue of redress was critical. Survivors told us they urgently needed professional help to heal and to live a productive and fulfilled life. Many want the institution to be recognised to have failed them. They want it to be required to make a payment in recognition of that failure.

The profoundly damaging and often long lasting impacts experienced by many survivors of child sexual abuse provoke questions of how best to respond to people who have been abused. The Royal Commission's terms of reference require us to address the issue of justice for victims, including the provision of redress.

The consultation process for our 2015 Redress and Civil Litigation Report was extensive. We developed our recommendations with the benefit of information gathered in private sessions, public hearings, and private roundtables. We considered submissions received in response to the redress and civil litigation consultation paper, as well as the public hearing on this topic.

The core need identified was for a single national redress scheme, established by the Commonwealth Government but funded by the institutions in which survivors were abused. Non-government institutions would be required to contribute more than half the costs of redress.

We recommended that an appropriate model for redress should include three core elements: a direct personal response; counselling and psychological care; and monetary payments.

I am pleased as are the other Commissioners that the Commonwealth Government accepted our recommendation although limiting the maximum payment to \$150,000. The national scheme will commence on 1 July next year.

The direct personal response is important. Many survivors of sexual abuse have told us how important it is to them and to their sense of achieving justice. This response may include a genuine apology from the institution, an opportunity to meet with a senior representative of the institution and receive an acknowledgement of the abuse and its impacts, and a clear account of steps the institution has made to prevent such abuse happening again.

There have been redress schemes previously provided by some state governments although more limited than the national scheme. They have not generally included the funding of counselling and psychological care for survivors when required.

We heard in private sessions that counselling had helped many survivors process the abuse and feel stronger. Some found it helped them develop coping strategies, and to manage relationships.

Counselling assisted survivors to make meaning of the abuse. It helped with understanding the dynamics of abuse and why it happened, and the impacts of trauma on childhood development.

The trauma associated with sexual abuse cannot be cured at a specific time so that it will never reoccur. Survivors told us that some impacts may not appear for many years after the abuse. These impacts may be triggered by particular events or life stages, for example having children themselves or getting older and require increasing personal and institutional care. We recommend that counselling should be made available to survivors on a flexible basis throughout their lives as the need arises. The Commonwealth Government has accepted this recommendation.

Caring for people with complex trauma requires a flexible and individually focussed approach. We heard that some survivors prefer group therapies, while others find individual counselling more effective. They may choose to seek support through specialised sexual assault services, or counselling provided through the institution in which they were abused. Some prefer to go through broader support groups to access support.

The need for this care, and the most appropriate forms of care, can vary between survivors and life stages. Some survivors may need very intensive modes of therapy at times, then go years without requiring any mental health support. Others will require regular counselling throughout their lives. Still others may not ever engage with this kind of support, regardless of need.

Many of the general barriers to disclosing child sexual abuse, such as shame, stigma, mistrust and fear of authorities and institutions, and the expectation of a negative response, can impede a survivor's capacity to access support.

Survivors may have trouble identifying, accessing, and paying for appropriate services. Structural barriers such as short-term funding models and staffing issues can make it harder for survivors to access ongoing and affordable support.

We were told about health, mental health, and social work professional who lacked training in appropriate responses to trauma.

Some survivors spoke of receiving counselling that was damaging and retraumatising. They told us about providers dismissing or minimising the abuse and impacts, and blaming them for the abuse they experienced.

In some cases there was great focus on the details of the abuse but no discussion about the possibility of recovery. Some professionals did not ask about sexual abuse at all.

Literature suggests that general training in child sexual abuse is not adequate. This is consistent with what we have heard from survivors, support organisations, and experts.

We have recommended that psychological care should be provided by practitioners with the qualifications and expertise to work with clients with complex trauma. Professionals should be encouraged to engage with the appropriate training to increase their capabilities in dealing with clients with complex trauma. They should also be properly supported in this work. Finally, clients should be helped to find professionals with these capabilities.

We have a long way to go before we can confidently say our institutions are safer, children are better protected, and all of the people who have been abused and need help are receiving the treatment and support they need to lead productive lives.

Our work has shown that across many decades many institutions failed our children. Our child protection, criminal and civil justice systems let them down. Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and mechanisms which were available to regulate and control aberrant behaviour failed.

Now that the Royal Commission is completing its work it is the responsibility of governments and institutions to consider and respond to our conclusions and recommendations. The Commissioners are aware of many initiatives already implemented to better protect children and respond to the needs of survivors. Although, inevitably, the Royal Commission has looked at past events it is important that the momentum for change which has been initiated by the Royal Commission's work is not lost and that lasting changes to protect children are implemented.

- [1] Memory Research ES p 2 and Criminal Justice report p 234
- [2] Criminal Justice report p 236
- [3] From Memory Research summary p 3
- [4] From Memory Research summary p 2
- [5] Verbatim from Memory Research p 184
- [6] Verbatim from Memory Research Conclusion p 145
- [7] From ODPP speech, 2 August 2017

2017 ODPP Victims' Voices Conference: Making Stronger Connections

Criminal justice issues for the Royal Commission - Sydney, New South Wales

2 August 2017

In our system of criminal justice the victim of an offence is not given a central role. This was not always the case.

Historically the role of the state in the criminal trial process was very limited. Criminal disputes were considered private matters. Until the start of the 1400s, the laying of charges and the conduct of the prosecution was performed almost exclusively by the victim or their family.^[1]

Over the next three centuries the royal courts and officers of royal justice would exercise increasing influence in the criminal justice process, conducting both investigations and prosecutions.^[2] However, victims remained, in many cases, responsible for apprehending the offender, filing charges, collecting evidence and running the trial.^[3]

With the coming of the Industrial Revolution, and as cities became more densely populated, the criminal justice process began to change and ultimately became the modern adversarial trial.^[4] The rise in crime associated with increasingly dense populations led government to offer incentives for the apprehension of criminals.^[5] Miscarriages of justice resulted from increases in false evidence.^[6] Accused were regularly imprisoned before trial and, accordingly, faced difficulties in preparing a defence. The evidence against an accused was not disclosed before trial. They could not subpoena witnesses.^[7]

The disadvantaged position of the accused ultimately led to changes in the criminal trial process. The most significant change was to allow the accused to be legally represented.^[8] The presence of defence counsel encouraged the development of rules of evidence and the modern style of cross-examination. The core elements of the modern adversarial trial began to appear: the judge as neutral arbiter, the jury as passive observer, and defence counsel advising their clients to remain silent and put the prosecution to proof.^[9]

By the 1850s, most prosecutions would be conducted by police on behalf of victims.^[10] The first Director of Public Prosecutions was appointed in England and Wales in 1879. The role of the victim in the criminal justice process receded.

And so it remains today. With the trial conceptualized as a contest between the state and the accused, the role of the victim is largely limited to that of witness for the prosecution.

There have been some developments in more recent times, aimed at providing victims with greater consideration during court proceedings. These include the development of Declarations or Charters of Victims' Rights and the issuing of DPP Guidelines which make reference to the role that victims should play in relation to the exercise of various prosecutorial discretions.^[11]

Notwithstanding these developments the role of the victim in the criminal justice process remains for many an issue of concern. As the Victorian Law Reform Commission recently reported, research has revealed that:

Many victims feel that their role as a witness simultaneously requires them to re-live the trauma of the crime, while denying them the ability to voice the circumstances and impact of the crime in a way that is meaningful for them.

Just retelling a traumatic event can be a traumatizing experience. Victims have described the process of giving evidence as humiliating, degrading and manipulative, and as adding to the trauma of the original crime. The public nature of a criminal trial; the focus on what happened instead of the impact; aggressive cross-examination techniques; and rules of evidence that restrict the way in which a victim can communicate have all been identified as contributing to victims' distress and frustration.^[12]

The role of victims and survivors in the criminal justice process has been a central element of the Royal Commission's criminal justice work.

The criminal justice system is often viewed as not being effective in responding to crimes of sexual violence, including adult sexual assault and child sexual abuse. Research has identified that, in relation to these crimes, there are lower reporting rates, higher attrition rates, lower charging and prosecution rates,^[13] and, as I will discuss further a little later, lower conviction rates.

For some victims the adversarial criminal trial can have negative psychological consequences. Judith Herman, a psychiatrist with expertise in traumatic stress, has observed that 'if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.'^[14]

The concern that the criminal justice process disincentives victims of sexual offences from reporting is real. In case study 38 the witness who we have called CDR told us that, in relation to his psychologist:

While he didn't explicitly discourage me from reporting to police, I remember he emphasized the negative impact that the criminal justice process would have on my health and well-being.^[15]

In 2013, six judges of the High Court recognised these issues when, in *Munda v The Queen*, they said:

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.^[16]

Munda was an appeal against sentence for the offence of manslaughter. However, the principles stated are fundamental to a fair criminal justice system. They have particular resonance in relation to the sexual abuse of children.

There are few classes of offences in which the victim's role in criminal proceedings will be as central as sexual offences. If we, as a community, wish to better 'vindicate the dignity of ... victim[s]' and better protect 'the vulnerable against repetition of violence' we must encourage and support the participation of the victims in the criminal justice process. We must ensure our laws in relation to both substantive offences, procedure and evidence promote the conviction of those who are guilty and the acquittal of the innocent. And we must ensure that those who do offend against children are dealt with appropriately post-conviction.

The question for the Royal Commission has been whether these objectives are being achieved and, if not, what, if any, changes are necessary to achieve them.

It is helpful to have in mind some statistics the Royal Commission obtained from the NSW Bureau of Crime Statistics and Research – the authoritative source of criminal offence data. They concern the outcomes in trials of child sexual abuse offences in New South Wales. These statistics confirm the difficulties complainants of sexual assault, both children and adults, continue to face in the criminal justice system.

In New South Wales between July 2012 and June 2016 the conviction rate for all offences, including matters finalised by a guilty plea, was 89%. For child sexual assault offences (again including guilty pleas) the conviction rate was 60%. By comparison the conviction rate for assault was 70%, robbery 73% and illicit drugs 94%. One class of offences with a lower conviction rate was adult sexual assault with a conviction rate of only 50%. One possible reason for the lower rate for adult sexual offences is that in addition to the fact that these cases are, like child sexual assault cases, commonly word against word, consent will often be an issue.

The conviction rate for assault matters is higher than for child sexual assault matters. Although in many common assault matters, the identity of the offender may be in issue. This is rarely the case for child sexual assault matters.

In relation to child sexual assault offences which were finalised at a defended hearing or at trial there were 725 matters in NSW between July 2012 and June 2016. Of these the defendant was convicted of all relevant offences in 32% of matters. The defendant was convicted of some but not all relevant offences in 16% of matters. The defendant was convicted of no relevant offences in 52% of matters.

Amongst other matters these figures are interesting because they tend to confirm that jurors do have the capacity to correctly isolate and apply the evidence in relation to each individual count. They suggest that long held concerns in relation to jurors being overwhelmed by feelings of prejudice and revulsion towards the accused in trials of child sexual offences may be misplaced. This has implications for laws based on these assumptions.

The Commission also received data in respect of conviction rates in child sexual offence trials in the time during which the Commission has been in operation. It had been suggested that the Commission's work has had such a transformative effect on the mind of the general community that it is now much more difficult to secure an acquittal in relation to child sexual offences. The data tells a different story.

In 2012-2013, 73 child sexual assault matters were finalised at a defended hearing in the District Court. In that court, of course, charges in defended hearings, with some exceptions, are most likely to be heard before a jury. Of those 73 matters the defendant was convicted of all relevant offences in 29% of matters, convicted of some but not all relevant offences in 27% of matters, and convicted of no relevant offence in 44% of matters.

By contrast, in 2015-2016, 142 matters were finalised at a defended hearing. That is almost double the number of matters. However, in relation to conviction rates the defendant was convicted of all relevant offences in 24% of matters, convicted of some but not all relevant offences in 23% of matters, and convicted of no relevant offences in 54% of matters.

Based on these figures, although many more complainants are coming forward, the chances of an offender being acquitted have risen rather than fallen.

Given that it appears, at least in New South Wales, that more victims are now entering the criminal justice system, the challenge for all of us is to ensure that, within the confines of the law and relevant professional obligations, the response of the criminal justice system achieves justice not only for the accused but also for victims. Justice for victims of child sexual abuse can never be obtained without their willing participation in the criminal justice process. It is increasingly apparent that changes to the process of, and evidence admitted at, a criminal trial may be necessary to achieve this end.

Best evidence of children

In both private sessions and public hearings we have heard from many survivors who have told us of the significant challenges they faced as complainants in the criminal justice system. We have also heard from parents with respect to the difficulties they have encountered in relation to their child's interaction with the criminal justice system. Some have questioned the utility of their child's participation. Others have expressed frustration at their child's exclusion.

The dilemma faced by many parents of children was clearly articulated by a mother who gave evidence in the criminal justice public hearing. She said:

The present criminal justice system forces parents of child abuse victims to decide between two options. Parents can either expose their children to the trauma of participating in the criminal justice system in order to achieve justice by putting paedophiles in jail to prevent harm to further children. Alternatively, parents can allow paedophiles to remain free in order to prevent the criminal justice system from causing further harm to their own child. In my mind, that will never be a fair and just system.^[17]

From survivors whose allegations proceeded to a trial we have heard of the difficulties they faced in giving evidence. Some have characterised their cross-examination as 'as bad as the abuse itself'. For those in this room who have participated in trials of child sexual offences those observations will not be a surprise. Complainants in sexual assault cases, children and people with disability have for some time been recognised as vulnerable witnesses.

Of particular concern to the Royal Commission are children with disability. High levels of institutional contact and dependency on professionals for treatment and care place children with disability at a higher risk of sexual abuse. As a result of their need for specialised care and support, children with disability are often segregated from mainstream society. This segregation can create isolation and increased vulnerability.

There is a risk that if young children and children with disability are unable to give evidence in criminal proceedings perpetrators of sexual abuse will be able to offend against some of the most vulnerable members of society with impunity.

Vulnerable witnesses face particular challenges in an adversarial system. They will often be the only source of direct evidence against the accused. Their credibility will loom large in the trial. It is almost always the central issue.

As this audience knows our criminal justice system is designed so that the trial is effectively a contest between the state and the accused, from which there emerges a winner and a loser. There is a real danger that, in the eyes of the community, the legitimacy of the criminal justice system will be undermined if the system is not concerned with revealing the truth as to what really happened but rather the winner of a contest.

This danger was discussed by Spigelman CJ in his Sir Maurice Byers lecture in 2011. He said:

The recognition that the principal purpose of legal proceedings is to identify the true factual circumstances of any matter in dispute is of fundamental significance for the administration of justice and the maintenance of public confidence in that system. If this recognition constitutes a modification of the adversary system, it is a modification that should be made.

The public will never accept that “justice” can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.^[18]

There is little encouragement for survivors to participate in the criminal justice system if it does not have truth as its fundamental objective. Why risk potential re-traumatisation, a risk which materialises in many cases, to merely be a player in a sophisticated lawyers’ game?

Part of the justification of the adversarial system, although not its declared objective, is that it contains within it mechanisms through which the truth will emerge. One such mechanism, theoretically at least is cross-examination. It is the means through which it is accepted that the tribunal of fact is able to evaluate the truth of the witness’ evidence.

Most if not all lawyers, and indeed some non-lawyers, would be familiar with Wigmore’s characterisation of cross-examination as ‘beyond any doubt the greatest legal engine ever invented for the discovery of truth’.^[19] Few, however, may be aware of the remarks that follow. Those remarks recognised the potential cross-examination has to distort the truth:

However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate its wonderful power, there has probably never been a moment’s doubt upon this point in the mind of a lawyer of experience. “You can do anything” said Wendell Phillips, “with a bayonet – except sit on it.” A lawyer can do anything with cross-examination – if he is skilful enough not to impale his own cause upon it. He may... - make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control.^[20]

Wigmore is making the point that although cross-examination can be a powerful tool for discerning the truth it also can be an effective weapon to distort it. His remedy is to stress the need for the judge to ensure that cross-examination is appropriate in the circumstances. For judges trained in the adversarial paradigm this can be a challenging task. Judges may have different views about the appropriate level of intervention.

Research commissioned by the Royal Commission found that, in an analysis of 120 transcripts of complainant’s evidence in trials of child sexual offences, the number of times the judge intervened during the complainant’s cross-examination ranged between 0 and 162.^[21] The average number of interventions was 10.78.^[22] There were also jurisdictional differences. In

NSW the average number of judicial interventions during the cross-examination of a child complainant was 25.87.^[23] For Victoria the average was 19.67 and for Western Australia the average was 6.53.^[24] For the purposes of this study the child complainants were defined to be between 6 and 13.^[25]

In an article on cross-examination available on the NSW Public Defenders website the Deputy Senior Public Defender describes cross-examination in the following way:

The purpose of cross-examination is to extract from a Crown witness, evidence which will weaken the Crown case, or evidence which will strengthen the defence case. I hope I am not misquoting Gleeson CJ when he memorably criticised cross-examiners who seemed to believe that they were members of the 'Junior League of Truth Seekers'. If the answer to the question you are thinking about asking will not weaken the Crown case, or strengthen the defence case, don't ask it.^[26]

The purpose of my referring to this quote is not to criticise the author. Indeed it is a piece of valuable practical advice and accords with defence counsel's professional obligations. But it does confirm the objectives of the participants in the process, and consequently, the objectives of the system itself. That purpose is to better the opposition in a contest. Witness' risk being caught in the cross-fire. In this context it is unsurprising that victims in the adversarial criminal trial have been described as as 'evidentiary cannon fodder'.^[27]

It may seem obvious that a child, and in particular a child with disability, will have greater difficulty answering questions asked by a well-educated adult trained in the art of questioning than an adult ordinarily might. If it is so obvious, however, why has the system failed to appropriately respond for so long? It is an unfortunate, yet inescapable reality, that children will be the victims of very serious crimes. Yet they will be forced to seek justice in a system designed not for them, but for adults.

In order for cross-examination to effectively investigate the truth the questions asked must be understood by the witness. The maturity or other relevant capacity of the witness matters. Questioning that prevents the complainant from giving their evidence effectively may lead to significant injustices.

Recent research published by the Royal Commission confirms the potential for injustice to occur. In their report entitled 'Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainant's Evidence' the researchers reported that the most reliable and accurate memory reports are generally provided in response to free recall prompts.^[28] Free recall is a narrative response to an open-ended prompt, provided in any order and without the help of cues.^[29] An example of a free recall prompt would be 'tell me what happened'.

Leading questions, questions posing options for agreement and other forms of suggestive questioning tend to lead to errors.^[30] Cross-examination style questions that do not include free-recall prompts tend to impair the memory reports of victims at the time of retrieval. This is particular so for pre-schoolers, primary school children and distressed witnesses.^[31] It is obvious that many, if not most, complainants of child sexual abuse will fall within these categories.

In relation to children, the researchers reported that being questioned repeatedly on the same topic may lead children to infer that their previous answer was incorrect. As a result they may doubt and change their answers.^[32] This, in turn, leads to both inaccuracies, which are unhelpful for the tribunal of fact, and inconsistencies, which provide fertile ground for defence counsel, in the child's evidence.

Rather than operating as a mechanism for uncovering the truth the nature of cross-examination and the stress that accompanies it may impair a witness' ability to recall events as accurately as they otherwise might. The emotional distress, shame and fear experienced by a complainant at the time they are interviewed by police or during court proceedings can impair their ability to retrieve relevant memories.^[33] Interviewing techniques which reduce stress at the time of recall may facilitate more accurate and complete memory reports.^[34] The adversarial trial in the traditional form does not appear well designed to facilitate accurate recall by witnesses giving evidence.

In a statement that challenges both the old common law assumption in relation to the unreliability of children, and the capacity of the adversarial system to accommodate them, the Court of Appeal of England and Wales in *B* said:

We emphasise that in our collective experience the age of a witness is not determinative of his or her ability to give truthful and accurate evidence. Like some adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and are to be treated and judged for what they are, not what they will, in years ahead, grow to be.^[35]

In the course of its criminal justice work the Royal Commission has explored processes and procedures that may alleviate some of the problems faced by children including those with disability. Those processes are often termed 'special measures'.

New South Wales first introduced measures to assist complainants to give evidence in the early 1990s. Since that time all Australian jurisdictions have introduced a range of measures to assist complainants by modifying the usual procedures for giving evidence. These measures have eroded some aspects of the adversarial system.

A number of special measures are now commonly available in criminal proceedings, although their use varies across jurisdictions. These include using pre-recorded interviews with the complainant as evidence in chief; the use of closed circuit television, so that the complainant is able to give evidence from a room away from the courtroom; allowing the complainant to have a support person with them whilst giving evidence; the use of screens or partitions if the complainant is giving evidence in court; and, in some cases particularly, when young children are giving evidence, the judge and counsel will remove their wigs and robes.

Two important developments, now available in some jurisdictions, are intermediaries and special hearings.

Intermediaries can be used to assist vulnerable witnesses at both the investigative stage and in preparation for a trial. The intermediary is generally a professional with expertise in the communication difficulties that have been identified with respect to the witness. They conduct an assessment of the communication skills of the witness and recommend to police, and later to the court, the appropriate communication style for that witness.

Ideally, a 'ground rules' hearing occurs before the witness' evidence is taken. At that hearing the intermediary can advise the court with respect to the witness' requirements. The judge will indicate to counsel which recommendations of the intermediary are to be adopted. The intermediary will sit with the witness during their evidence, and may intervene where they believe a communication difficulty is likely to occur. Importantly, the intermediary's role is not to rephrase or summarise the witness' evidence.

A witness intermediary scheme was piloted in England and Wales in 2004-05.

The pilot was successful and the scheme was rolled out nationally.

Under the England and Wales scheme intermediaries undertake formal training in relation to their role in the justice system and are bound by a code of practice.

Of the intermediary scheme the former Lord Chief Justice of England and Wales Lord Judge, a very experienced criminal lawyer, has said:

The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court. And they are used at much earlier stages in the process, to flag up potential difficulties in advance of the trial. These can then be addressed in during the trial process.

... Their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial. In some cases juries have convicted, and in others there have been acquittals. But the use of intermediaries has meant that a number of those who are among the most vulnerable in the community may now be heard when before they would have been forced to remain silent.^[36]

There are further benefits in the use of intermediaries. The first is that the complainant is no longer dependent on the judge having kept up with the most recent learnings in respect of children and other vulnerable witnesses. The second is that even in circumstances where the judge has appraised him or herself of the relevant knowledge, that knowledge will inevitably be of a general character. We know, of course, that children develop differently. A particular child may in some capacity, for example language, be more or less developed than the average child of that age. And persons diagnosed with a particular cognitive impairment may not have that impairment manifest in precisely the same way. Complainants may be uniquely challenged by the court process. The advantage of an intermediary is that the judge is able to understand the capacity, including any relevant disability, of a particular complainant and is informed of the challenges that that complainant will face in the courtroom. It allows the intermediary to assist not only the judge, but the parties to ask questions that will best assist the complainant to give effective evidence. This objective is fundamental to any system of justice.

Both New South Wales and South Australia have commenced intermediary schemes that draw, to some extent, on the experience of the scheme in England and Wales.

The function of intermediaries is to improve the quality, including the reliability, of the evidence given to the court. This function is entirely consistent with the objective of making the criminal justice system accessible to children and increasing its capacity to produce safe convictions in child sexual abuse cases.

An additional way of dealing with the challenges some sexual assault complainants face is through the use of special hearings. Special hearings provide for the evidence of complainants – that is, evidence in chief, cross-examination and re-examination – to be recorded before the trial, in the absence of the jury.

Special hearings may facilitate the more effective use of other special measures. For example, if the cross-examination takes place in the absence of a jury, prosecution counsel, the judge, and, if relevant, an intermediary, may feel more comfortable intervening to object or suggest alternative wordings of questions to suit the language and cognitive abilities of the witness. These interventions can then be edited out of the final video that is presented to a jury. Full recording of the complainant's evidence may also reduce delay for the complainant and the stress and anxiety that is likely to arise if the complainant has to be ready to give evidence on one or more occasions before the court is ready for the evidence to be given. There is no doubt that the full benefit will only be realised if the special hearing is conducted at an early stage of the proceedings.

The giving of evidence at an early stage means that the memory of the complainant is fresh and for this reason more likely to be accurate.^[37] Importantly, having given evidence the complainant may then undergo counselling which may otherwise have to be postponed to minimise the risk that his or her evidence becomes tainted.^[38] The complainant's participation in proceedings is brought to an end at an earlier stage allowing the focus to shift to the complainant's recovery.^[39] And in the context of proceedings in which the assessment of a complainant's credibility is often determinative, a complainant's emotional response to an alleged offence is recorded closer to the time of the allegation.^[40]

A further advantage is that pre-recording may assist in the identification of the key issues in the trial which may lead to earlier resolution of cases.

Particularisation

A further difficulty for survivors in child sexual abuse cases is the requirement for the prosecution to provide particulars in relation to the offence or offences charged. The requirement to provide particulars, undoubtedly reasonable, is required to ensure the accused knows the case against him or her.^[41]

Victims and survivors of child sexual abuse often find it difficult to provide adequate or accurate details in relation to the offending. There are a number of reasons. The first is that 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.

Second, delay in reporting may cause events to be wrongly attributed to a particular time or location when they in fact occurred earlier or later, or at another location.

A third reason is that the abuse may have occurred so often and in such similar circumstances, that the victim or survivor is unable to describe specific or distinct occasions in which they were offended against.

The memory research I referred to earlier confirms this. The researchers reported that it is the core features and meaning of an event that are most likely remembered.^[42] Other information is less well preserved. They stated that 'for example, core features of sexual abuse such as the nature of the abusive acts and the perpetrator may be remembered but details such as the time, the colour of someone's clothing, or what was said may be forgotten.'^[43]

The researchers also reported that for repeated or familiar events, a person generally develops a schema for the core or gist features of that type of experience.^[44] A schema is a mental template which represents some aspect of experience and is based on prior experience and memory. It is structured to facilitate perception, cognition, the drawing of inferences or the interpretation of new information in terms of existing knowledge.^[45] Once that schema exists, the specific details of every instance of that type of experience may not be encoded or consolidated. As a consequence they cannot be recalled.^[46]

The challenges in relation to particularising a series of repeated events which occurred some time ago are obvious. The result is a cruel paradox: the greater the regularity with which a child is offended against, the more difficult it can become to charge and prosecute the offender.

Parliaments have attempted to remedy this situation through the introduction of legislation to create persistent sexual abuse offences. This first occurred in Queensland in 1989. By the end of the 1990s an offence of this type had been introduced in each of the states and territories. There have, however, been challenges in relation to these offences.

The Queensland offence as originally enacted was an offence of ‘maintaining a sexual relationship with a child/young person.’^[47] The legislation required the prosecution to prove the sexual relationship by showing three distinct occasions of unlawful sexual conduct each proved beyond reasonable doubt.

The offence was considered by the High Court in 1997 in *KBT v The Queen*.^[48] The Court held that the offence required the jury to be satisfied beyond reasonable doubt as to the commission of the same three acts which constituted relevant sexual offences.^[49]

It follows that in order for the jury to agree that the same three acts of sexual offending have been proved, one must be able to identify with some precision each of the three discrete acts or occasions of offending necessary to make up the charge. As a consequence the problem was not removed.

In most Australian jurisdictions the relevant offence continues to require proof of the occurrence of three or more unlawful sexual acts.^[50] It is not surprising, given the decision in *KBT*, that in most, but not all, of these jurisdictions the persistent sexual abuse offence is rarely charged. Data provided to the Royal Commission indicates it is rarely charged in the two largest jurisdictions: New South Wales and Victoria.

In Queensland, however, the persistent sexual abuse offence is regularly charged. In that state the offence has been reframed in order to address the concerns identified in *KBT*. Under the Queensland legislation the actus reus of the offence is the unlawful sexual relationship, not particular unlawful acts.

The amended section 229B defines an unlawful sexual relationship as one that involves more than one unlawful act over any period. All members of the jury are required to be satisfied beyond reasonable doubt that the evidence established that an unlawful sexual relationship with the child involving unlawful sexual acts existed. Importantly, however, s 229B(4) provides that:

- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence and;
- (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
- (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

Section 229B has been considered at appellate level in Queensland on a number of occasions. The Court's decisions establish that the key element of the offence is the unlawful sexual relationship.^[51] The indicia of maintaining a relationship include its alleged duration, the number of acts and the nature of the acts alleged.^[52] The Court was satisfied that the trial's judge's power to ensure a fair trial is maintained under the section,^[53] and that the section does not remove the court's power to set aside a conviction on the grounds that there was a miscarriage of justice where the accused was given so little information about the charge as to render it impractical to prepare a defence.^[54] The Court of Appeal has also held that s 229B(4) does not offend Chapter III of the Commonwealth Constitution.^[55]

Application for special leave to appeal to the High Court in relation to convictions under s 229B have been twice refused. Once in 2008 and again in 2012.

The Royal Commission is considering the law in relation to persistent sexual offences as part of its criminal justice work. It is unacceptable, in our view, that the criminal justice system should accept a situation in which children who have suffered the most extensive abuse may be those who are less able to receive justice in the criminal courts.

Further improvements

The Royal Commission has also considered a number of options designed to improve the criminal system's response to victims and survivors of child sexual abuse.

One option is that state and territory governments should develop a standard document for complainants and other witnesses to better inform them about the process of giving evidence. Currently complainants may not be given information about what to expect in court, and in particular the process of cross-examination. Complainants may not be given this information because of fears the prosecution may be accused of 'coaching' witnesses. The Commission has

considered whether survivors would be assisted by being provided standardised information about matters including the purpose of giving evidence in chief, the purpose of cross-examination, the detail in which they are likely to be required to give their evidence, the obligations of defence counsel to challenge their evidence, and particularly difficult questions that might be used in cross-examination.

The Royal Commission has also considered whether victims and survivors should be provided better information about the role of victim impact statements in the sentencing process. This could include information in relation to understanding the sort of content that may result in objection being taken to some or all of the statement.

Conclusion

The Royal Commission's recommendations in relation to criminal justice issues are an opportunity for the entire Australian community to come together through their Parliaments to make changes to ensure that the High Court's sentiments in Munda are achieved.

There are likely to be some, perhaps many, practitioners and judges, who will be resistant change. Perhaps their thinking may be assisted by reflecting on a comment by Lord Judge, who said:

Just because a change does not coincide with the way we have always done things does not mean that it should be rejected ... Do proposed changes cause unfair prejudice to the defendant? If so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective.^[56]

The Royal Commission provided its report in relation to criminal justice to government last week

- [1] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015) [2.15], [2.18].
- [2] *Ibid* [2.19].
- [3] *Ibid* [2.19]-[2.20].
- [4] *Ibid* [2.24].
- [5] *Ibid* [2.26].
- [6] *Ibid*.
- [7] *Ibid* [2.28].
- [8] *Ibid* [2.29].
- [9] *Ibid*.
- [10] *Ibid* [2.30].
- [11] Garkawe, 'The Role of the Victim During Criminal Court Proceedings' (1994) 17 *University of New South Wales Law Journal* 598-599.
- [12] Victorian Law Reform Commission, above n 1, [2.64]-[2.65]
- [13] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal justice* (Consultation Paper, September 2016) 70.
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State funeral of Anthony Foster

Eulogy - Melbourne, Victoria

7 June 2017

Anthony Foster leaves a legacy for all Australians. We can see his legacy in the changes which many institutions have made for the safety of children in their care. We can see it in the changes institutions are making in their response to survivors of abuse. More changes will certainly follow.

The sexual abuse of a child is a terrible crime. It is perpetrated against the most innocent in our community. It strips the child of that innocence. It can and often does damage the child's ability to develop and live a happy and fulfilled life. It is the gravest of personal violations.

The abuse of a child can not only damage that child. In many cases it inflicts trauma on the close relatives and friends of that child. The distress, anguish, and sense of betrayal felt by the parents of a child who has been abused can never be fully appreciated other than by those who must suffer it. Can any of us who have not been in Anthony's position imagine the sense of loss experienced by a parent who has entrusted their child to an institution only to find that a member of that institution has fundamentally betrayed that trust? Can we imagine the anger the parent feels when the abuser denies their crime or the institution seeks to avoid responsibility for it?

The Commissioners have spoken with many parents who have struggled with their own trauma as they sought to assist their children to recover and live productive lives. Some parents carry unresolved anger. Understandably overcome by grief their capacity to contribute to others lives may be diminished. For some their grief and anger becomes a motivating force to advocate for their own children, and for all abused children. They seek a just response. And they seek that institutions resolve to bring lasting change to ensure that other children will not suffer as their own have done.

Anthony Foster is such a person. Anthony loved all of his children. A love he shared with Chrissie. The suffering which they experienced as a result of the abuse of Emma and Katie is documented in Chrissie's book 'Hell on the way to Heaven.' Many people, quite understandably, would have been destroyed by that suffering. Many would have been overwhelmed by what they saw as the uncaring response of an institution to the needs of their children. But Anthony, with Chrissie, did not let this happen. Instead they resolved to devote their lives to both care for their own children and to advocate for all children who may have been abused.

After Anthony had given evidence before the Royal Commission and we had reported in relation to the Melbourne Response I came to know him at a personal level. In every conversation I had with Anthony his central concern was for the welfare of others. In his quiet and articulate way he talked to me of his concerns that institutions and all their leaders should accept that terrible

events had happened. And he was determined to do what he could to ensure that institutions and government made an appropriate and just response.

Others have documented Anthony's contribution to the decision to hold the Victorian Parliamentary Inquiry. This was of course followed by the decision by governments to create a national Royal Commission. Anthony knew when pressing for these inquiries that the needs of those who had been sexually abused as children extended far beyond his immediate family. He understood that unless the resources of a national inquiry were employed there was little chance that the Australian community would come to understand what had occurred. No doubt there were some, perhaps many, who thought the Royal Commission was not necessary. Anthony knew otherwise.

Anthony understood that the sexual abuse of children was a whole of community issue. He believed that crimes had been committed against children by many people in many institutions across Australia. He believed that those institutions had put their reputations before the welfare of children. He believed they had covered up to avoid scandal. He believed that they had failed by breaching the fundamental trust that the community's parents had placed in them.

Whilst caring for their own family Anthony, together with Chrissie, devoted their lives to seeking justice for all victims. They spent countless days at Royal Commission hearings. They participated in roundtables. They provided us with considered submissions. They were always caring and thoughtful for others.

In as much as the Royal Commission has been tasked with bearing witness to the suffering of children who have been abused Anthony, with Chrissie, accepted an obligation to bear witness on behalf of survivors.

There were many occasions during our public hearings when some of those present were overcome by their own memories or the grief carried by others. Anthony was always alert to their suffering and ready to provide a comforting word or gentle embrace. Many have directly felt the warmth of the acknowledgement from someone who truly understood their pain.

Anthony and Chrissie attended our public hearings so often it was not a surprise that when our hearings were coming to an end they came from Melbourne to take their usual place in the room.

Anthony will remain in the memory of all the Commissioners and Commission staff. There are many others who have walked beside him. They have been encouraged, supported and inspired by Anthony.

Anthony was a loving and good man. He was gentle, courageous and caring.

Anthony's legacy will be realised by a just response for all those who were abused in an institution. This must include a commitment by the Australian community that these terrible crimes should never happen again.

National Council of Churches

Addressing the National Council of Churches - Safe as churches? conference - Sydney, New South Wales

16 May 2017

Introduction

Thank you for inviting me to address your conference today. I am sorry that I am unable to deliver this address in person. Unfortunately the other demands on my time have made that impossible.

I last spoke to you in September 2015. Since that time the Royal Commission had held a further 25 public hearings. That brings the total number of public hearings to 57. Our public hearing program concluded in March this year with a discussion of the nature, cause and impact of child sexual abuse.

Our public hearing program was extensive. We examined more than 1.2 million documents. We heard evidence from more than 1,200 witnesses. The Commissioners sat for more than 440 days. Hearings have been held in every state and territory and in a number of regional centres and towns.

In addition to the hearings in which we sought to understand the conduct of individuals and institutions, the Commission has conducted public hearings with a policy focus. These include Case study 24 – Out of Home Care and Case studies 38 and 46 into Criminal Justice issues.

Towards the end of last year and through the first few months of this year we held a series of review hearings. A number of institutions, including some faith based institutions, who had previously been examined in a public hearing were invited back to discuss their responses to our findings.

The Commission also held a hearing into the current policies and procedures of Commonwealth, state and territory governments in relation to child protection and child safety standards, including responding to allegations of child sexual abuse.

Public hearings have a significant role in driving institutional and regulatory change. Many institutions who have not themselves been the subject of a public hearing have already responded to the problems revealed in similar institutions and have implemented changes or reviews to improve the safety of children in their care.

As of this week 33 case study reports have been published. The remaining case study reports will be published in the coming months.

The Commissioners have continued to hold private sessions with survivors. For those of you who may not be aware a private session provides an opportunity for a survivor, or a survivor's family member, to tell their story of abuse to a Commissioner in a protected and supportive environment.

It is the primary way for the Commissioners to bear witness to the abuse and trauma inflicted on children who suffered in an institutional context. The Commissioners have now held more than 6,700 private sessions.

Some of you may be aware of our extensive research and policy development program. This program has had the assistance of national and international experts across many disciplines. The program has four broad areas of focus: prevention, identification, response and justice for victims.

The Commission has published 44 research reports. But for the resources given to the Royal Commission much of this research would never have been undertaken.

These reports are an important part of the Royal Commission's legacy. We have also published consultation papers in relation to criminal justice, records and record-keeping, out of home care, complaint handling and response and redress and civil litigation.

I have now referred 2,025 matters to authorities, almost always the police, with a view to the possible prosecution of an offender. At this stage we have been advised that there have been 127 prosecutions commenced as a result of these referrals. However, the volume of referrals is so great it will take some time before all the matters are processed and prosecutions commenced.

When I spoke to you last time the Royal Commission's final report on Working with Children Checks had recently been published. That report contains 36 recommendations. It is available on the Commission's website. The report in relation to redress and civil litigation was released in September 2015. It contains 99 recommendations.

In the redress report the Commissioners said that in order for any redress process to deliver justice it is essential that there be equal access and equal treatment for survivors – regardless of the location, operator, type, or continued existence or assets of the institution in which they were abused.

For this reason the Commissioners recommended that the Australian Government should establish a single national redress scheme.

We said appropriate redress should include three elements:

1. A direct personal response by the institution, including an apology, an opportunity for the survivor to meet with a senior representative of the institution and an assurance as to the steps the institution has taken, or will take, to protect against further abuse.
2. Access to therapeutic counselling and psychological care as needed throughout a survivor's life.
3. Modest monetary payments as a tangible means of recognising the wrong survivors have suffered.

We recommended a set of principles by which redress should be funded. Those principles were:

- The institution in which the abuse is alleged or accepted to have occurred should fund the cost of redress.
- Where an applicant alleges or is accepted to have experienced abuse in more than one institution, the redress scheme should apportion the cost of funding redress between the relevant institutions.
- Where the institution in which the abuse is accepted to have occurred no longer exists and the institution was part of a larger group of institutions or where there is a successor to the institution, the group of institutions or the successor institution should fund the cost of redress.

We also recommended that the Australian Government and the state and territory governments should be the 'funder of last resort' with governments meeting any shortfall of funding for the scheme. We do not anticipate there will be a large number of claims in which will require the resources of funder of last resort.

The Commissioners made the following observation about the responsibilities of governments.

'Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution they were part of, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. The broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse.'

On 4 November 2016 the Minister for Social Services, Christian Porter, announced the establishment of the Commonwealth Redress Scheme. In that announcement Minister Porter said that 'any state, any territory, any church, any charity, who has responsibility in this area will be able to opt-in to the scheme'. Institutions would opt-in on the basis that they fund the cost of their own eligible redress claims.

The Commissioners understand that many churches and religious groups have indicated that they are positively disposed to the Commonwealth's scheme. This is very pleasing to hear. The need for an effective response for survivors who have been abused in a religious context is undoubted.

The need to provide for their ongoing psychological and psychiatric care is urgent. The risk that a survivor's compromised health may have tragic consequences is real. It is unacceptable that we should not do what we can to minimize that risk.

The recommendations made by the Commissioners in relation to civil litigation focused on four topics: limitation periods, the duty of institutions, identifying a proper defendant and principles for managing litigation. A number of our recommendations in relation to civil litigation have already been taken up by state and territory governments.

New South Wales, Victoria, Queensland and the ACT have legislation that gives effect to the Commission's recommendations in relation to limitation periods. In fact in NSW and Victoria the amendments made to the Statute of Limitations go beyond the recommendations of the Royal Commission.

We understand that Tasmania is in the process of drafting a bill that will give effect to the Commission's recommendations and that the NT has approved the preparation of a bill to that effect. Western Australia told us they are committed to introducing laws to give effect to the Commission's recommendations in relation to limitation periods.

Queensland have now introduced model litigant guidelines specifically for child sexual abuse claims that apply in litigation to which it is a party. They join NSW and Victoria in having such guidelines.

In relation to the Commission's recommendations with respect to the duty of care of institutions Victoria has introduced the Wrongs Amendment (Organisational Child Abuse) Bill to parliament.

The Bill provides that in a proceeding on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, by a person associated with that organisation, the organisation is presumed to have breached its duty of care unless it can prove that it took reasonable precautions to prevent the abuse. It will be for the institution to demonstrate they took reasonable steps to prevent the abuse of the child.

Child sexual abuse in religious institutions – private sessions information

As I mentioned earlier we have now heard from more than 6,700 survivors in a private session. To date we have been able to analyse the information given to us by 6,302 of those survivors.

32 percent of survivors who have attended a private session reported abuse in a government institution. 10 percent of survivors reported abuse in a secular institution. 59 percent reported abuse in a religious institution.

37 percent of survivors who have attended a private session reported abuse in a Catholic Church institution. 9 percent reported abuse in an Anglican institution, 4 percent in a Salvation Army institution, 3 percent in an other protestant institution, 2 percent in a Presbyterian and Reformed churches institution, 1.3 percent in a Uniting Church institution, 1 percent in a Jehovah's Witness institution, 0.6 percent in a Baptist Church, 0.5 percent in a Pentecostal churches' institution, 0.4 percent in a Churches of Christ institution, 0.4 percent in a Seventh Day Adventist institution and 0.3 percent in a Lutheran Church institution.

70 percent of attendees who reported child sexual abuse in a religious institution were male. 30 percent were female.

The average age that attendees report they were abused in a religious institution for the first time is 10.3 years.

More than half, that is 51 percent, of the survivors who have attended a private session who reported abuse in a religious institution report being abused by a person in religious ministry. Twenty-two percent reported abuse by a teacher in a religious institution.

Criminal justice

The Royal Commission's criminal justice project is significant in scale. The issues which we must consider cover a broad reach.

One issue discussed in a number of case studies is the circumstance where abuse although known to a responsible person in an institution was not reported to the authorities. The criminal law does not generally impose a positive duty requiring a person to act. However, although unusual it is not unprecedented.

We know that it is often very difficult for victims to disclose or report what is happening to them at the time. We also know that children are particularly vulnerable. They are likely to have less opportunities to report to police and are less able to take effective steps to protect themselves.

We also know the perpetrators of child sexual abuse may have multiple victims and may offend against particular victims over lengthy periods of time. Failure to report abuse to the authorities may leave a child, or perhaps a number of children, exposed to abuse.

Reporting offences may be particularly important in an institutional context. Institutions may be conflicted. They have a duty to protect children. They also have an interest in protecting the reputation of the institution. Imposing criminal liability for failure to report is likely to encourage reporting despite the damage this may inflict on the institution's reputation.

Both New South Wales and Victoria have offences relating to failure to report. In New South Wales there is an offence of concealing a serious indictable offence. In Victoria there is an offence of failure to disclose a child sexual offence.

The Royal Commission is considering whether it should recommend that other states and territories follow the lead of New South Wales and Victoria, and if so, what might be the appropriate terms of that offence.

Special vulnerability

As I mentioned the majority of the allegations we have received have emerged from faith-based institutions. This inevitably raises the question "why". Why is it that in institutions which proclaim faith in God and embrace the highest ethical and moral principles so many children are abused?

Why do some people who proclaim their faith and have accepted a life of religious endeavour breach their obligations to children? Is there something in either the structure, culture, or personal qualities of members of the churches and other religious bodies, whether lay or ordained, that gives them such a prominent place amongst offenders?

One matter is clear. When children are placed in residential facilities, whether an orphanage or a boarding school, access is more readily available to those with evil intent.

This is true of any residential facility. For that reason, as we know, the overwhelming majority of children are abused in a family context. The problems within families were excluded from our inquiry but remain a complex and tragic problem which our society has not yet adequately addressed.

Faith based institutions also provide access to children. That access is available in an environment in which a child's spiritual development occurs and is nurtured by adults.

Children are brought up to respect, and to accept, the instruction of adults. It is how children learn, both about themselves and society. The child will always be vulnerable to the abusing adult.

Where the adult is perceived by the child to be a manifestation of spiritual good, in some cases especially chosen by God, and able to instruct the child about the mysteries of life, death, belief in God, and good and evil an extra level of vulnerability may be present.

The Commissioners have heard many times from survivors who as children were told that if they tell anyone about the abuse they will be punished by God and may go to hell. Both physical punishment of the child and alienation from God are threats of which we repeatedly hear. Sometimes the child was told that the abuse afflicted upon them is God's will.

Remarkably some have been told it is the way God wants them to learn about sex. The calculated exploitation of a child's innocence is difficult to comprehend. The power afforded to the adult by the institution is corrupted and used to abuse the child.

The special attention which an abusing priest, pastor or religious person may have paid to the abused child is commonly welcomed by the child's parent.

This will also be true of a child's sporting coach, lay teacher or dance instructor. That attention may engender a sense in the developing child that they are special. When the nurturing of a child's spiritual development becomes entangled with affection and misplaced adoration of the abuser, both the risk to the child and the impact of the abuse when it occurs increases.

The loss of a spiritual life for a survivor is common, although not universal. For many survivors this loss compounds the burdens they must carry for the rest of their lives.

A pubescent or post-pubescent child seeking to understand their own identity and place in the world, including their sexual identity, is vulnerable to the affections and special treatment of the adult leading ultimately to disillusionment and, for many, lifelong destructive consequences.

The Royal Commission has undertaken the task of identifying specific elements that institutions should adopt in order to be child-safe. This has involved an extensive analysis of available the research and other evidence gathered by the Royal Commission.

A preliminary list of elements considered to be fundamental to a child safe institution was identified. These elements were then tested in a research study that obtained feedback from a panel of 40 Australian and international experts. The panel agreed that the elements identified were relevant, reliable and achievable. The research, *Key elements of a childsafe organization research study – Final Report* is available on our website.

The Royal Commission's final report, which will be delivered to government in December this year, will include an entire volume on making institutions child safe. However, by publishing the research and disseminating the child safe elements early, institutions are able to work on strengthening their child safe practices without having to wait for our final recommendations.

The ten elements that we have identified are:

- Child safety is embedded in institutional leadership, governance and culture
- Children participate in decisions affecting them and are taken seriously
- Families and communities are informed and involved
- Equity is promoted and diversity respected
- People working with children are suitable and supported
- Processes to respond to complaints of child sexual abuse are child focused
- Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training
- Physical and online environments minimize the opportunity for abuse to occur
- Implementation of child safe standards is continually reviewed and improved
- Policies and procedures document how the organization is child safe.

These elements apply to all institutions. It is incumbent on the leaders of those institutions to adopt these principles and ensure that they are followed. All who have leadership responsibility must inform themselves about the principles and ensure that their institution puts them into practice.

I am often asked by people whether I believe that much will change as a result of the Royal Commission. Do I think it has been worthwhile? Will institutions change?

Although in the early days of the Royal Commission the question could not be answered I am now able to confidently give a positive answer.

As we have continued with our work we can already see fundamental change occurring in the way institutions are managed with the introduction of many practices designed to protect the safety of children. Although there may be some people in some institutions who resent the intrusion by the Royal Commission into their institution the overwhelming response is positive.

What we can be certain of is that any institution which does not acknowledge past wrongs and the need for change will lose the confidence of Australians. The community will not accept the legitimacy of any institution which does not give priority to the safety and wellbeing of the children which for which it has responsibility.

I have previously said that the Royal Commission's work has changed the conversation about child sexual abuse in Australia. As the Commission moves towards the completion of its work in December this year the task which is posed to all of you is to continue to ensure that the institution to which you belong takes part in that conversation. Institutions must make the changes necessary to ensure, as far as may be possible, children are not abused in the future.

Modern Prosecutor Conference

Seeking 'justice for victims' (Part II) - Melbourne, Victoria

13 April 2017

Introduction

In Part I of this speech, which I gave in Sydney last month, I focused on issues for victims of child sexual abuse when complainants in criminal proceedings. These issues relate to two areas of the law. Firstly, the substantive law in relation to offences, and secondly, criminal procedure.

Today has a different focus. I will discuss some of the challenges for victims as they proceed through the criminal justice system. I will also touch on issues with respect to the sentencing of sexual offenders.

I began the Sydney speech with a discussion of the difficulties sexual assault complainants have faced in the criminal justice system. Many of these difficulties arose from what are now recognised as unfounded assumptions that judges have made about the behaviour and reliability of sexual assault complainants. These assumptions found expression in jury directions given by judges.

Many of these directions have now been modified or displaced by legislation. The legislative changes reflect a better understanding of the dynamics of sexual assault, including child sexual assault, and the impact these offences have on victims.

However research demonstrates that, still today, incorrect assumptions about victims of child sexual abuse are common in the general community. The Royal Commission is considering the need for jury directions which contain educative information about children and their response to child sexual abuse.

A further difficulty faced by some survivors in the criminal justice system concerns the requirement for particularisation. For a number of reasons victims and survivors of child sexual abuse often find it difficult to provide adequate details of the offence.

One significant problem is that the abuse may have occurred so frequently and in such similar circumstances, that victims are unable to describe distinct or specific occasions on which they were abused. Ironically, this can mean that the most extensive offending can be the most difficult to prosecute.

The Commission is considering ways in which offences for persistent sexual abuse could be better defined so as to overcome these difficulties.

In the Sydney speech I also discussed one of the most significant criminal justice issues facing the Royal Commission – tendency and coincidence evidence and joint trials. This law is complex and, as I am sure you know, has developed differently across Australia.

Different states currently deal with this evidence in different ways. Even where the same legislative provisions apply to govern the admission of tendency and coincidence evidence differences have emerged in the way in which the legislation is interpreted.

I spoke of some of the history of the law in relation to similar fact evidence and the assumptions on which the exclusionary rule is founded. I also discussed some of the key findings of the jury research study commissioned by the Royal Commission which challenges many of these assumptions.

There are likely to be some, perhaps many, practitioners and judges, who are resistant to change. Perhaps their thinking may be assisted by reflecting on a comment by the former Lord Chief Justice of England and Wales, Lord Judge, who said:

Just because a change does not coincide with the way we have always done things does not mean that it should be rejected. We should be considering each individual child as the individual he or she is, at the age and with the levels of maturity that he or she has, alleging whatever form of crime he or she has been the victim. Do proposed changes cause unfair prejudice to the defendant? If so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective.^[1]

Although I understand that my previous speech has been made available to you, before I turn to today's issues I would like to draw your attention to some of the statistics contained in the earlier speech. They are to say the least thought provoking. They concern outcomes in trials of child sexual abuse offences in New South Wales. I do not know what the position would be in Victoria.

The information comes from the NSW Bureau of Crime Statistics and Research which is the authoritative source for criminal offence data. It confirms the difficulties complainants of sexual assault, both children and adults, continue to face in the criminal justice system.

In New South Wales between July 2012 and June 2016 the conviction rate for all offences, including matters finalised by a guilty plea, was 89%. For child sexual assault offences (again including guilty pleas) the conviction rate was 60%. By comparison the conviction rate for assault was 70%, robbery 73% and illicit drugs 94%. One class of offences with a lower conviction rate was adult sexual assault with a conviction rate of only 50%.

One possible reason for the lower rate for adult sexual offences is that in addition to the fact that these cases are, like child sexual assault cases, commonly word against word, consent will often be an issue.

The conviction rate for assault matters is higher than for child sexual assault matters. That is notwithstanding that in many common assault matters, the identity of the offender may be in issue. This is rarely the case for child sexual assault matters.

In relation to child sexual assault offences which were finalised at a defended hearing or at trial there were 725 matters in NSW between July 2012 and June 2016. Of these the defendant was convicted of all relevant offences in 32% of matters. The defendant was convicted of some but not all relevant offences in 16% of matters. The defendant was convicted of no relevant offences in 52% of matters.

Amongst other matters these figures are interesting because they tend to confirm that jurors do have the capacity to correctly isolate and apply the evidence in relation to each individual count.

They suggest that long held concerns in relation to jurors being overwhelmed by feelings of prejudice and revulsion towards the accused in trials of child sexual offences may be overblown. This has implications for laws based on these assumptions. They are consistent with our jury research which I discussed in the earlier speech.

The Commission also received data in respect of conviction rates in child sexual offence trials in the time during which the Commission has been in operation. It had been suggested that the Commission's work has had such a transformative effect on the mind of the general community that it is now much more difficult to secure an acquittal in relation to child sexual offences. The data tells a different story.

In 2012-2013, 73 child sexual assault matters were finalised at a defended hearing in the District Court. In that court, of course, charges in defended hearings, with some exceptions, are most likely to be heard before a jury. Of those 73 matters the defendant was convicted of all relevant offences in 29% of matters, convicted of some but not all relevant offences in 27% of matters, and convicted of no relevant offence in 44% of matters.

By contrast, in 2015-2016, 142 matters were finalised at a defended hearing. That is almost double the number of matters. However, in relation to conviction rates the defendant was convicted of all relevant offences in 24% of matters, convicted of some but not all relevant offences in 23% of matters, and convicted of no relevant offences in 54% of matters.

Based on these figures, although many more complainants are coming forward, the chances of an offender being acquitted have risen rather than fallen.

Given that it appears, at least in New South Wales, that more victims are now entering the criminal justice system, the challenge for all of us is to ensure that, within the confines of the law and relevant professional obligations, the response of the criminal justice system achieves justice not only for the accused but also for victims.

Justice for victims of child sexual abuse can never be obtained without their willing participation in the criminal justice process. It is increasingly apparent that changes to the process of, and evidence admitted at, a criminal trial may be necessary to achieve this end.

Best evidence in relation to children

In both private sessions and public hearings we have heard from many survivors who have told us of the significant challenges they faced as complainants in the criminal justice system.

We have also heard from parents with respect to the difficulties they have encountered in relation to their child's interaction with the criminal justice system. Some have questioned the utility of their child's participation. Others have expressed frustration at their child's exclusion.

The dilemma faced by many parents of children was clearly articulated by a mother who gave evidence in the criminal justice public hearing. She said:

The present criminal justice system forces parents of child abuse victims to decide between two options. Parents can either expose their children to the trauma of participating in the criminal justice system in order to achieve justice by putting paedophiles in jail to prevent harm to further children. Alternatively, parents can allow paedophiles to remain free in order to prevent the criminal justice system from causing further harm to their own child. In my mind, that will never be a fair and just system.^[2]

From survivors whose allegations proceeded to a trial we have heard of the difficulties they faced in giving evidence. Some have characterised their cross-examination as 'as bad as the abuse itself'. Many describe being re-traumatised by the process.

For those in this room who have participated in trials of child sexual offences those observations will not be a surprise. Complainants in sexual assault cases, children and people with disability have for some time been recognised as vulnerable witnesses.

Of particular concern to the Royal Commission are children with disability. High levels of institutional contact and dependency on professionals for treatment and care place children with disability at a higher risk of sexual abuse.

As a result of their need for specialised care and support, children with disability are often segregated from mainstream society. This segregation can create isolation and increased vulnerability.

There is a risk that if young children and children with disability are unable to give evidence in criminal proceedings perpetrators of sexual abuse will be able to offend against some of the most vulnerable members of society with impunity.

Vulnerable witnesses face particular challenges in an adversarial system. They are greater for complainants of child sexual offences as they will often be the only source of direct evidence against the accused. Their credibility will loom large in the trial. It is almost always the central issue.

As this audience knows our criminal justice system is designed so that the trial is effectively a contest, from which there emerges a winner and a loser. Chief Justice Barwick characterised it in the following way:

Under our law a criminal trial ... is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or cross-examination shall be asked; always of course subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law.^[3]

There is a real danger that, in the eyes of the community, the legitimacy of the criminal justice system will be undermined if it is perceived that the system is not concerned with revealing the truth as to what really happened.

This danger was discussed by Spigelman CJ in his Sir Maurice Byers lecture in 2011. He said:

The recognition that the principal purpose of legal proceedings is to identify the true factual circumstances of any matter in dispute is of fundamental significance for the administration of justice and the maintenance of public confidence in that system. If this recognition constitutes a modification of the adversary system, it is a modification that should be made.

The public will never accept that “justice” can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.^[4]

There is little encouragement for survivors to participate in the criminal justice system if it does not have truth as its fundamental objective. Why risk potential re-traumatisation, a risk which materialises in many cases, to merely be a player in a sophisticated lawyers’ game?

Part of the justification of the adversarial system, although not its declared objective, is that it contains within it mechanisms through which the truth will emerge. One such mechanism, theoretically at least is cross-examination. It is the means through which it is accepted that the tribunal of fact is able to evaluate the truth of the witness’ evidence.

Most if not all lawyers, and indeed some non-lawyers, would be familiar with Wigmore's characterisation of cross-examination as 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'.^[5] Few, however, may be aware of the remarks that follow. Those remarks recognised the potential cross-examination has to distort the truth:

However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. "You can do anything" said Wendell Phillips, "with a bayonet – except sit on it." A lawyer can do anything with cross-examination – if he is skilful enough not to impale his own cause upon it. He may... - make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control.^[6]

Wigmore is making the point that although cross-examination can be a powerful tool for discerning the truth it also can be an effective weapon to distort it.

His remedy is to stress the need for the judge to ensure that cross-examination is appropriate in the circumstances. For judges trained in the adversarial paradigm this can be a challenging task. Judges may have different views about the appropriate level of intervention.

Research commissioned by the Royal Commission found that, in an analysis of 120 transcripts of complainant's evidence in trials of child sexual offences, the number of times the judge intervened during the complainant's cross-examination ranged between 0 and 162.^[7]

The average number of interventions was 10.78.^[8] There were also jurisdictional differences. In NSW the average number of judicial interventions during the cross-examination of a child complainant was 25.87.^[9] For Victoria the average was 19.67 and for Western Australia the average was 6.53.^[10]

For the purposes of this study the child complainants were defined to be between 6 and 13.^[11]

In an article on cross-examination available on the NSW Public Defenders website the Deputy Senior Public Defender describes cross-examination in the following way:

The purpose of cross-examination is to extract from a Crown witness, evidence which will weaken the Crown case, or evidence which will strengthen the defence case. I hope I am not misquoting Gleeson CJ when he memorably criticised cross-examiners who seemed to believe that they were members of the 'Junior League of Truth Seekers'. If the answer to the question you are thinking about asking will not weaken the Crown case, or strengthen the defence case, don't ask it.^[12]

The purpose of my referring to this quote is not to criticise the author. Indeed it is a piece of valuable practical advice and accords with defence counsel's professional obligations. But it does confirm the objectives of the participants in the process, and consequently, the objectives of the system itself. That purpose is to better the opposition in a contest. Witness' risk being caught in the cross-fire.

It may seem obvious that a child, and in particular a child with disability, will have greater difficulty answering questions asked by a well-educated adult trained in the art of questioning than an adult ordinarily might. If it is so obvious, however, why has the system failed to appropriately respond for so long? It is an unfortunate, yet inescapable reality, that children will be the victims of very serious crimes. Yet they will be forced to seek justice in a system designed not for them, but for adults.

In order for cross-examination to effectively investigate the truth the questions asked must be understood by the witness. The maturity or other relevant capacity of the witness matters. Questioning that prevents the complainant from giving their evidence effectively may lead to significant injustices.

In a statement that challenges both the old common law assumption in relation to the unreliability of children, and the capacity of the adversarial system to accommodate them, the Court of Appeal of England and Wales in *B* said:

We emphasise that in our collective experience the age of a witness is not determinative of his or her ability to give truthful and accurate evidence. Like some adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and are to be treated and judged for what they are, not what they will, in years ahead, grow to be.^[13]

In the course of its criminal justice work the Royal Commission is exploring processes and procedures that may alleviate some of the problems faced by children including those with disability. Those processes are often termed 'special measures'.

New South Wales first introduced measures to assist complainants to give evidence in the early 1990s. Since that time all Australian jurisdictions have introduced a range of measures to assist complainants by modifying the usual procedures for giving evidence. These measures have eroded some aspects of the adversarial system.

A number of special measures are now commonly available in criminal proceedings, although their use varies across jurisdictions.

These include using pre-recorded interviews with the complainant as evidence in chief; the use of closed circuit television, so that the complainant is able to give evidence from a room away from the courtroom; allowing the complainant to have a support person with them whilst giving evidence; the use of screens or partitions if the complainant is giving evidence in court; and, in some cases particularly, when young children are giving evidence, the judge and counsel will remove their wigs and robes.

Two important developments, now available in some jurisdictions, are intermediaries and special hearings.

Intermediaries can be used to assist vulnerable witnesses at both the investigative stage and in preparation for a trial. The intermediary is generally a professional with expertise in the communication difficulties that have been identified with respect to the witness.

They conduct an assessment of the communication skills of the witness and recommend to police, and later to the court, the appropriate communication style for that witness.

Ideally, a 'ground rules' hearing occurs before the witness' evidence is taken. At that hearing the intermediary can advise the court with respect to the witness' requirements. The judge will indicate to counsel which recommendations of the intermediary are to be adopted.

The intermediary will sit with the witness during their evidence, and may intervene where they believe a communication difficulty is likely to occur. Importantly, the intermediary's role is not to rephrase or summarise the witness' evidence.

A witness intermediary scheme was piloted in England and Wales in 2004-05.

The pilot was successful and the scheme was rolled out nationally.

Under the England and Wales scheme intermediaries undertake formal training in relation to their role in the justice system and are bound by a code of practice.

Of the intermediary scheme Lord Judge, a very experienced criminal lawyer, has said:

The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court. And they are used at much earlier stages in the process, to flag up potential difficulties in advance of the trial. These can then be addressed in during the trial process.

... Their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial. In some cases juries have convicted, and in others there have been acquittals. But the use of intermediaries has meant that a number of those who are among the most vulnerable in the community may now be heard when before they would have been forced to remain silent.^[14]

There are further benefits in the use of intermediaries. The first is that the complainant is no longer dependent on the judge having kept up with the most recent learnings in respect of children and other vulnerable witnesses. The second is that even in circumstances where the judge has appraised him or herself of the relevant knowledge, that knowledge will inevitably be of a general character.

We know, of course, that children develop differently. A particular child may in some capacity, for example language, be more or less developed than the average child of that age. And persons diagnosed with a particular cognitive impairment may not have that impairment manifest in precisely the same way. Complainants may be uniquely challenged by the court process.

The advantage of an intermediary is that the judge is able to understand the capacity, including any relevant disability, of a particular complainant and is informed of the challenges that that complainant will face in the courtroom. It allows the intermediary to assist not only the judge, but the parties to ask questions that will best assist the complainant to give effective evidence.

This objective is fundamental to any system of justice.

Both New South Wales and South Australia have commenced intermediary schemes that draw, to some extent, on the experience of the scheme in England and Wales.

The function of intermediaries is to improve the quality, including the reliability, of the evidence given to the court. This function is entirely consistent with the objective of making the criminal justice system accessible to children and increasing its capacity to produce safe convictions in child sexual abuse cases.

An additional way of dealing with the challenges some sexual assault complainants face is through the use of special hearings. Special hearings provide for the evidence of complainants – that is, evidence in chief, cross-examination and re-examination – to be recorded before the trial, in the absence of the jury.

I understand that special hearings are available in Victoria. They are used in criminal proceedings relating to a charge for a sexual offence^[15] where, at the time of the commencement of the proceedings, the complainant is under 18 or has a cognitive impairment.

Special hearings may facilitate the more effective use of other special measures. For example, if the cross-examination takes place in the absence of a jury, prosecution counsel, the judge, and, if relevant, an intermediary, may feel more comfortable intervening to object or suggest alternative wordings of questions to suit the language and cognitive abilities of the witness. These interventions can then be edited out of the final video that is presented to a jury.

Full recording of the complainant's evidence may also reduce delay for the complainant and the stress and anxiety that is likely to arise if the complainant has to be ready to give evidence on one or more occasions before the court is ready for the evidence to be given. There is no doubt that the full benefit will only be realised if the special hearing is conducted at an early stage of the proceedings.

The giving of evidence at an early stage means that the memory of the complainant is fresh and for this reason more likely to be accurate.^[16] Importantly, having given evidence the complainant may then undergo counselling which may otherwise have to be postponed to minimise the risk that his or her evidence becomes tainted.^[17]

The complainant's participation in proceedings is brought to an end at an earlier stage allowing the focus to shift to the complainant's recovery.^[18] And in the context of proceedings in which the assessment of a complainant's credibility is often determinative, a complainant's emotional response to an alleged offence is recorded closer to the time of the allegation.^[19]

A further advantage is that pre-recording may assist in the identification of the key issues in the trial which may lead to earlier resolution of cases.

Prosecution responses and oversight

The establishment of independent prosecuting offices has been described as 'one of the more significant improvements to the criminal justice system in this country in the 20th century.'^[20]

In *Price v Ferris*, then President Kirby described the object of having a Director of Public Prosecutions as 'to ensure a high degree of independence in the vital task of making prosecution decisions in exercising prosecution discretions.'^[21]

The position of Director of Public Prosecutions was first established in Australia, in Victoria in 1982. The move in Victoria followed the establishment of a Crown Advocate under the Tasmanian *Crown Advocate Act 1973*, in Tasmania. The Tasmanian Act, however, did not provide guidance on the relationship between the Crown Advocate, the Attorney-General and the Solicitor-General.^[22] This was seen as a significant flaw.

The Victorian *Director of Public Prosecutions Act 1982* transferred most of the Attorney's functions in matters of criminal prosecution to the Director's office.^[23] The second reading speech to the relevant Victorian bill stated:^[24]

A major aim of the Bill is to remove any suggestion that prosecutions in this State or, indeed the failure to launch prosecutions can be the subject of political pressure.

Shortly before the creation of independent ODPPs the Australian Law Reform Commission described the process of prosecution in Australia at both state and federal level as 'probably the most secretive, least understood and poorly documented aspect of the administration of criminal justice.'^[25]

It is fair to say that through the establishment, and subsequent activities, of ODPPs the degree of transparency, and the capacity for scrutiny, of the prosecution process has increased. These activities have included the promulgation and publication of Director's Guidelines.

Director's guidelines are, probably, the primary mechanism in this country for the control of prosecutorial discretion. However, they are only part of the picture.

A report by the Australian Institute of Criminology almost a quarter of a century after the creation of independent prosecuting agencies, stated the following:

The exercise of prosecutorial discretion is one of the most important but least understood aspects in the administration of criminal justice. The considerable discretionary powers vested in prosecutors employed by the state and territory Offices of the Director of Public Prosecutions are exercised in accordance with prosecution policies and guidelines, *but the decision making process is rarely subject to external scrutiny.*^[26]

This lack of external scrutiny or oversight has emerged as an issue for the Royal Commission.

Significant problems in the decision-making process of ODPPs have emerged as a systemic issue in our case study work. Whilst this issue was not anticipated the Commission has been required to examine the issue of DPP complaints and oversight mechanisms.

For those of you who may not be aware in Case Study 15 the Commissioners found inadequacies in the processes of the ODPP of New South Wales. The Commissioners further found that the Queensland DPP failed to comply with its own guidelines, including in relation to consulting with complainants.

Concerns in relation to DPP processes emerged again in Case Study 17 in relation to the Northern Territory ODDP. The Commissioners again found noncompliance with the Northern Territory DPP guidelines in relation to a decision to discontinue a prosecution.

These case studies confirm that the mere existence of the Director's guidelines is not sufficient to ensure the level of accountability and transparency the community might reasonably expect. This is not surprising.

The Commissioners are conscious that there is a tension between ensuring DPP accountability and maintaining DPP independence. Given that independence was essentially the *raison d'être* of ODPPs, concern in relation to how greater accountability might be achieved is understandable. However as former Victorian DPP, and later Justice, John Coldrey observed:

Whilst it is argued that prosecutorial independence is an essential element in the proper administration of criminal justice it must be equally recognised that inherent in an independence without accountability is the potential for making arbitrary, capricious and unjust decisions.^[27]

Currently there is no formal mechanism through which a complainant can challenge, or seek review of, the exercise of prosecutorial discretion including in circumstances where the decision making process has not been in accordance with the relevant Director's guidelines.

Further, the general community has no body or mechanism it can rely on to be satisfied that the DPPs and their staff are adhering to their guidelines.

In the Report of Case Study 15 the Commissioners stated:

Any body that is given statutory independence and that cannot be subject to any external reviews is at risk of failure in its decision-making processes. When the decisions being made are critical to the lives of the individuals involved, be they the complainant or accused, and are being made on behalf of the entire community it is relevant to ask whether the current structure, where there is absolute immunity from review of any decision is appropriate. Experience suggests that an absence of review increases the risk of administrative failure.^[28]

Of particular concern to the Commission is the failure to comply with guidelines to consult with victims, particularly in relation to discontinuing a prosecution.

Requirements in the guidelines to consult before decisions are made to discontinue recognise the importance of these decisions to complainants. Insufficient consultation before deciding to discontinue a prosecution or accept a negotiated plea is likely to cause victims to experience distress and dissatisfaction.

The ACT Victims of Crime Commissioner told the Commission that 'it is the procedural justice issue for many victims of crime that stays with them as much as the crime itself.

The opportunity to be acknowledged and to have their questions answered and to have things explained in a way that they can understand is critical for their level of satisfaction.'^[29]

The point at which the prosecutorial discretion to commence or continue a prosecution is exercised is one of the key points of attrition in the criminal justice system.^[30] As the ALRC has stated 'prosecutors play a key role as gatekeepers determining which victims of crime have access to justice'.^[31]

With respect to DPP oversight mechanisms the situation in the United Kingdom is very different to that in Australia.

In 2013 the Victims Right of Review Scheme commenced in England and Wales. That scheme gives victims the right to request a review of certain decisions of the Crown Prosecution Service (CPS).

Decisions to which a right of review applies are decisions by the CPS to not bring proceedings; to discontinue proceedings or withdraw all charges involving the victim; to offer no evidence in all proceedings relating to the victim; or, to leave all charges in the proceeding to 'lie on the file' such that they cannot be proceeded with without leave of the court or the Court of Appeal.

Decisions to accept pleas to lesser charges or decisions to only prosecute some counts are not reviewable. In our consultations with the CPS they informed the Commission that review is afforded where otherwise a victim would have no remedy at all.

The creation of the VRR scheme followed the decision of the Court of Appeal of England and Wales in *R v Christopher Killick*.^[32] In *Killick* the Court considered that rather than victims having to resort to the courts for judicial review, which unlike Australia is available for prosecutorial decisions in England and Wales, the right to review a CPS decision should be made the subject of a clearer procedure.

Under the VRR scheme the CPS first conducts what it terms 'local resolution.' This is a review of the original decision conducted by a different prosecutor but one from the same CPS area as the original decision-maker. The decision is checked and the reviewer ensures that the victim has been given a clear and detailed explanation of the decision.

In the event that local resolution does not resolve the issue to the satisfaction of the victim the matter proceeds to an independent review. Other than in relation to a review of a decision to offer no evidence, independent review is conducted by the CPS Appeals and Review Unit.

The case is approached afresh by the reviewer. They may ask police to obtain further evidence. If the original decision was to discontinue proceedings it may be possible reinstitute proceedings if the reviewer found the original decision to be incorrect.

The victim is then notified of the outcome and provided with a full explanation of the decision, initially in writing. There is some capacity for victims of serious offences or their family members to be given an explanation in person.

In theory judicial review remains available if the victim remains dissatisfied. However, leave of the court is required to obtain judicial review. Since the introduction of the VRR scheme it has not been granted.

A further accountability mechanism operating in the United Kingdom is Her Majesty's Crown Prosecution Service Inspectorate. The Inspectorate was established in 2000. The Chief Inspector reports to the Attorney-General. Reports are tabled in parliament.

In our consultations with the current Chief Inspector he told the Commission that the Inspectorate grew out of an internal CPS audit process. Subsequently, it became clear that it would be better if that process was external from, and independent of, the CPS.

The Inspectorate carries out a range of inspections including area or unit based inspections, thematic inspections and an annual case work examination program. The inspection program is developed in consultation with the Attorney General and other stakeholders.

Those stakeholders include the DPP, other criminal justice inspectorates, the Victims Commissioner and Judges. The Inspectorate also responds to requests from the Attorney General and the DPP to review specific matters. Inspectorate staff include both business and legal inspectors. They have access to the CPS computer system.

As part of its criminal justice work the Commission is considering whether oversight or review mechanisms for ODDPs are necessary in the Australian context and, if so, what they might look like.

The Commissioners consider that all Australian DPPs should be able to implement a number of minimum requirements. Those requirements are:

1. The adoption of comprehensive written policies for decision-making and consultation with victims and police.
2. Ensuring that all policies are publically available and published online.
3. Provision of a right for complainants to seek written reasons for key decisions.

In relation to a complaints mechanism the Commissioners recognise that the CPS is significantly larger than individual Australian DPP offices. Indeed the CPS is significantly larger than the offices of all Australian DPPs combined.

We also recognise that, as conveyed to the Commission, decision-making in Australian ODDPs already occurs at a more senior level than in the CPS. Accordingly there is a capacity for some degree of informal review before a decision is made.

Notwithstanding these matters, and although a concluded view has not been determined, it appears to the Commissioners that there is merit in the provision of a formal internal complaints mechanism which would allow victims to seek merits review of key decisions, in particular decisions that result in a prosecution not being brought or being discontinued.

There is a further option – an audit of compliance with DPPs guidelines and policies. If the results of any audit were published this would advance the transparency and accountability of DPPs and their offices, and might negate the need for an external audit process. This too is an option the Commissioners are closely considering.

Sentencing

In Part I of this speech I discussed how judicial assumptions about the way genuine victims of sexual assault behaved underpinned some of the more problematic jury directions in sexual assault trials, and in particular, child sexual assault trials.

Judicial assumptions have also played a role in the sentencing of offenders who have been convicted of sexual offences against children. These include assumptions about the harm caused by sexual offending.

In New South Wales it is now accepted that:

child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the “long term and serious harm, both physical and psychological, which premature sexual activity can do”.^[33]

This position is the product of a shift in judicial understanding. From the early 2000s the decisions of the New South Wales Court of Criminal Appeal reveal a greater willingness on the part of judges to assume that harmful consequences result from child sexual abuse.^[34] This has been accompanied by increased severity in the sentences for these offences.

This shift was remarked upon by Mason P in *R v MJR* in 2002. His Honour stated that over time the pattern of sentences for child sexual assaults had increased and that ‘this putative increase has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.’^[35]

The issue in MJR was whether an offender should be sentenced in accordance with the sentencing practice adopted at the time of the commission of the offences, or whether the court should apply current sentencing practice notwithstanding the higher level of sentencing severity. His Honour held that current practice should apply. His Honour was, however, in the minority on this point.

The issue of what sentencing standards should apply in historical child sexual abuse cases is being considered by the Royal Commission as part of its criminal justice project. It has particular significance in the work of the Commission. This is because it is common for periods of significant time, sometimes decades, to pass between the offending and reporting by the victim of child sexual abuse to the authorities.

Research commissioned by the Royal Commission found that in relation to 84 institutional child sexual abuse cases finalised in the NSW District Court between 1989 and 2015, over 20 per cent of matters were sentenced 25 years after the sexual assault occurred. The longest period between offending and sentence was 51.7 years.^[36]

A further study with an expanded dataset comprised of 283 matters of institutional child sexual abuse found that the median period of delay was 25 years. The longest period of delay was 58 years.^[37] Longer periods of delay were more likely in cases where the offending was conducted over a long period of time, in cases that involved more offences and cases involving more than one victim.^[38]

This indicates that cases where there may be a disparity between two sets of sentencing standards because of delayed reporting are likely to be cases in which the offending is extensive. Longer periods of delay were also more likely in recent time.

That is, cases sentenced since 2000 were associated with longer delay between the first offence and the sentence date.^[39] This indicates that the question of which standards should apply is likely to remain an issue in the immediate future.

In most Australian jurisdictions an offender is sentenced with reference to the sentencing standards in existence at the time of the offending. There are a number of concerns with this practice.

First, applying historical standards may result in a sentence that does not align with the contemporary assessment of the criminality of the offence.

Sentences may be shorter than they would otherwise be applying current standards. Non-custodial sentences may be imposed for offending which, applying current standards, would result in a term of imprisonment. This may cause distress for victims and undermine community confidence in the administration of justice.

This is especially so in circumstances where previous standards were based on a lack of understanding of the seriousness of the offending and its impact.

Second, the court may be prohibited from taking into account matters that are today are recognised as aggravating features, such as grooming.^[40]

Third, applying historical standards can be a difficult and complicated task. Relevant sentencing remarks and statistics may simply not be available.

In Victoria the *Sentencing Act 1991* provides that the sentencing court must have regard to, amongst other matters, current sentencing practices.^[41] Sentencing practice includes 'current practice with respect to the use of pre-sentence reports, drug and alcohol reports and victim impact statements.'^[42]

The Victorian Court of Appeal has held that although sentencing practices at the date of offending may be a factor to which the court may have regard, reference only to the historical statutory maximum in combination with current sentencing considerations, such as contemporary community attitudes would not be an error.^[43]

In South Australia s 29D of the *Criminal Law (Sentencing) Act 1988* requires sentencing courts to apply, in relation to matters of persistent or multiple child sexual abuse, the standards set out in *R v D*^[44] irrespective of when the offending occurred.

In *R v D* a majority of the South Australian Court of Criminal Appeal held that heavier sentences should be imposed for child sexual abuse matters.

They held that unlawful sexual intercourse with children under 12, when there are multiple offences committed over a period of time, should attract as a starting point a head sentence of about 12 years subject to a guilty plea, co-operation with the police, genuine contrition and other mitigating factors. In relation to unlawful sexual intercourse with children over 12 the starting point should be a head sentence of about 10 years imprisonment. Doyle CJ considered the court should take this course 'because of the seriousness of the crime in question, and because of its prevalence.'^[45]

England and Wales have gone further still. Substantial reforms followed decisions by the England and Wales Court of Appeal including *R v H and Others*.^[46] In that case the court held that for sexual abuse cases the appropriate approach to sentencing includes that the sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current and measured by reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.

The Court said that although the sentence must be limited to the maximum allowable at the date the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify today what the sentence for the individual offence was likely to have been if the offence had come to light soon after it was committed.^[47]

In 2012 the Sentencing Council for England and Wales commenced consultation as part of a broad review of sentencing issues relating to sexual offences. The Council issued a guideline in 2013 which came into force on 1 April 2014. That guideline affirmed the approach in *R v H* and provides:

The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Under the *Criminal Justice Act 2003* the court must have regard to the statutory purposes of sentencing and must base the sentencing exercise on its assessment of the seriousness of the offence.^[48]

The guideline directs the court to prioritise the culpability of the offender and the harm caused or intended. The sentence is, however, limited to the maximum sentence at the time of the offending providing it is not higher than the current maximum.^[49]

The Council stated that a key element in the development of the guideline was public protection. The guideline 'reinforces the importance of proper punishment and the prevention of re-offending, either through significant custodial sentences or rigorous treatment programs that will address the offender's behaviour.'^[50]

In addition to standards other sentencing issues being considered by the Royal Commission include whether provision should be made to exclude good character as a mitigating factor for child sexual abuse offenses, similar to the approach in New South Wales and South Australia.

And whether, like in England and Wales provision should be made for good character to be an aggravating factor where good character facilitated the offending. A further issue is whether there should be a presumption in favour of cumulative sentencing for child sexual abuse offences similar to the approach taken in Victoria.

Conclusion

In 2013 in *Munda v The Queen* 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.^[51]

Munda was an appeal against sentence for the offence of manslaughter. However, the words of the Court are of general application.

They have particular resonance in relation to the sexual abuse of children. The Royal Commission's recommendations in relation to criminal justice issues are an opportunity for the entire Australian community to come together through their Parliaments to make changes in order to better fulfil that 'long-standing obligation.'

There are few classes of offences in which the victim's role in criminal proceedings will be as central as sexual offences. If we, as a community, wish to better 'vindicate the dignity of ... victim[s]' and better protect 'the vulnerable against repetition of violence' we must encourage and support the participation of the victims in the criminal justice process.

We must ensure our laws in relation to both substantive offences and procedure and evidence promote the conviction of those guilty of sexually offending against children and the acquittal of the innocent. And we must ensure that those who do offend against children are dealt with appropriately post-conviction.

The Royal Commission will provide its report in relation to criminal justice to government in August.

- [1] Igor Judge 'Half a Century of Change: The Evidence of Child Victims', Tomlin Lecture in Law and Psychiatry, March 2013, Kings College London.
- [2] Transcript of CDP, Case Study 38, 22 March 2016, 18036:43-18037:5.
- [3] *Ratten v The Queen* (1974) 131 CLR 510, 517.
- [4] Spigelman 'Truth and the Law' The Maurice Byers Lecture (Sydney, 26 May 2011)
- [5] Wigmore, *Wigmore on Evidence* (1974) vol 5, s 1367.
- [6] *Ibid.*
- [7] Powell, Westera, Goodman-Delahunty and Pichler, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse* (August 2016) 236.
- [8] *Ibid.*
- [9] *Ibid* 237.
- [10] *Ibid.*
- [11] *Ibid* 197.
- [12] http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_crossexamination_stratton.aspx
- [13] B [2010] EWCA Crim 4, [40].
- [14] The Rt Hon Lord Judge 'Vulnerable Witnesses in the Administration of Criminal Justice' (Speech delivered at the 17th AIJA Oration in Judicial Administration, Sydney, 7 September 2011) cited in Woodward, Hepner and Stewart, 'Out of the Mouths of Babes: Enabling Children to Give Evidence in the Justice System' (2014) 39 *Alternative Law Journal* 27, 30.
- [15] Criminal Procedure Act 2009, s 369. The Judge must direct a special hearing be held unless, on application by the prosecution, the judge directs that the complainant is to give direct testimony: ss 370(1A), 370(2).
- [16] Zhou, 'Challenges in prosecuting child sexual assault in New South Wales' (2010) 34 *Criminal Law Journal* 306, 309.
- [17] *Ibid.*
- [18] Bowden, Henning and Plater 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 556.

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Australian Lawyers Alliance NSW Annual State Conference

Seeking 'justice for victims' (part I) – Sydney, New South Wales

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Introduction

Some of you may be asking why it is that the Royal Commission is considering criminal justice issues. Apart from the many issues concerning the nature, cause and impact of sexual abuse and the response of institutions, our Terms of Reference require us to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through ... processes for referral for investigation and prosecution^[1]

When asking the Commission to look at criminal justice the executive would have had in mind anecdotal accounts of the problems faced by complainants in sexual assault trials. We have all heard about or experienced them. We now have some statistics which confirm the difficulties faced by sexual assault complainants. I will come to those later.

The question they raise is why do the outcomes for sexual assault differ so markedly from the outcomes for other crimes?

A little over thirty years ago in *Bromley v The Queen* Brennan J, in relation to accomplices, children giving evidence on oath, and complainants in sexual assault cases, said:

The courts have had experience of the reasons why witnesses in the three accepted categories may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses.^[2]

These words reflect the long and difficult history of victims of sexual offences, including child sexual offences, in the criminal justice system.

They also reflect a view amongst judges that they are possessed with particular insight, and that their role is to formulate the rules for criminal trials which reflect that insight. Some of those rules have had a significant and negative impact on the ability of child sexual abuse survivors to access justice.

Because of their classification as potentially unreliable witnesses, together with the form of directions designed specifically in relation to their evidence, and a judicial attitude that juries may not be able to fairly assess all the evidence, the criminal justice system has created a series of barriers in sexual assault cases not known for other crimes.

For many complainants the barriers have been insurmountable. For many others the rules have proved a deterrent to any engagement with the criminal justice system.

A recognition that the system may have gone too far and may be denying justice to complainants first started to emerge about 30 years ago. Since then, largely through the intervention of parliament, significant reforms have been made. The question for the Royal Commission is whether there is more that should be done.

Directing the jury

When directing a jury a judge may in some circumstances be required to give a warning or caution. A warning or caution will typically be required where acting upon particular evidence is believed to involve ‘dangers’ or concerns matters about which the court is said to have ‘special experience’ which the jurors do not possess.^[3]

The judicial distrust of sexual assault complainants has a long tradition.

In the mid-1700s the English jurist Sir William Blackstone discussed the common law approach to assessing the truthfulness of a woman alleging sexual assault. He said:

“if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place, where the act was alleged to be committed, was where it was possible she might be heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned.”^[4]

The source of later and erroneous approaches to issues of sexual assault can be seen in these remarks. They emerge in the need for corroboration, the relevance of delay to a complainant’s credibility and the inappropriate use of a complainant’s sexual history.

It may be suggested that the courts were merely relying upon the understanding of these issues current in the general community. However, we know that the courts were not relying on what was commonly understood. Indeed courts expressly rejected the understanding of the general public.

What the quote from *Bromley* clearly demonstrates is that courts believed that their experience had generated knowledge often described as ‘judicial wisdom’ on these issues. They were relying on the ‘sharpened awareness’ the courts said they had about who jurors should and should not believe and why.

Decisions such as *Longman*,^[5] *Doggett*,^[6] *Crompton*^[7] and *Murray*^[8] have had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time they were assaulted. They derive from what judges’ thought they knew about how genuine complainants behave and what they thought they knew about how memory works.

Those assumptions have turned out, with the benefit of empirical research, to be flawed. However, they became embedded in the fabric of the common law and proved difficult even for Parliament to dislodge.

In 1981 NSW enacted legislation to provide that if delay in complaint was raised in a trial for a prescribed sexual offence the trial judge was required to direct the jury that delayed complaint does not necessarily indicate that the allegation is false. The judge is to inform the jury that there may be good reason why a sexual assault victim may hesitate in complaining.^[9]

Similar legislation was enacted in Victoria a decade later. That legislation was considered by the High Court in *Crofts v The Queen*^[10] in 1996.

Crofts concerned complaints of child sexual abuse that were made six years after the first alleged incident of abuse and just six months after the last alleged incident. Justices Toohey, Gaudron, Gummow and Kirby stated that ‘by the measure of cases of this kind, that was a substantial delay.’^[11] We now know that this characterisation of the delay, if it is intended to diminish the veracity of the allegation, is wrong.

The Court held that the relevant provisions required a balanced direction. The effect was that while a direction in accordance with the section could be given, so too should a direction consistent with the common law that delay is relevant to the complainant’s credibility and should be taken into account.

Although lengthy it is worth quoting in full the relevant portion of the joint judgment as it provides a clear illustration of how closely the courts can protect judicial assumptions. Perhaps it passed without notice but in this passage the judges both reject and then rely on the court’s assumption as to ordinary human experience.

[The decision in *Longman*] makes it clear that the purpose of such legislation, properly understood, was to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses. It was simply to correct what had previously

been standard practice by which, based on supposed ‘human experience’ and the ‘experience of courts’, judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to ‘sterilise’ complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for consideration. The overriding duty of the trial judge remains to ensure that the accused secures a fair trial. It would require much clearer language than appears in s 61 of the Act to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts which, on ordinary human experience, would be material to the evaluation of those facts.

On one hand acknowledging that legislative intervention was necessary in order to correct flawed directions ostensibly based on ‘human experience’ and then, on the other hand invoking ‘human experience’ as the rationale for substantially diluting a direction required by legislation, appears, with respect, not to have troubled the judges.

A further difficulty arises in that there may not be uniformity amongst judges as to their assumptions about what and how jurors think. Rules are typically rationalised as being necessary because the weight of judicial experience says that it must be so, in order to avoid an injustice. It is this body of ‘judicial experience’ or ‘collective wisdom’ that gives these laws their legitimacy.

Collective judicial “wisdom”, however, may be nothing more than the way we have always thought about the issue. Further, that collective wisdom may not be so collective.

For survivors, and for many in the community, it may be difficult to understand why on some issues juries are directed in one way in one state, and differently in another. If judges in New South Wales believe a rule is necessary to avoid an injustice, how is it that judges in Victoria do not?

The *Markuleski* direction is one example of this lack of uniformity. In *Markuleski* the NSW Court of Appeal held that, in word against word cases, the trial judge should, as a general rule, direct the jury that a reasonable doubt with respect to the complainant’s evidence on any count ought to be taken into account in its assessment of the complainant’s credibility generally.^[12]

In contrast, Victorian courts have held that a *Markuleski* direction should generally be avoided.^[13] Justice Buchanan in *R v Trainor* stated:

‘I think it unlikely that a jury given a separate consideration direction will be entirely uninfluenced by the impressions they derive from the evidence of a witness taken as a whole; I doubt that such a natural tendency needs judicial encouragement in the form of a *Markuleski* direction.’^[14]

It is apparent that the Victorian court took a different view as to the guidance the jury needed as to how to reason to avoid an injustice to the accused.

The need identified in NSW to give guidance is premised on an anterior assessment of whether or not the reasoning process the jury would ordinarily undertake is flawed, inadequate or indeed dangerous. It is interesting that a flaw detected by NSW judges in the reasoning process of jurors in Albury is, according to the law, not one present in the jurors in Wodonga.

The point is not to deny an evidentiary rule or a rule requiring a judicial direction in relation to particular evidence will never be necessary. Rather it is that judicial assumptions about how people reason may not be the most appropriate foundation for these types of rules.

One issue the Royal Commission is considering is the need for jury directions containing educative information about children and their response to child sexual assault. I will refer to them as educative directions.

There is significant research that demonstrates that the way a child behaves and reacts in response to sexual abuse is inconsistent with the expectation of many jurors.^[15] The behaviours of sexually abused children are commonly described as 'counter-intuitive'.

These erroneous expectations in relation to children may also be present in beliefs held about their capacity to give evidence. This, of course, is not surprising – it was an assumption of the common law for many, many years.

Justification for these directions may be found not only in the fact that incorrect assumptions about victims of child sexual abuse are common in the general community.

It is important that research commissioned by the Commission demonstrates that defence counsel commonly use strategies when questioning complainants in child sexual abuse offence trials which rely on these misconceptions or uncertainties amongst jurors in relation to child complainants.

Analysis of 120 transcripts of complainant evidence from 94 child sexual abuse trials showed that defence counsel often employed strategies to suggest that there is one typical way a victim responds to abuse. If the complainant had not responded in that way, counsel suggested to the jury that this was an indication that the offence may not have occurred.

The researchers found that the types of misconceptions about child sexual abuse exploited included the lack of resistance by the complainant at the time of the offence, the delay in reporting, the apparent lack of emotion by the complainant at the time of the offence and the continued relationship between the complainant and the accused after the offence.^[16]

In their report *Family Violence: A national legal response* the ALRC and NSWLRC stated that there was a strong case for the use of jury directions which would ‘summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour.’^[17]

Similarly the National Child Sexual Assault Reform Committee has also recommended that three mandatory judicial directions, summarising the research and containing the same information, should be introduced in all Australian jurisdictions. Those three directions are in relation to children’s abilities as witnesses, very young children’s abilities as witnesses, and children’s responses to child sexual abuse.^[18]

Providing the jury, and indeed the judge, with accurate information about the behaviour of children who are sexually abused assists in their credibility being assessed more accurately. This in turn promotes the public interest in securing the convictions of the guilty and the acquittal of the innocent.

Tendency and coincidence evidence

Judge’s assumptions about human behaviour have influenced other aspects of the laws of evidence. One important area is tendency and coincidence evidence or, as these concepts were known to the common law, propensity and similar fact evidence.

I have said on many occasions that this issue – that is, 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. Before turning to that issue you will be interested in a recent analysis of outcomes in sexual assault trials.

Data recently obtained by the Royal Commission from the NSW Bureau of Crime Statistics and Research confirms the difficulties facing complainants of sexual assault, both children and adults.

In New South Wales between July 2012 and June 2016 the conviction rate for all offences, including matters finalised by a guilty plea, was 89%. For child sexual assault offences the conviction rate was 60%. By comparison the conviction rate for assault was 70%, robbery 73% and illicit drugs 94%.

One class of offences with a lower conviction rate was adult sexual assault with a conviction rate of only 50%. One possible reason is that in addition to the fact that these cases are, like child sexual assault cases, commonly word against word, consent will often be an issue.

The conviction rate for assault matters is higher than for child sexual assault matters. That is notwithstanding that in many cases, the identity of the offender may well be at issue. This is rarely the case for child sexual assault matters.

The conviction rates for illicit drug matters is significantly higher than for child sexual assault matters. This is likely because in a substantial number of drug cases the offender will be found to have the drugs on them making proof of the offence much easier than in child sexual assault matters.

The law reports are replete with comments by judges about the extra caution with which juries must approach sexual assault cases. In *KRM v The Queen*, Kirby J said:

In cases involving accusations of sexual offences, courts and prosecutors must exercise particular vigilance, so far as they can, to ensure that the fairness of the trial is maintained because the circumstances are *peculiarly likely to arouse feelings of prejudice and revulsion*. This duty imposes special difficulties for judges presiding at such trials where they are conducted before a jury.^[19]

This concern – the arousing of prejudice and revulsion in jurors – is not borne out by the data. If it is the case that the mere allegation of a sexual offence against a child is peculiarly likely to arouse feelings of prejudice then we should see high conviction rates in these cases.

This is because, self-evidently, every trial in relation to a child sexual offence will involve an allegation that a child has been sexually offended against. What we in fact see is much lower than average conviction rates.

In a statement in relation to the severance of trials concerning multiple sexual offence counts Gibbs CJ in *De Jesus v The Queen* said:

Sexual cases ... are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard.^[20]

Again the data suggests these concerns are overblown. In relation to child sexual assault offences which were finalised at a defended hearing or at trial there were 725 matters in NSW between July 2012 and June 2016. Of those the defendant was convicted of all relevant offences in 32% of matters.

The defendant was convicted of some but not all relevant offences in 16% of matters. The defendant was convicted of no relevant offences in 52% of matters.

The capacity for jurors to correctly isolate and apply the evidence in relation to each individual case is not only demonstrated in the data but has been recognised by courts in cases in relation to the issue of ‘inconsistent verdicts.’

In rejecting the ground of appeal that if the jury acquitted on one or more counts it follows they did not believe the complainant in relation to these counts and for that reason they should not have believed the complainant in relation to the other counts, appeal courts have accepted that there may be rational reasons for convicting on some counts and acquitting on others.

The courts have recognised that jurors follow the direction to consider each count, and the evidence in relation to it, separately.

The Commission is aware of comment amongst members of the legal profession that the Commission's work has had such a transformative effect on the mind of the general community so that it has now become much more difficult, perhaps, it has been suggested, dangerously difficult, to secure an acquittal in relation to child sexual offences. The data clearly suggests otherwise.

In 2012-2013, 73 child sexual assault matters were finalised at a defended hearing or trial in the District Court. In the District Court, of course, charges in defended hearings are most likely to be heard before a jury.

Of those 73 matters the defendant was convicted of all relevant offences in 29% of matters, convicted of some but not all relevant offences in 27% of matters, and convicted of no relevant offences in 44% of matters.

By contrast, in 2015-2016, 142 matters were finalised at a defended hearing.

That is almost double the number of matters. However, in relation to conviction rates the defendant was convicted of all relevant offences in 24% of matters, convicted of some but not all relevant offences in 23% of matters, and convicted of no relevant offences in 54% of matters.

It appears that, although many more complainants are coming forward, the chances of an offender being acquitted have risen rather than fallen.

Issues in relation to tendency and coincidence evidence have troubled our courts for many years. The recent Victorian report into jury directions suggests they have caused problems for more than 100 years. In *Pfennig v The Queen*, Justice McHugh spoke of:

the *vexed question* as to the circumstances in which the prosecution may prove a criminal charge by tendering evidence that the accused has engaged in criminal conduct on occasions other than that which is the subject of the charge before the court.^[21]

Our work to date indicates this question remains vexed.

Tendency and coincidence evidence has particular significance in relation to the work of the Royal Commission. This is because, in the absence of such evidence, child sexual abuse cases often reduce to word against word. Child sexual offences are generally committed in private.

In many cases there will be no medical or forensic evidence. Unless the perpetrator has retained images of the abuse or makes an admission it is likely that the only direct evidence will come from the complainant. Satisfying the jury beyond reasonable doubt in these circumstances can be very difficult.

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. In these cases issues of tendency and coincidence arise.

The courts have traditionally been cautious about allowing tendency and coincidence evidence, or their common law counterparts, to be put before the jury. The reason for that caution was articulated by Lord Cross of Chelsea in *Boardman v DPP*. It is:

Not that the law regards such evidence as inherently irrelevant but that it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was, so that ... its prejudicial effect would outweigh its probative value.^[22]

The importance of the role of the judge as the gatekeeper for evidence of this type was recently reaffirmed by the High Court in *IMM v The Queen*.^[23] Justices Nettle and Gordon commented on the requirement that the judge should make a preliminary assessment of evidence that falls within a particular category the common law and/or statute have identified as potentially unreliable:

Such an assessment is not in any sense a usurpation of the jury's function. It is the discharge of the long recognised duty of a trial judge to exclude evidence that, because of its nature or inherent frailties, could cause a jury to act irrationally either in the sense of attributing greater weight to the evidence than it is rationally capable of bearing, or because its admission would otherwise be productive of unfair prejudice which exceeds its probative value.^[24]

In a 1933 article published in the Harvard Law Review Professor Julius Stone traced the history of the rule of exclusion of similar fact evidence in England from its earliest origins until Makin's Case in 1894. Stone identifies the starting point for the rule as the case of *Rex v Cole* first referred to in an 1814 text.

By 1850, Stone argues, the rule in relation to similar fact evidence was understood to be that 'whenever the evidence of similar facts offered was relevant to any specific act or issue upon which the jury has to make its mind up it was admitted.'^[25]

He says that *Rex v Cole* was 'authority merely for the proposition that if the evidence offered is relevant only by an argument which proceeds from the other crimes to the disposition of the prisoner to commit such crimes' (ie mere propensity) 'and thence to the probability of his having committed the crime charged, it is not admissible.'^[26]

Stone goes on to discuss the way the law developed between 1850 and Makin's case in 1894. His general thesis is that prosecutors generally succeeded in attaching the evidence to some issue before the jury other than mere propensity, for example to rebut a defence, with the

consequence that the rule in *Rex v Cole* would not apply.

Over time the issues to which the evidence was attached came to be considered to be heads of exception to a general rule of exclusion. Stone states ‘as so easily occurs in the common law ... the tendency to crystallise particular determinations of relevance into categories of admission appeared.’^[27]

This began to cause difficulties for courts. An example Stone offers is the New Zealand case of *Regina v Hall*, involving similar fact evidence, in relation to which he states:^[28]

This remarkable opinion closes with a classic declaration of the impatience of judges before the tyranny of absurd rules of their own creation.

‘Viewed in light of science, philosophy or common sense there is without a doubt a nexus between the two events ...

We are aware that in cases like the present the application of the rigid principle of the common law must often result in what the public may regard as a failure of justice. That is really not our concern. It is our duty to see that justice be administered according to law.’^[29]

In relation to the expression of the rule in *Makin’s* case, Stone states that it has been cited ‘sometimes with understanding of its meaning, sometimes not.’^[30]

Stone’s view is that *Makin’s* case should be understood as holding that there is ‘no broad rule of exclusion with exceptions, but a broad rule of admissibility where there is relevance, except where the only relevance is via disposition’^[31] (that is, mere propensity).

Stone concludes with his suggestion of how the rule should be formulated: ‘It is that the trial judge should be recognised to have a discretion to decide whether the probative weight of the proffered evidence outweighs its mere prejudice.’^[32]

Two issues stand out in relation to Professor Stone’s conclusion: the first is that he accepts that the evidence is troublesome. Earlier in the article he states that similar fact evidence ‘presents the possibility of undue prejudice in an extreme form’.^[33]

The foundation on which this statement rests is not explored in detail other than to state that ‘the policy of avoiding undue prejudice is based on weaknesses of human nature which are today as obvious as ever.’^[34] The second is in relation to his suggested remedy. Notable is the absence of any requirement for the probative value of the evidence to substantially outweigh the prejudicial effect as required under the uniform evidence law.

The Royal Commission commissioned research designed to interrogate whether the assumption that the evidence ‘presents the possibility of undue prejudice in an extreme form’ is correct.

Using mock juries and a trial involving charges in relation to child sexual abuse in an institutional context the researchers examined the effect of joinder and the admission of tendency evidence upon the jury's reasoning and their decisions.

1,029 jury eligible citizens, 580 women and 449 men, participated in the study. They were randomly allocated to one of 90 mock juries.

The juries each watched a video of one of ten versions of a trial. Variations of the trial included:

- A separate trial of an adult complainant with moderately strong evidence.
- A separate trial of an adult complainant with moderately strong evidence in which relationship evidence comprised of uncharged acts and grooming behaviour was also admitted.
- A separate trial of an adult complainant with moderately strong evidence in which tendency evidence from two other prosecution witnesses was admitted.
- A joint trial with three adult complainants who gave weak, moderately strong and strong evidence.
- The deliberations of each of the juries were audiotaped and videotaped. Transcriptions of each jury deliberation were qualitatively and quantitatively analysed.

The trial was designed to interrogate three types of unfair prejudice:

1. Inter-case conflation prejudice – the idea that juries will confuse or conflate the evidence led to support different charges in a joint trial and wrongly use evidence related to one charge in considering another charge.
2. Accumulation prejudice – the idea that juries will assume the accused is guilty because of the number of charges against him or the number of prosecution witnesses regardless of the strength of the evidence.
3. Character prejudice – the idea that juries will use evidence about the accused's other criminal misconduct and find guilt by reasoning that because he did it once he has done it again.^[35]

The qualitative and quantitative analysis of the deliberations is an important feature of this research. A key criticism of a number of previous studies was their over reliance on conviction rates as the relevant measure. Verdicts on their face reveal nothing about the reasoning process that lies behind them.

They do not tell us whether any increase in conviction rates is the result of permissible reasoning arising from the availability of more logically probative evidence such as tendency evidence, or whether they are due to impermissible reasoning based on unfair prejudice.

With respect to the issue of inter-case conflation the researchers found that jurors were more likely to make errors within a case, rather than between cases, suggesting little inter-case conflation prejudice. They found that these errors were corrected by other jurors in the course of deliberation. The researchers found that no verdicts were based on persistent uncorrected or inter-case conflation of the evidence.^[36]

In relation to the risk of unfair prejudice from accumulation prejudice the researchers found that conviction rates for the weakest case did not increase significantly with extra witnesses or extra charges, indicating no accumulation prejudice.^[37]

Perhaps most significantly, in relation to character prejudice evaluation of the jury deliberations revealed that no juries in either the tendency evidence or joint trials impermissibly used the tendency evidence to conclude that the defendant was guilty because of the number of allegations of prior misconduct that were made.

The researchers found no evidence of verdicts motivated by emotional reactions to the severity of the allegations, such as a sense of horror regarding the allegations, or a desire to punish the defendant.^[38]

Conscious of the fact that some jurors may have been inhibited from revealing the true basis for their decision to convict in a group setting, as part of the post-trial questionnaire the jurors were asked to identify the main reason for their verdict. This questionnaire was completed anonymously. The responses revealed that only three percent of jurors gave reasons that were identified as displaying character prejudice.^[39]

The researchers ultimately concluded that:

the low frequency and isolated examples of reasoning in deliberations involving inter-case conflation of the evidence, accumulation prejudice, or character prejudice suggest that the likelihood of impermissible reasoning, whether in joint trials or separate trials, is exceedingly low. This low probability suggests that there was negligible unfair prejudice to the defendant in joint trials where tendency evidence was admitted.^[40]

The law in Australia at present

The law in relation to the admissibility of tendency and coincidence evidence has developed in different ways across Australia.

The common law in relation to propensity and similar fact evidence, with some modification, applies in Queensland. The test for admissibility is that set down in *Pfennig v The Queen*. Propensity or similar fact evidence will be admitted only if it possesses 'a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused in the offence charged.'^[41]

The ALRC has described this test as ‘extremely stringent’.^[42] It is more stringent than the test that existed at common law in England and Wales before the significant reforms made in those jurisdictions in 2003.

The uniform evidence legislation applies in NSW, Victoria, Tasmania, the ACT and the NT. In criminal proceedings tendency or coincidence is admissible only if notice is given, the court considers the evidence has significant probative value and the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.^[43]

Despite this legislative uniformity, differences have emerged between NSW and Victoria in relation to how the provisions for the admissibility of tendency and coincidence should be interpreted and applied. There are three notable differences of significance in the context of institutional child sexual abuse.

The first is that, particularly in relation to tendency evidence, there are differences as to whether and to what extent similarity in the manner of offending is required in order for the evidence to be admissible as tendency evidence. In NSW, similarity is not essential, although it may assist in establishing probative value. In Victoria common or similar features or an underlying unity in the offending is required.

The second is in relation to the question of whether features of the institutional context are relevant in determining similarity and the probative value of the evidence. NSW courts have found similarities in the circumstances of institutional offending that Victorian courts have regarded as unremarkable circumstances that are not within the accused’s control.^[44]

Thirdly, differences have emerged as to whether the reliability of the evidence, particularly in relation to issues of possible collusion, concoction and contamination should be determined by the judge or the jury.

In NSW reliability and credibility generally have no role to play in the assessment of probative value with the result that these are generally matters for the jury. Before *IMM v The Queen*^[45] resolved the issue in favour of the NSW approach, Victoria maintained the common law position that the reliability of evidence affects its probative value and therefore amongst other matters issues of possible concoction or contamination are to be determined by the judge.

In relation to the first difference it is relevant to ask why we are looking for similarity, when the provisions which, in relation to tendency evidence, do not refer to it. It is because the common law has determined that the probative force of the relevant evidence is tied to the similarities in the behaviour of the accused as alleged by the witnesses.

However, in relation to the question of whether sexual offending has in fact occurred, rather than the identity of the offender, it is relevant to ask to what extent is similarity an indicator of greater probative value? If it is the case that sexual offenders typically perform the same sexual acts on victims of the same sex who are the same age then it may be correct to reject as significantly probative, evidence that does not have these similarities.

However, the work the Royal Commission confirms that a sexual offender may offend in a variety of ways against a range of victims of varying ages. In case studies 16, 17, 18, 26, 37 and 46 we heard evidence of a single offender offending against both boys and girls.^[46] The different types of offence, from touching, fondling and ultimately penetration, will commonly be committed by the same offender.

There is a danger that if judges fail to understand how sex offenders actually operate the assessment of the probative value of tendency witnesses will be based on a false premise. Proceeding from a false premise rarely leads to a correct conclusion.

In South Australia new rules for the admissibility of ‘discreditable conduct’ evidence commenced in 2012. Evidence of a defendant’s discreditable conduct may be admitted if its probative value substantially outweighs any prejudicial effect it may have on the defendant. If it is tendered for propensity reasoning, it must have ‘strong probative value’.^[47]

The rules in Western Australia are notably different. Propensity evidence is admissible if the court considers that it would have significant probative value and ‘that the probative value of the evidence compared to the degree of risk of an unfair trial is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.’^[48]

This formulation of the public interest test adopts McHugh J’s approach in *Pfennig*. The test for admission in Western Australia is arguably the most liberal in Australia.

This lack of clarity and inconsistency between the states could itself justify a recommendation for reform. It is difficult for the Commissioners to support a situation in which the rules in relation to evidence of such significance are different for a survivor involved in criminal proceedings in one state than for a survivor in another.

In an oft-quoted passage, Justice Brennan has observed that ‘[i]nconsistency is not merely inelegant’ but suggests ‘an arbitrariness which is incompatible with commonly accepted notions of justice’.^[49]

Considered together the inconsistency across the jurisdictions, the lack of clarity in relation to uniform provisions, the low conviction rates in child sexual offence cases, the fact that juries regularly return different verdicts on different counts and the findings of the jury research suggest that the law in relation to tendency and coincidence evidence may need reform.

The Western Australian provisions have a lower threshold of admissibility than in any other Australian jurisdiction. Yet the Commission has not seen or heard any evidence or indeed any suggestion of injustices flowing from these changes.

And in relation to the position in England and Wales, where the law in relation to admissibility is more liberal still, we have not seen or heard any suggestion of injustices arising as result of the changes occurring there. Those changes were made more than a decade ago.

Whilst reasonably satisfied that the law should change to facilitate greater admissibility of tendency and coincidence evidence in child sexual abuse cases, the Commissioners have not yet identified how this is best achieved.

Particularisation

A further difficulty for survivors in child sexual abuse cases is the requirement for the prosecution to provide particulars in relation to the offence or offences charged. The requirement to provide particulars, undoubtedly reasonable, is necessitated by the accused being entitled to know the case against him or her.^[50]

Victims and survivors of child sexual abuse often find it difficult to provide adequate or accurate details in relation to the offending.

There are a number of reasons. The first is that 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. Second, delay in reporting may cause events to be wrongly attributed to a particular time or location when they in fact occurred earlier or later, or at another location.

Thirdly, the abuse may have occurred so often and in such similar circumstances, that the victim or survivor is unable to describe specific or distinct occasions in which they were offended against.

The result, particularly in relation to this third reason, is a cruel paradox: the greater the regularity with which a child is offended against, the more difficult it can become to charge and prosecute the offender.

Parliaments have attempted to remedy this situation through the introduction of legislation to create persistent sexual abuse offences. This first occurred in Queensland in 1989. By the end of the 1990s an offence of this type had been introduced in each of the states and territories. There have, however, been challenges in relation to these offences.

The Queensland offence as originally enacted was an offence of ‘maintaining a sexual relationship with a child/young person.’^[51] The legislation required the prosecution to prove the sexual relationship by showing three distinct occasions of unlawful sexual conduct each proved beyond reasonable doubt.

The offence was considered by the High Court in 1997 in *KBT v The Queen*.^[52] The Court held that the offence required the jury to be satisfied beyond reasonable doubt as to the commission of the same three acts which constituted relevant sexual offences.^[53]

It follows that in order for the jury to agree that the same three acts of sexual offending have been proved, one must be able to identify with some precision each of the three discrete acts or occasions of offending necessary to make up the charge. As a consequence the problem was not removed.

In most Australian jurisdictions the relevant offence continues to require proof of the occurrence of three or more unlawful sexual acts.^[54] It is not surprising, given the decision in *KBT*, that in most, but not all, of these jurisdictions the persistent sexual abuse offence is rarely charged. Data provided to the Royal Commission indicates it is rarely charged in the two largest jurisdictions: New South Wales and Victoria.

In Queensland, however, the persistent sexual abuse offence is regularly charged. In that state the offence has been reframed in order to address the concerns identified in *KBT*. Under the Queensland legislation the actus reus of the offence is the unlawful sexual relationship, not particular unlawful acts.

The amended section 229B defines an unlawful sexual relationship as one that involves more than one unlawful act over any period. All members of the jury are required to be satisfied beyond reasonable doubt that the evidence established that an unlawful sexual relationship with the child involving unlawful sexual acts existed. Importantly, however, s 229B(4) provides that:

- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence and;
- (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
- (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

Section 229B has been considered at appellate level in Queensland on a number of occasions. The Court’s decisions establish that the key element of the offence is the unlawful sexual relationship.^[55] The indicia of maintaining a relationship include its alleged duration, the number of acts and the nature of the acts alleged.^[56]

The Court was satisfied that the trial's judge's power to ensure a fair trial is maintained under the section,^[57] and that the section does not remove the court's power to set aside a conviction on the grounds that there was a miscarriage of justice where the accused was given so little information about the charge as to render it impractical to prepare a defence.^[58]

The Court of Appeal has also held that s 229B(4) does not offend Chapter III of the Commonwealth Constitution.^[59]

Application for special leave to appeal to the High Court in relation to convictions under s 229B have been twice refused. Once in 2008 and again in 2012.

The Royal Commission is considering the law in relation to persistent sexual offences as part of its criminal justice work. It is unacceptable, in our view, that the criminal justice system should accept a situation in which children who have suffered the most extensive abuse may be those who are less able to receive justice in the criminal courts.

Conclusion

The Royal Commission's criminal justice project is significant in scale. The issues which we must consider cover a broad reach. In Part II of this speech, which I will deliver at the Modern Prosecutor Conference in Melbourne on 13 April, I will discuss some of the other issues the Commission is examining.

These include prosecution responses, including DPP complaints and oversight mechanisms; the evidence of victims and survivors, including the use of special measures such as intermediaries and special hearings; and, sentencing.

The Royal Commission intends to provide its report in relation to criminal justice to government in August.

[1] Terms of Reference, para (d).

[2] (1986) 161 CLR 315, 324.

[3] See, eg, *R v Stewart* [2001] NSWCCA 260 [71]-[83] (Howie J); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, NSWLRC Report 128, 2010, 1309-1310.

[4] Blackstone's Commentaries on the Laws of England, 1st ed, bk 4, c 15, 213-4.

[5] (1989) 168 CLR 79.

[6] (2001) 208 CLR 343.

[7] (2000) 206 CLR 161.

[8] (1987) 11 NSWLR 12.

[9] Crimes Act 1900 (NSW) ss 405B and 405C.

[10] (1996) 186 CLR 427.

[11] (1996) 186 CLR 427, 442.

[12] *R v Markuleski* (2001) 52 NSWLR 82, 122 (Spigelman J)

[13] See *The Queen v Goss* [2007] VSCA 116; *R v PMT* [2003] VSCA 200 [34]. See also Judicial College of Victoria, *Criminal Charge Book*, [4.18.1].

[14] *R v Trainor* [2003] VSCA 200 [32].

[15] A Cossins, J Goodman-Delahunty and K O'Brien, 'Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System', *Psychiatry, Psychology and Law*, vol 16, no 3, (2000).

- [16] M Powell, N Westera, J Goodman-Delahunty, A S Pichler, An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse (August 2016) 197-201.
- [17] Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response, ALRC Report 114, NSWLRC 128, 2010 p 1272.
- [18] A Cossins, Alternative models for prosecuting child sex offences in Australia, National Child Sexual Assault Reform Committee, 2010, 26-27, 173-175.
- [19] (2001) 206 CLR 221, 254.
- [20] (1986) 68 ALJR 1 [4].
- [21] (1995) 182 CLR 461, 510.
- [22] [1975] AC 421, 456
- [23] [2016] HCA 14.
- [24] [2016] HCA 14 [161].
- [25] Julius Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' (1933) 46 Harvard Law Review 954, 959.
- [26] Ibid 965.
- [27] Ibid 965-966.
- [28] Ibid 966: 'as so easily occurs in the common law ... the tendency to crystallise particular determinations of relevance into categories of admission appeared.'
- [29] Ibid 973.
- [30] 5 NZLR 93 (1887)
- [31] Makin v Attorney-General of New South Wales [1894] AC 57, 65.
- [32] Stone, above n 25, 975.
- [33] Ibid 984.
- [34] Ibid 954.
- [35] J Goodman-Delahunty, A Cossins and N Martschuk, Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study (May 2016) 45-48.
- [36] Ibid 249.
- [37] Ibid 28, 249, 259.
- [38] Ibid 35.
- [39] Ibid 124.
- [40] Ibid 35.
- [41] (1995) 182 CLR 461, 481.
- [42] ALRC, Uniform Evidence Law (Report No 102, 2005), [11.6]
- [43] See, eg, Evidence Act 1999 (NSW) ss 97, 98, 101.
- [44] Compare PNJ v DPP (2010) 27 VR 146 and R v PWD (2010) 205 A Crim R 75.
- [45] [2016] HCA 14.
- [46] See also, for example, Henderson v R [2016] NSWCCA 8.
- [47] Evidence Act 1929 (SA) s 34P.
- [48] Evidence Act 1906 (WA) s 31A.
- [49] Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 11 FLR 203.
- [50] Johnson v Miller (1937) 59 CLR 467, 489 (Dixon J).
- [51] Criminal Code Act 1899 (Qld) s 229B.
- [52] (1997) 191 CLR 417.
- [53] (1997) 191 CLR 417, 422-423.
- [54] NSW, Victoria, WA, Tasmania, ACT, NT.
- [55] R v LAF [2015] QCA 130 [4].
- [56] R v DAT [2009] QCA 181 [17]
- [57] R v CAZ [2011] QCA 231 [45], [51].
- [58] R v CAZ [2011] QCA 231 [51].
- [59] R v CAZ [2011] QCA 231 [52]-[53].

Judicial College of Victoria

Melbourne, Victoria

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Introduction

Some of you may be asking why it is that the Royal Commission is considering criminal justice issues. Apart from the many issues concerning the nature, cause and impact of sexual abuse and the response of institutions, our Terms of Reference require us to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through ... processes for referral for investigation and prosecution^[1]

When asking the Commission to look at criminal justice the executive would have had in mind anecdotal accounts of the problems faced by complainants in sexual assault trials. We have all heard about or experienced them. We now have some statistics which confirm the difficulties faced by sexual assault complainants. I will come to those later.

The question they raise is why do the outcomes for sexual assault differ so markedly from the outcomes for other crimes?

A little over thirty years ago in *Bromley v The Queen* Brennan J, in relation to accomplices, children giving evidence on oath, and complainants in sexual assault cases, said:

The courts have had experience of the reasons why witnesses in the three accepted categories may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses.^[2]

These words reflect the long and difficult history of victims of sexual offences, including child sexual offences, in the criminal justice system.

They also reflect a view amongst judges that they are possessed with particular insight, and that their role is to formulate the rules for criminal trials which reflect that insight. Some of those rules have had a significant and negative impact on the ability of child sexual abuse survivors to access justice.

Because of their classification as potentially unreliable witnesses, together with the form of directions designed specifically in relation to their evidence, and a judicial attitude that juries may not be able to fairly assess all the evidence, the criminal justice system has created a series of barriers in sexual assault cases not known for other crimes.

For many complainants the barriers have been insurmountable. For many others the rules have proved a deterrent to any engagement with the criminal justice system.

A recognition that the system may have gone too far and may be denying justice to complainants first started to emerge about 30 years ago. Since then, largely through the intervention of parliament, significant reforms have been made. The question for the Royal Commission is whether there is more that should be done.

Directing the jury

When directing a jury a judge may in some circumstances be required to give a warning or caution. A warning or caution will typically be required where acting upon particular evidence is believed to involve ‘dangers’ or concerns matters about which the court is said to have ‘special experience’ which the jurors do not possess.^[3]

The judicial distrust of sexual assault complainants has a long tradition.

In the mid-1700s the English jurist Sir William Blackstone discussed the common law approach to assessing the truthfulness of a woman alleging sexual assault. He said:

“if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place, where the act was alleged to be committed, was where it was possible she might be heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned.”^[4]

The source of later and erroneous approaches to issues of sexual assault can be seen in these remarks. They emerge in the need for corroboration, the relevance of delay to a complainant’s credibility and the inappropriate use of a complainant’s sexual history.

It may be suggested that the courts were merely relying upon the understanding of these issues current in the general community. However, we know that the courts were not relying on what was commonly understood. Indeed courts expressly rejected the understanding of the general public.

What the quote from *Bromley* clearly demonstrates is that courts believed that their experience had generated knowledge often described as ‘judicial wisdom’ on these issues. They were relying on the ‘sharpened awareness’ the courts said they had about who jurors should and should not believe and why.

Decisions such as *Longman*,^[5] *Doggett*,^[6] *Crompton*^[7] and *Murray*^[8] have had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time they were assaulted. They derive from what judges’ thought they knew about how genuine complainants behave and what they thought they knew about how memory works.

Those assumptions have turned out, with the benefit of empirical research, to be flawed. However, they became embedded in the fabric of the common law and proved difficult even for Parliament to dislodge.

In 1981 NSW enacted legislation to provide that if delay in complaint was raised in a trial for a prescribed sexual offence the trial judge was required to direct the jury that delayed complaint does not necessarily indicate that the allegation is false. The judge is to inform the jury that there may be good reason why a sexual assault victim may hesitate in complaining.^[9]

Similar legislation was enacted in Victoria a decade later. That legislation was considered by the High Court in *Crofts v The Queen*^[10] in 1996.

Crofts concerned complaints of child sexual abuse that were made six years after the first alleged incident of abuse and just six months after the last alleged incident. Justices Toohey, Gaudron, Gummow and Kirby stated that ‘by the measure of cases of this kind, that was a substantial delay.’^[11] We now know that this characterisation of the delay, if it is intended to diminish the veracity of the allegation, is wrong.

The Court held that the relevant provisions required a balanced direction. The effect was that while a direction in accordance with the section could be given, so too should a direction consistent with the common law that delay is relevant to the complainant’s credibility and should be taken into account.

Although lengthy it is worth quoting in full the relevant portion of the joint judgment as it provides a clear illustration of how closely the courts can protect judicial assumptions. Perhaps it passed without notice but in this passage the judges both reject and then rely on the court’s assumption as to ordinary human experience.

[The decision in *Longman*] makes it clear that the purpose of such legislation, properly understood, was to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses. It was simply to correct what had previously been standard

practice by which, based on supposed ‘human experience’ and the ‘experience of courts’, judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to ‘sterilise’ complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for consideration. The overriding duty of the trial judge remains to ensure that the accused secures a fair trial. It would require much clearer language than appears in s 61 of the Act to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts which, on ordinary human experience, would be material to the evaluation of those facts.

On one hand acknowledging that legislative intervention was necessary in order to correct flawed directions ostensibly based on ‘human experience’ and then, on the other hand invoking ‘human experience’ as the rationale for substantially diluting a direction required by legislation, appears, with respect, not to have troubled the judges.

A further difficulty arises in that there may not be uniformity amongst judges as to their assumptions about what and how jurors think. Rules are typically rationalised as being necessary because the weight of judicial experience says that it must be so, in order to avoid an injustice. It is this body of ‘judicial experience’ or ‘collective wisdom’ that gives these laws their legitimacy.

Collective judicial “wisdom”, however, may be nothing more than the way we have always thought about the issue. Further, that collective wisdom may not be so collective.

For survivors, and for many in the community, it may be difficult to understand why on some issues juries are directed in one way in one state, and differently in another. If judges in New South Wales believe a rule is necessary to avoid an injustice, how is it that judges in Victoria do not?

The *Markuleski* direction is one example of this lack of uniformity. In *Markuleski* the NSW Court of Appeal held that, in word against word cases, the trial judge should, as a general rule, direct the jury that a reasonable doubt with respect to the complainant’s evidence on any count ought to be taken into account in its assessment of the complainant’s credibility generally.^[12]

In contrast, Victorian courts have held that a *Markuleski* direction should generally be avoided.^[13] Justice Buchanan in *R v Trainor* stated:

‘I think it unlikely that a jury given a separate consideration direction will be entirely uninfluenced by the impressions they derive from the evidence of a witness taken as a whole; I doubt that such a natural tendency needs judicial encouragement in the form of a *Markuleski* direction.’^[14]

It is apparent that the Victorian court took a different view as to the guidance the jury needed as to how to reason to avoid an injustice to the accused.

The need identified in NSW to give guidance is premised on an anterior assessment of whether or not the reasoning process the jury would ordinarily undertake is flawed, inadequate or indeed dangerous. It is interesting that a flaw detected by NSW judges in the reasoning process of jurors in Albury is, according to the law, not one present in the jurors in Wodonga.

The point is not to deny an evidentiary rule or a rule requiring a judicial direction in relation to particular evidence will never be necessary. Rather it is that judicial assumptions about how people reason may not be the most appropriate foundation for these types of rules.

One issue the Royal Commission is considering is the need for jury directions containing educative information about children and their response to child sexual assault. I will refer to them as educative directions.

There is significant research that demonstrates that the way a child behaves and reacts in response to sexual abuse is inconsistent with the expectation of many jurors.^[15] The behaviours of sexually abused children are commonly described as 'counter-intuitive'.

These erroneous expectations in relation to children may also be present in beliefs held about their capacity to give evidence. This, of course, is not surprising – it was an assumption of the common law for many, many years.

Justification for these directions may be found not only in the fact that incorrect assumptions about victims of child sexual abuse are common in the general community.

It is important that research commissioned by the Commission demonstrates that defence counsel commonly use strategies when questioning complainants in child sexual abuse offence trials which rely on these misconceptions or uncertainties amongst jurors in relation to child complainants.

Analysis of 120 transcripts of complainant evidence from 94 child sexual abuse trials showed that defence counsel often employed strategies to suggest that there is one typical way a victim responds to abuse. If the complainant had not responded in that way, counsel suggested to the jury that this was an indication that the offence may not have occurred.

The researchers found that the types of misconceptions about child sexual abuse exploited included the lack of resistance by the complainant at the time of the offence, the delay in reporting, the apparent lack of emotion by the complainant at the time of the offence and the continued relationship between the complainant and the accused after the offence.^[16]

In their report *Family Violence: A national legal response* the ALRC and NSWLRC stated that there was a strong case for the use of jury directions which would ‘summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour.’^[17]

Similarly the National Child Sexual Assault Reform Committee has also recommended that three mandatory judicial directions, summarising the research and containing the same information, should be introduced in all Australian jurisdictions. Those three directions are in relation to children’s abilities as witnesses, very young children’s abilities as witnesses, and children’s responses to child sexual abuse.^[18]

Providing the jury, and indeed the judge, with accurate information about the behaviour of children who are sexually abused assists in their credibility being assessed more accurately. This in turn promotes the public interest in securing the convictions of the guilty and the acquittal of the innocent.

Tendency and coincidence evidence

Judge’s assumptions about human behaviour have influenced other aspects of the laws of evidence. One important area is tendency and coincidence evidence or, as these concepts were known to the common law, propensity and similar fact evidence.

I have said on many occasions that this issue – that is, 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. Before turning to that issue you will be interested in a recent analysis of outcomes in sexual assault trials.

Data recently obtained by the Royal Commission from the NSW Bureau of Crime Statistics and Research confirms the difficulties facing complainants of sexual assault, both children and adults.

In New South Wales between July 2012 and June 2016 the conviction rate for all offences, including matters finalised by a guilty plea, was 89%. For child sexual assault offences the conviction rate was 60%. By comparison the conviction rate for assault was 70%, robbery 73% and illicit drugs 94%.

One class of offences with a lower conviction rate was adult sexual assault with a conviction rate of only 50%. One possible reason is that in addition to the fact that these cases are, like child sexual assault cases, commonly word against word, consent will often be an issue.

The conviction rate for assault matters is higher than for child sexual assault matters. That is notwithstanding that in many cases, the identity of the offender may well be at issue. This is rarely the case for child sexual assault matters.

The conviction rates for illicit drug matters is significantly higher than for child sexual assault matters. This is likely because in a substantial number of drug cases the offender will be found to have the drugs on them making proof of the offence much easier than in child sexual assault matters.

The law reports are replete with comments by judges about the extra caution with which juries must approach sexual assault cases. In *KRM v The Queen*, Kirby J said:

In cases involving accusations of sexual offences, courts and prosecutors must exercise particular vigilance, so far as they can, to ensure that the fairness of the trial is maintained because the circumstances are *peculiarly likely to arouse feelings of prejudice and revulsion*. This duty imposes special difficulties for judges presiding at such trials where they are conducted before a jury.^[19]

This concern – the arousing of prejudice and revulsion in jurors – is not borne out by the data. If it is the case that the mere allegation of a sexual offence against a child is peculiarly likely to arouse feelings of prejudice then we should see high conviction rates in these cases.

This is because, self-evidently, every trial in relation to a child sexual offence will involve an allegation that a child has been sexually offended against. What we in fact see is much lower than average conviction rates.

In a statement in relation to the severance of trials concerning multiple sexual offence counts Gibbs CJ in *De Jesus v The Queen* said:

Sexual cases ... are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard.^[20]

Again the data suggests these concerns are overblown. In relation to child sexual assault offences which were finalised at a defended hearing or at trial there were 725 matters in NSW between July 2012 and June 2016. Of those the defendant was convicted of all relevant offences in 32% of matters.

The defendant was convicted of some but not all relevant offences in 16% of matters. The defendant was convicted of no relevant offences in 52% of matters.

The capacity for jurors to correctly isolate and apply the evidence in relation to each individual case is not only demonstrated in the data but has been recognised by courts in cases in relation to the issue of ‘inconsistent verdicts.’

In rejecting the ground of appeal that if the jury acquitted on one or more counts it follows they did not believe the complainant in relation to these counts and for that reason they should not have believed the complainant in relation to the other counts, appeal courts have accepted that there may be rational reasons for convicting on some counts and acquitting on others.

The courts have recognised that jurors follow the direction to consider each count, and the evidence in relation to it, separately.

The Commission is aware of comment amongst members of the legal profession that the Commission's work has had such a transformative effect on the mind of the general community so that it has now become much more difficult, perhaps, it has been suggested, dangerously difficult, to secure an acquittal in relation to child sexual offences. The data clearly suggests otherwise.

In 2012-2013, 73 child sexual assault matters were finalised at a defended hearing or trial in the District Court. In the District Court, of course, charges in defended hearings are most likely to be heard before a jury.

Of those 73 matters the defendant was convicted of all relevant offences in 29% of matters, convicted of some but not all relevant offences in 27% of matters, and convicted of no relevant offences in 44% of matters.

By contrast, in 2015-2016, 142 matters were finalised at a defended hearing.

That is almost double the number of matters. However, in relation to conviction rates the defendant was convicted of all relevant offences in 24% of matters, convicted of some but not all relevant offences in 23% of matters, and convicted of no relevant offences in 54% of matters.

It appears that, although many more complainants are coming forward, the chances of an offender being acquitted have risen rather than fallen.

Issues in relation to tendency and coincidence evidence have troubled our courts for many years. The recent Victorian report into jury directions suggests they have caused problems for more than 100 years. In *Pfennig v The Queen*, Justice McHugh spoke of:

the *vexed question* as to the circumstances in which the prosecution may prove a criminal charge by tendering evidence that the accused has engaged in criminal conduct on occasions other than that which is the subject of the charge before the court.^[21]

Our work to date indicates this question remains vexed.

Tendency and coincidence evidence has particular significance in relation to the work of the Royal Commission. This is because, in the absence of such evidence, child sexual abuse cases often reduce to word against word. Child sexual offences are generally committed in private.

In many cases there will be no medical or forensic evidence. Unless the perpetrator has retained images of the abuse or makes an admission it is likely that the only direct evidence will come from the complainant. Satisfying the jury beyond reasonable doubt in these circumstances can be very difficult.

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. In these cases issues of tendency and coincidence arise.

The courts have traditionally been cautious about allowing tendency and coincidence evidence, or their common law counterparts, to be put before the jury. The reason for that caution was articulated by Lord Cross of Chelsea in *Boardman v DPP*. It is:

Not that the law regards such evidence as inherently irrelevant but that it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was, so that ... its prejudicial effect would outweigh its probative value.^[22]

The importance of the role of the judge as the gatekeeper for evidence of this type was recently reaffirmed by the High Court in *IMM v The Queen*.^[23] Justices Nettle and Gordon commented on the requirement that the judge should make a preliminary assessment of evidence that falls within a particular category the common law and/or statute have identified as potentially unreliable:

Such an assessment is not in any sense a usurpation of the jury's function. It is the discharge of the long recognised duty of a trial judge to exclude evidence that, because of its nature or inherent frailties, could cause a jury to act irrationally either in the sense of attributing greater weight to the evidence than it is rationally capable of bearing, or because its admission would otherwise be productive of unfair prejudice which exceeds its probative value.^[24]

In a 1933 article published in the Harvard Law Review Professor Julius Stone traced the history of the rule of exclusion of similar fact evidence in England from its earliest origins until Makin's Case in 1894. Stone identifies the starting point for the rule as the case of *Rex v Cole* first referred to in an 1814 text.

By 1850, Stone argues, the rule in relation to similar fact evidence was understood to be that 'whenever the evidence of similar facts offered was relevant to any specific act or issue upon which the jury has to make its mind up it was admitted.'^[25]

He says that *Rex v Cole* was 'authority merely for the proposition that if the evidence offered is relevant only by an argument which proceeds from the other crimes to the disposition of the prisoner to commit such crimes' (ie mere propensity) 'and thence to the probability of his having committed the crime charged, it is not admissible.'^[26]

Stone goes on to discuss the way the law developed between 1850 and Makin's case in 1894. His general thesis is that prosecutors generally succeeded in attaching the evidence to some issue before the jury other than mere propensity, for example to rebut a defence, with the consequence that the rule in *Rex v Cole* would not apply.

Over time the issues to which the evidence was attached came to be considered to be heads of exception to a general rule of exclusion. Stone states ‘as so easily occurs in the common law ... the tendency to crystallise particular determinations of relevance into categories of admission appeared.’^[27]

This began to cause difficulties for courts. An example Stone offers is the New Zealand case of *Regina v Hall*, involving similar fact evidence, in relation to which he states:^[28]

This remarkable opinion closes with a classic declaration of the impatience of judges before the tyranny of absurd rules of their own creation.

‘Viewed in light of science, philosophy or common sense there is without a doubt a nexus between the two events ...

We are aware that in cases like the present the application of the rigid principle of the common law must often result in what the public may regard as a failure of justice. That is really not our concern. It is our duty to see that justice be administered according to law.’^[29]

In relation to the expression of the rule in *Makin’s case*, Stone states that it has been cited ‘sometimes with understanding of its meaning, sometimes not.’^[30]

Stone’s view is that *Makin’s case* should be understood as holding that there is ‘no broad rule of exclusion with exceptions, but a broad rule of admissibility where there is relevance, except where the only relevance is via disposition’^[31] (that is, mere propensity).

Stone concludes with his suggestion of how the rule should be formulated: ‘It is that the trial judge should be recognised to have a discretion to decide whether the probative weight of the proffered evidence outweighs its mere prejudice.’^[32]

Two issues stand out in relation to Professor Stone’s conclusion: the first is that he accepts that the evidence is troublesome. Earlier in the article he states that similar fact evidence ‘presents the possibility of undue prejudice in an extreme form’.^[33]

The foundation on which this statement rests is not explored in detail other than to state that ‘the policy of avoiding undue prejudice is based on weaknesses of human nature which are today as obvious as ever.’^[34] The second is in relation to his suggested remedy. Notable is the absence of any requirement for the probative value of the evidence to substantially outweigh the prejudicial effect as required under the uniform evidence law.

The Royal Commission commissioned research designed to interrogate whether the assumption that the evidence ‘presents the possibility of undue prejudice in an extreme form’ is correct.

Using mock juries and a trial involving charges in relation to child sexual abuse in an institutional context the researchers examined the effect of joinder and the admission of tendency evidence upon the jury's reasoning and their decisions.

1,029 jury eligible citizens, 580 women and 449 men, participated in the study. They were randomly allocated to one of 90 mock juries.

The juries each watched a video of one of ten versions of a trial. Variations of the trial included:

- A separate trial of an adult complainant with moderately strong evidence.
- A separate trial of an adult complainant with moderately strong evidence in which relationship evidence comprised of uncharged acts and grooming behaviour was also admitted.
- A separate trial of an adult complainant with moderately strong evidence in which tendency evidence from two other prosecution witnesses was admitted.
- A joint trial with three adult complainants who gave weak, moderately strong and strong evidence.
- The deliberations of each of the juries were audiotaped and videotaped. Transcriptions of each jury deliberation were qualitatively and quantitatively analysed.

The trial was designed to interrogate three types of unfair prejudice:

1. Inter-case conflation prejudice – the idea that juries will confuse or conflate the evidence led to support different charges in a joint trial and wrongly use evidence related to one charge in considering another charge.
2. Accumulation prejudice – the idea that juries will assume the accused is guilty because of the number of charges against him or the number of prosecution witnesses regardless of the strength of the evidence.
3. Character prejudice – the idea that juries will use evidence about the accused's other criminal misconduct and find guilt by reasoning that because he did it once he has done it again.^[35]

The qualitative and quantitative analysis of the deliberations is an important feature of this research. A key criticism of a number of previous studies was their over reliance on conviction rates as the relevant measure. Verdicts on their face reveal nothing about the reasoning process that lies behind them.

They do not tell us whether any increase in conviction rates is the result of permissible reasoning arising from the availability of more logically probative evidence such as tendency evidence, or whether they are due to impermissible reasoning based on unfair prejudice.

With respect to the issue of inter-case conflation the researchers found that jurors were more likely to make errors within a case, rather than between cases, suggesting little inter-case conflation prejudice. They found that these errors were corrected by other jurors in the course of deliberation. The researchers found that no verdicts were based on persistent uncorrected or inter-case conflation of the evidence.^[36]

In relation to the risk of unfair prejudice from accumulation prejudice the researchers found that conviction rates for the weakest case did not increase significantly with extra witnesses or extra charges, indicating no accumulation prejudice.^[37]

Perhaps most significantly, in relation to character prejudice evaluation of the jury deliberations revealed that no juries in either the tendency evidence or joint trials impermissibly used the tendency evidence to conclude that the defendant was guilty because of the number of allegations of prior misconduct that were made.

The researchers found no evidence of verdicts motivated by emotional reactions to the severity of the allegations, such as a sense of horror regarding the allegations, or a desire to punish the defendant.^[38]

Conscious of the fact that some jurors may have been inhibited from revealing the true basis for their decision to convict in a group setting, as part of the post-trial questionnaire the jurors were asked to identify the main reason for their verdict. This questionnaire was completed anonymously. The responses revealed that only three percent of jurors gave reasons that were identified as displaying character prejudice.^[39]

The researchers ultimately concluded that:

the low frequency and isolated examples of reasoning in deliberations involving inter-case conflation of the evidence, accumulation prejudice, or character prejudice suggest that the likelihood of impermissible reasoning, whether in joint trials or separate trials, is exceedingly low. This low probability suggests that there was negligible unfair prejudice to the defendant in joint trials where tendency evidence was admitted.^[40]

The law in Australia at present

The law in relation to the admissibility of tendency and coincidence evidence has developed in different ways across Australia.

The common law in relation to propensity and similar fact evidence, with some modification, applies in Queensland. The test for admissibility is that set down in *Pfennig v The Queen*. Propensity or similar fact evidence will be admitted only if it possesses 'a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused in the offence charged.'^[41]

The ALRC has described this test as ‘extremely stringent’.^[42] It is more stringent than the test that existed at common law in England and Wales before the significant reforms made in those jurisdictions in 2003.

The uniform evidence legislation applies in NSW, Victoria, Tasmania, the ACT and the NT. In criminal proceedings tendency or coincidence is admissible only if notice is given, the court considers the evidence has significant probative value and the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.^[43]

Despite this legislative uniformity, differences have emerged between NSW and Victoria in relation to how the provisions for the admissibility of tendency and coincidence should be interpreted and applied. There are three notable differences of significance in the context of institutional child sexual abuse.

The first is that, particularly in relation to tendency evidence, there are differences as to whether and to what extent similarity in the manner of offending is required in order for the evidence to be admissible as tendency evidence. In NSW, similarity is not essential, although it may assist in establishing probative value. In Victoria common or similar features or an underlying unity in the offending is required.

The second is in relation to the question of whether features of the institutional context are relevant in determining similarity and the probative value of the evidence. NSW courts have found similarities in the circumstances of institutional offending that Victorian courts have regarded as unremarkable circumstances that are not within the accused’s control.^[44]

Thirdly, differences have emerged as to whether the reliability of the evidence, particularly in relation to issues of possible collusion, concoction and contamination should be determined by the judge or the jury.

In NSW reliability and credibility generally have no role to play in the assessment of probative value with the result that these are generally matters for the jury. Before *IMM v The Queen*^[45] resolved the issue in favour of the NSW approach, Victoria maintained the common law position that that the reliability of evidence affects its probative value and therefore amongst other matters issues of possible concoction or contamination are to be determined by the judge.

In relation to the first difference it is relevant to ask why we are looking for similarity, when the provisions which, in relation to tendency evidence, do not refer to it. It is because the common law has determined that the probative force of the relevant evidence is tied to the similarities in the behaviour of the accused as alleged by the witnesses.

However, in relation to the question of whether sexual offending has in fact occurred, rather than the identity of the offender, it is relevant to ask to what extent is similarity an indicator of greater probative value? If it is the case that sexual offenders typically perform the same sexual acts on victims of the same sex who are the same age then it may be correct to reject as significantly probative, evidence that does not have these similarities.

However, the work the Royal Commission confirms that a sexual offender may offend in a variety of ways against a range of victims of varying ages. In case studies 16, 17, 18, 26, 37 and 46 we heard evidence of a single offender offending against both boys and girls.^[46] The different types of offence, from touching, fondling and ultimately penetration, will commonly be committed by the same offender.

There is a danger that if judges fail to understand how sex offenders actually operate the assessment of the probative value of tendency witnesses will be based on a false premise. Proceeding from a false premise rarely leads to a correct conclusion.

In South Australia new rules for the admissibility of ‘discreditable conduct’ evidence commenced in 2012. Evidence of a defendant’s discreditable conduct may be admitted if its probative value substantially outweighs any prejudicial effect it may have on the defendant. If it is tendered for propensity reasoning, it must have ‘strong probative value’.^[47]

The rules in Western Australia are notably different. Propensity evidence is admissible if the court considers that it would have significant probative value and ‘that the probative value of the evidence compared to the degree of risk of an unfair trial is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.’^[48]

This formulation of the public interest test adopts McHugh J’s approach in *Pfennig*. The test for admission in Western Australia is arguably the most liberal in Australia.

This lack of clarity and inconsistency between the states could itself justify a recommendation for reform. It is difficult for the Commissioners to support a situation in which the rules in relation to evidence of such significance are different for a survivor involved in criminal proceedings in one state than for a survivor in another.

In an oft-quoted passage, Justice Brennan has observed that ‘[i]nconsistency is not merely inelegant’ but suggests ‘an arbitrariness which is incompatible with commonly accepted notions of justice’.^[49]

Considered together the inconsistency across the jurisdictions, the lack of clarity in relation to uniform provisions, the low conviction rates in child sexual offence cases, the fact that juries regularly return different verdicts on different counts and the findings of the jury research suggest that the law in relation to tendency and coincidence evidence may need reform.

The Western Australian provisions have a lower threshold of admissibility than in any other Australian jurisdiction. Yet the Commission has not seen or heard any evidence or indeed any suggestion of injustices flowing from these changes.

And in relation to the position in England and Wales, where the law in relation to admissibility is more liberal still, we have not seen or heard any suggestion of injustices arising as result of the changes occurring there. Those changes were made more than a decade ago.

Whilst reasonably satisfied that the law should change to facilitate greater admissibility of tendency and coincidence evidence in child sexual abuse cases, the Commissioners have not yet identified how this is best achieved.

Particularisation

A further difficulty for survivors in child sexual abuse cases is the requirement for the prosecution to provide particulars in relation to the offence or offences charged. The requirement to provide particulars, undoubtedly reasonable, is necessitated by the accused being entitled to know the case against him or her.^[50]

Victims and survivors of child sexual abuse often find it difficult to provide adequate or accurate details in relation to the offending.

There are a number of reasons. The first is that 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. Second, delay in reporting may cause events to be wrongly attributed to a particular time or location when they in fact occurred earlier or later, or at another location.

Thirdly, the abuse may have occurred so often and in such similar circumstances, that the victim or survivor is unable to describe specific or distinct occasions in which they were offended against.

The result, particularly in relation to this third reason, is a cruel paradox: the greater the regularity with which a child is offended against, the more difficult it can become to charge and prosecute the offender.

Parliaments have attempted to remedy this situation through the introduction of legislation to create persistent sexual abuse offences. This first occurred in Queensland in 1989. By the end of the 1990s an offence of this type had been introduced in each of the states and territories. There have, however, been challenges in relation to these offences.

The Queensland offence as originally enacted was an offence of ‘maintaining a sexual relationship with a child/young person.’^[51] The legislation required the prosecution to prove the sexual relationship by showing three distinct occasions of unlawful sexual conduct each proved beyond reasonable doubt.

The offence was considered by the High Court in 1997 in *KBT v The Queen*.^[52] The Court held that the offence required the jury to be satisfied beyond reasonable doubt as to the commission of the same three acts which constituted relevant sexual offences.^[53]

It follows that in order for the jury to agree that the same three acts of sexual offending have been proved, one must be able to identify with some precision each of the three discrete acts or occasions of offending necessary to make up the charge. As a consequence the problem was not removed.

In most Australian jurisdictions the relevant offence continues to require proof of the occurrence of three or more unlawful sexual acts.^[54] It is not surprising, given the decision in *KBT*, that in most, but not all, of these jurisdictions the persistent sexual abuse offence is rarely charged. Data provided to the Royal Commission indicates it is rarely charged in the two largest jurisdictions: New South Wales and Victoria.

In Queensland, however, the persistent sexual abuse offence is regularly charged. In that state the offence has been reframed in order to address the concerns identified in *KBT*. Under the Queensland legislation the actus reus of the offence is the unlawful sexual relationship, not particular unlawful acts.

The amended section 229B defines an unlawful sexual relationship as one that involves more than one unlawful act over any period. All members of the jury are required to be satisfied beyond reasonable doubt that the evidence established that an unlawful sexual relationship with the child involving unlawful sexual acts existed. Importantly, however, s 229B(4) provides that:

- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence and;
- (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
- (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

Section 229B has been considered at appellate level in Queensland on a number of occasions. The Court’s decisions establish that the key element of the offence is the unlawful sexual relationship.^[55] The indicia of maintaining a relationship include its alleged duration, the number of acts and the nature of the acts alleged.^[56]

The Court was satisfied that the trial's judge's power to ensure a fair trial is maintained under the section,^[57] and that the section does not remove the court's power to set aside a conviction on the grounds that there was a miscarriage of justice where the accused was given so little information about the charge as to render it impractical to prepare a defence.^[58] The Court of Appeal has also held that s 229B(4) does not offend Chapter III of the Commonwealth Constitution.^[59]

Application for special leave to appeal to the High Court in relation to convictions under s 229B have been twice refused. Once in 2008 and again in 2012.

The Royal Commission is considering the law in relation to persistent sexual offences as part of its criminal justice work. It is unacceptable, in our view, that the criminal justice system should accept a situation in which children who have suffered the most extensive abuse may be those who are less able to receive justice in the criminal courts.

Conclusion

The Royal Commission's criminal justice project is significant in scale. The issues which we must consider cover a broad reach. In Part II of this speech, which I will deliver at the Modern Prosecutor Conference in Melbourne on 13 April, I will discuss some of the other issues the Commission is examining.

These include prosecution responses, including DPP complaints and oversight mechanisms; the evidence of victims and survivors, including the use of special measures such as intermediaries and special hearings; and, sentencing.

The Royal Commission intends to provide its report in relation to criminal justice to government in August.

[1] Terms of Reference, para (d).

[2] (1986) 161 CLR 315, 324.

[3] See, eg, *R v Stewart* [2001] NSWCCA 260 [71]-[83] (Howie J); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, NSWLRC Report 128, 2010, 1309-1310.

[4] Blackstone's Commentaries on the Laws of England, 1st ed, bk 4, c 15, 213-4.

[5] (1989) 168 CLR 79.

[6] (2001) 208 CLR 343.

[7] (2000) 206 CLR 161.

[8] (1987) 11 NSWLR 12.

[9] Crimes Act 1900 (NSW) ss 405B and 405C.

[10] (1996) 186 CLR 427.

[11] (1996) 186 CLR 427, 442.

[12] *R v Markuleski* (2001) 52 NSWLR 82, 122 (Spigelman J)

[13] See *The Queen v Goss* [2007] VSCA 116; *R v PMT* [2003] VSCA 200 [34]. See also Judicial College of Victoria, *Criminal Charge Book*, [4.18.1].

[14] *R v Trainor* [2003] VSCA 200 [32].

[15] A Cossins, J Goodman-Delahunty and K O'Brien, 'Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System', *Psychiatry, Psychology and Law*, vol 16, no 3, (2000).

- [16] M Powell, N Westera, J Goodman-Delahunty, A S Pichler, An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse (August 2016) 197-201.
- [17] Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response, ALRC Report 114, NSWLRC 128, 2010 p 1272.
- [18] A Cossins, Alternative models for prosecuting child sex offences in Australia, National Child Sexual Assault Reform Committee, 2010, 26-27, 173-175.
- [19] (2001) 206 CLR 221, 254.
- [20] (1986) 68 ALJR 1 [4].
- [21] (1995) 182 CLR 461, 510.
- [22] [1975] AC 421, 456
- [23] [2016] HCA 14.
- [24] [2016] HCA 14 [161].
- [25] Julius Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' (1933) 46 Harvard Law Review 954, 959.
- [26] Ibid 965.
- [27] Ibid 965-966.
- [28] Ibid 966: 'as so easily occurs in the common law ... the tendency to crystallise particular determinations of relevance into categories of admission appeared.'
- [29] Ibid 973.
- [30] 5 NZLR 93 (1887)
- [31] Makin v Attorney-General of New South Wales [1894] AC 57, 65.
- [32] Stone, above n 25, 975.
- [33] Ibid 984.
- [34] Ibid 954.
- [35] J Goodman-Delahunty, A Cossins and N Martschuk, Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study (May 2016) 45-48.
- [36] Ibid 249.
- [37] Ibid 28, 249, 259.
- [38] Ibid 35.
- [39] Ibid 124.
- [40] Ibid 35.
- [41] (1995) 182 CLR 461, 481.
- [42] ALRC, Uniform Evidence Law (Report No 102, 2005), [11.6]
- [43] See, eg, Evidence Act 1999 (NSW) ss 97, 98, 101.
- [44] Compare PNJ v DPP (2010) 27 VR 146 and R v PWD (2010) 205 A Crim R 75.
- [45] [2016] HCA 14.
- [46] See also, for example, Henderson v R [2016] NSWCCA 8.
- [47] Evidence Act 1929 (SA) s 34P.
- [48] Evidence Act 1906 (WA) s 31A.
- [49] Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 11 FLR 203.
- [50] Johnson v Miller (1937) 59 CLR 467, 489 (Dixon J).
- [51] Criminal Code Act 1899 (Qld) s 229B.
- [52] (1997) 191 CLR 417.
- [53] (1997) 191 CLR 417, 422-423.
- [54] NSW, Victoria, WA, Tasmania, ACT, NT.
- [55] R v LAF [2015] QCA 130 [4].
- [56] R v DAT [2009] QCA 181 [17]
- [57] R v CAZ [2011] QCA 231 [45], [51].
- [58] R v CAZ [2011] QCA 231 [51].
- [59] R v CAZ [2011] QCA 231 [52]-[53].

Association of Children's Welfare Agencies Conference

Sydney, New South Wales

15 August 2016

Introduction

Thank you, for your introduction.

I would like to acknowledge the traditional owners of this land, the Cadigal people of the Eora nation. I pay my respects to Elders past and present.

On 26 September 1924 in Geneva an event of great significance occurred. The League of Nations adopted the first international human rights document concerned specifically with the rights of children: The Geneva Declaration of the Rights of the Child of 1924. Through that document humanity declared formally, and for the first time, that it 'owes to children the best that it has to give'.

The 1924 Declaration was later to form the basis of a more comprehensive document: The Geneva Declaration of the Rights of the Child 1959.

Proclaimed by the General Assembly of the League's successor, the United Nations, the preamble to the declaration affirmed that children were entitled to those rights set down for all people in the Universal Declaration of Human Rights, while recognizing that 'the child by reason of his physical and mental immaturity, needs special safeguards and care.'

The Geneva declarations were later embedded into the Preamble of what has become the most ratified treaty in the world: The Convention on the Rights of the Child. Through this document the rights of children are articulated far more comprehensively and with a greater level of sophistication than ever before.

Whereas the length of 1924 Declaration is roughly half a page and is comprised of five principles, the 1990 Convention is an extensive document made up of over 50 articles setting out the obligations of state parties.

The Australian Government ratified the Convention on the Rights of the Child in December 1990. The adoption of the Convention has both symbolic significance and practical consequences in Australia.

It has been a critical step in our society in being prepared to look at the manner in which the obligations owed to children have been met, acknowledge wrong-doing and provide practical means to redress those wrongs and assist in the healing of those who have suffered.

The growing willingness to recognize the rights of children has occurred against a background of profound social change. When the Royal Commission first sat on 3 April 2013 I said:

‘Australians of recent generations have lived through a period of rapid change across many aspects of society. Many changes can be identified. One which is important for the work of this Royal Commission is our preparedness to challenge authority and the actions of those in power in areas where would not previously been contemplated. We have seen significant changes in the manner in which power is distributed throughout the community. The women’s movement and the fact that women now hold positions of responsibility in government and business are markers of many of the changes which have occurred. These changes have brought with them a need and capacity to reflect on the functioning of institutions and the behavior of individuals within those institutions.’

A picture is emerging for us that although sexual abuse of children is not confined in time – it is happening today – there has been 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.

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 which 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, be they youth worker, teacher, residential supervisor or cleric, the power imbalance was entrenched to the inevitable detriment of many children.

When, amongst adults, who are given the power, there are people with an impaired psycho-sexual development, a volatile mix is created.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society’s values and mechanisms which were available to regulate and control aberrant behaviour failed.

This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions.

It is confirmed by the development, in recent years, of regulatory control by government over many institutions which provide for children, and the development of education programs and mechanisms by which problems can be more readily brought to attention.

The most obvious is Working With Children regulations, but there are many others. I am sure that we all hope that from the tragic personal stories and institutional failures revealed in our public hearings the community will be reminded that both individual institutions and governments failed in their responsibility for children.

Where once silence was demanded, a child's complaint, however tentative in its communication, must be heard and given an appropriate response. Whatever the nature of the institution and however its members are respected by the community we must all accept that there may be members of trusted institutions who fail in their duty towards children.

The power of the institution must never again be allowed to silence a child or diminish the preparedness or capacity of adults to act to protect children.

Royal Commission update

The Royal Commission has now held 42 public hearings. Public hearings have a significant role in driving institutional and regulatory change. Many institutions who have not themselves been the subject of a public hearing have already responded to the problems revealed in similar institutions and have implemented change or reviews intended to improve the safety of children in their care.

Hearings have been held in every state in Australia. We will soon commence our 43rd public hearing – an inquiry into the response of Catholic Church authorities in the Maitland-Newcastle region to allegations of child sexual abuse by clergy and religious.

The Commissioners have now listened to the personal stories of more than 5,500 survivors in private sessions. For those of you who are not aware a private session with one of our Commissioners provides an opportunity for a survivor, or a survivor's family member, to tell their story of abuse in a protected and supportive environment.

It is the primary way for the Commissioners to bear witness to the abuse and trauma inflicted on children who suffered sexual abuse in an institutional context.

A further significant component of work is our research and policy development program. This has had the assistance of national and international experts across many disciplines. The program has four broad areas of focus: prevention, identification, response and justice for victims.

As of July the Commission has published 26 research reports and two consultation papers. We have released 11 issues papers and received over 850 submissions in response to those papers.

We have also released two final reports. Our Working With Children Checks report was released in August 2015 and contains 36 recommendations. Our Redress and Civil Litigation Report was released in September 2015 and contains 99 recommendations.

I have now referred over 1,600 matters to authorities, mainly police, with a view to the possible prosecution of an offender. Many have resulted in charges and arrests. We have been advised that there have been over 60 prosecutions commenced as a result of these referrals.

A Royal Commission for all of Australia

The Royal Commission which I chair is a Commission for all of Australia. It is, in fact, seven Royal Commissions. We have letters patent from the Commonwealth and from every state in Australia.

This national focus is of significance. If we are to start by accepting, as I believe we must, that all Australian children deserve to be equally protected, then the challenges of federalism become immediately apparent. An almost inevitable consequence of multiple parliaments, and multiple bureaucracies, is that across the jurisdictions inconsistent law and policy emerges.

Inconsistency is problematic not only in relation to protecting children from abuse. Similar challenges emerge for survivors, in their attempts to pursue justice through the criminal or civil law or through alternative redress mechanisms.

In an oft-quoted passage, Justice Brennan has observed that '[i]nconsistency is not merely inelegant' but suggests 'an arbitrariness which is incompatible with commonly accepted notions of justice'.^[1]

Consistency has emerged as a key theme in the final reports we have already published.

In relation to Working With Children Checks, the present position is that each state and territory has its own scheme. The schemes are inconsistent, complex and operate independently of each other. The consequence is that children are being afforded different levels of protection depending on the state or territory in which they are located.

I have previously described the lack of a national framework for Working With Children Checks as 'a blight upon the communities' efforts to provide effectively for the protection of children.'

In our report we recommended a national approach. That approach would involve the establishment of a centralized database. The effect would be one accreditation which would operate across jurisdictions. We also identified a set of standards so that key aspects of Working With Children Checks regimes are dealt with in the same way. There would be consistency with respect to who requires a check and how a person's records are accessed.

In relation to redress the fundamental need identified in the report is for a single national redress scheme to be established by the Australian Government but funded by the institutions in which survivors were abused. A national scheme fulfils a key requirement necessary to ensure equal justice for survivors; it ensures that survivors would be treated equally regardless of the institution, or place in Australia, in which they were abused.

Regulation and oversight of institutions is a further area in which consistency emerges as an important issue.

Regulation and oversight

Our terms of reference require us to inquire into, among other things, ‘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’.

Across Australia there are a range of oversight bodies that monitor aspects of child welfare, in particular the welfare of children in the care and protection system. These include Ombudsmen Offices, Reportable Conduct Schemes, Children’s Commissions, Community Visitors Schemes, Child Advocates and Children’s Guardians, and Crime and Misconduct Commissions.

There are also various regulatory mechanisms in place in Australia. The larger regulatory bodies include non-government schools accreditation boards, early childhood and care regulators and medical sector regulators. These bodies also have different features across jurisdictions.

The Commission is concerned to examine what these different approaches to the regulation and oversight of institutions that exist amongst the jurisdictions means for the protection of children. Accordingly, we have commissioned research on this issue which we intend to publish in due course.

I can share with you today some preliminary findings from that research undertaken for the Royal Commission by Professor Ben Mathews of the Queensland University of Technology. In relation to the six types of oversight bodies mentioned previously, Professor Mathews found there is great deal of variation in the presence, nature, scope and power of these bodies.

The exception is Ombudsmen’s Offices which are largely similar. Several of these bodies or mechanisms do not exist in every jurisdiction and no Australian state or territory has a dedicated Children’s Ombudsman. Differences in these bodies arise from differences in their constitutive legislation.

That legislation sets out the parameters within which each body operates. In addition, State and Territory governments invest more heavily in some agencies than others. Some of these bodies, will as a result, have features and resourcing that allows for greater oversight of relevant institutions. Currently New South Wales is the only jurisdiction to have a reportable conduct scheme. And Queensland appears to have the most extensive community visitors' scheme.

With the exception of the reportable conduct scheme, which is focused on institutional child sexual abuse, the research appears to indicate that, overall, there does not appear to be either frequent or wide-ranging engagement by oversight bodies with matters concerning institutional child sexual abuse.

Preliminary findings regarding regulatory bodies covering non-government schools, early childhood education and care and the medical sector have some common positive elements, such as criminal history checks. However, they approach some important areas, such as staff training about child sexual abuse, very differently.

There are related concerns in respect of the regulation of smaller organisations such as sporting, cultural, arts and recreation groups. These organisations are largely self-regulated but there are large numbers of children involved in their activities.

Recent data shows that in NSW alone, in the 12 months prior to April 2012, almost 539,000 children aged between the ages of five and 14 participated in at least one sport outside of school hours. There is a risk of child sexual abuse occurring in any of these institutions although this risk will vary depending on the context.

Our recent public hearings into performing arts centres (Case Study 37) and sporting clubs and institutions (Case Study 39) have focussed on these issues. We will be publishing our reports on these cases studies in the coming months.

Regulation and oversight of out-of-home care

Inconsistencies between the states' and territories' regulation and oversight systems also exist in relation to out-of-home care.

This is despite the adoption of the National Standards for Out-of-Home Care. Across the country there are different service provider accreditation systems, mandatory reporting requirements and complaint management systems. This means that children receive different levels of protection, care and support depending on their circumstances and geographical location.

- Following our Consultation paper on out-of-home care issued in March 2016, we are considering the following issues:
- Should core oversight functions be conducted by a body external to, and independent of, the relevant jurisdiction's lead department and all service providers?

- Should independent oversight of complaints handling be conducted by a body independent of the lead department and all service providers? That is, should a 'reportable conduct scheme' be implemented in each jurisdiction?
- Should there be a nationally consistent minimum standards for assessing and authorising all carers?
- Should the accreditation of all government and non-government out-of-home care providers be to a nationally consistent minimum standard?
- Should there be a body that is responsible for assessing and granting applications for accreditation, independent of the relevant jurisdiction's lead department?
- Should the accreditation body retain ongoing responsibility for monitoring accredited providers to ensure their continued compliance with the conditions and standards of their accreditation?
- Should all carers be reassessed on a regular basis?
- Should there be a register of carers in each jurisdiction, containing relevant information about all applicant and authorised carers?

The current approach to regulation and oversight, in the out-of-home care space and more broadly, appears to be far from consistent. If our goal, as a society, is to do our best to protect all children from child sexual abuse then these inconsistent systems are impossible to justify.

The safety of a child should not depend on state or territory in which they reside. There can be little doubt that there is time for greater uniformity in relation to regulation and oversight mechanisms across the nation.

Out-of-home care

Out-of-home care is an area of central concern to the Royal Commission. It will not come as a surprise to you that of all the categories of institutions identified by people who have had a private sessions with us, out-of-home care is the largest.

Our latest analysis indicates that, forty-three percent of victims in private sessions reported sexual abuse in out-of-home care. However, it is important to understand that this category includes historical care institutions such as orphanages and homes that no longer exist, as well as contemporary out-of-home care environments such as foster care.

There were more than 43,000 children in out-of-home care in 2014 in Australia. There has been an 82 percent increase nationally in the number of children in care over the past decade.

We have heard concerns that the current out-of-home care system does not adequately protect children from sexual abuse, or respond as well as it should when abuse occurs. We know that children in out-of-home care are at a heightened risk of sexual abuse.

The task of preventing and responding to child sexual abuse in out-of-home care has often been limited to sexual abuse perpetrated by foster carers, residential care staff and professionals.

Notwithstanding the importance of remaining vigilant about this risk, two other forms of child sexual abuse require more attention in order to properly protect children in care. These are child sexual exploitation and child-to-child sexual abuse.

Child exploitation is concerned with when children are coerced or manipulated into engaging in sexual activity in return for something such as alcohol, money or gifts. The perpetrator often initially grooms children for this abuse online. The sexual exploitation of children in care, particularly residential care, is a serious problem in out-of-home care. It raises a number of issues including:

- the lack of coordinated and cross-sector protocols, procedures and responses particularly among out-of-home care service providers, child protection services and the police
- the lack of preventative measures, such as strategies for when children are missing from their placement; and the enforcement of social media policies and education within out-of-home care, child protection services and the police
- the need to address the barriers to children disclosing sexual exploitation

We have heard in public hearings that child-to-child sexual abuse is a serious and common problem in contemporary out-of-home care.

We have been informed that when a child first enters care, trained professionals need to make thorough assessments and placement matching decisions. We understand that children with sexually harmful behaviours, their carers and their families, need adequate and timely access to specialised trauma-informed services and support programs.

Evidence before the Commission suggests that placement and treatment options for children need to be identified, strengthened and implemented in every state and territory, to address the complex needs of children with sexually harmful behaviours.

We have been told that more needs to be done to better protect children from, and respond to, issues of child-to-child sexual abuse in out-of-home care. We are specifically considering:

- the shortage of home-based care for children with sexually harmful behaviours
- inappropriate matching of these children with other vulnerable children in residential and home-based care

- the insufficient treatment responses for children across Australia who display sexually harmful behaviours
- the lack of policies, procedures and/or best practice guidelines for preventing and responding to child-to-child sexual abuse in out-of-home care
- the lack of nationally consistent accreditation and professional development training for counsellors working in this field
- the shortage of expert advice and assistance for foster and kinship/relative carers
- carers receiving insufficient information about the child's background
- the lack of nationally consistent identification and terminology in relation to child-to-child sexual abuse in out-of-home care, and the resulting impacts on data collection and knowledge.

All these issues were explored in detail in our recent consultation paper on out-of-home care. We have published 55 submissions in response. They are currently being considered and will help inform our final recommendations which will be published in December next year.

Child-safe organisations

A key aspect the work of the Commission is to identify what makes an institutions 'child-safe'.

The concept of 'child-safe' would be familiar to most of you. However, if placed in the social history of institutionalised care of children, it is relatively recent.

The idea of a child safe organisation emerged in Australia in the last decade in response to increased community awareness of the vulnerability of children to harm, including children in care of institutions. This awareness arose partly in response to high profile cases of, and public inquiries into, child maltreatment in institutional settings.

Through our work we have been repeatedly presented with examples of institutions failing to keep children safe from abuse. We have identified problems in leadership, governance and culture. We have seen problems with implementing child safe policies. We have seen problems with complaint handling and identifying the needs of vulnerable children, amongst others.

Over some months, we have worked to identify specific elements that organisations should adopt in order to be child-safe. This has involved an extensive analysis of available research and evidence. We identified a preliminary list of elements which we considered fundamental to a child safe institution.

We had these elements tested in a research study that obtained feedback from a panel of 40 Australian and international experts. This group included academics, children's commissioners and guardians, regulators and other child safe industry experts and practitioners.

The panel agreed that the elements we had identified were relevant, reliable and achievable. The research study, *Key elements of a childsafe organisation research study - Final Report* will be published on our website in due course.

The Royal Commission's final report will include an entire volume on making institutions child safe. However, by publishing this research study and disseminating the child safe elements now, institutions can work on strengthening their child safe practices without having to wait for our final recommendations.

The 10 elements that we have identified are:

- Child safety is embedded in institutional leadership, governance and culture
- Children participate in decisions affecting them and are taken seriously
- Families and communities are informed and involved
- Equity is promoted and diversity respected
- People working with children are suitable and supported
- Processes to respond to complaints of child sexual abuse are child focused
- Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training
- Physical and online environments minimise the opportunity for abuse to occur
- Implementation of child safe standards is continually reviewed and improved
- Policies and procedures document how the organisation is child safe

We are now considering the how best to implement these child safe elements. This must involve consideration of the role of the Commonwealth, state and territory governments in the implementation of child safe elements, and in ensuring ongoing commitment to them.

While we have not finalised our recommendations, we have identified a number of relevant factors. Child safe standards should be nationally consistent, and that there should be some form of compliance mechanism. Compliance should be monitored and enforced.

Listening to, and believing, children and young people

Society's shifting attitudes towards children have come to value the importance of giving children and young people a voice. Article 12 of the Convention on the Rights of the child requires State parties 'to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child.'

As I identified earlier taking children seriously and allowing them to participate in decisions that affect them is an important element of what makes an institution child-safe.

Children who are empowered are more likely to disclose harm. Early and safe disclosure is critical. As we have learnt, the trauma caused by being silenced or disbelieved can be as impactful as the abuse itself.

The Royal Commission has been listening to young children and young people. We have conducted 60 private sessions with people aged under 25, and a number of young people have taken part in our roundtables on schools and child safe organisations.

Young people have given evidence in public hearings, including one into out-of-home care, and more recently, into performing arts centres. We have engaged with multicultural youth advocates. Commissioners have hosted workshops with young people to discuss safety in organisations. The voice of children and young people is apparent through our work and will be prominent in our final recommendations.

In line with this commitment, and to complement our work on child safe organisations, we have commissioned special research into children's views of safety.

We have published the report, *"Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns"*. This research was conducted by the Australian Catholic University in partnership with Griffith University, the Queensland University of Technology and Southern Cross University.

The study involved ten focus groups with 121 children and young people conducted in a range of institutional settings including out-of-home care, schools, youth activities and childcare centres.

As well as including the direct views of children themselves, the study was guided by three children and young people's reference groups who advised the research team on methodology and analysis.

Interestingly, when it comes to defining safety, children and young people differentiate between 'being safe' and 'feeling safe'.

They assess safety differently from adults by relying more on initial immediate reactions to a person, place or experience, rather than their past experience.

Children and young people generally agreed that institutions were safer when the institution focused on helping children and young people. This is demonstrated in the way adults interact with children; things children can do there; and signs that children are welcome. For example child-friendly posters, pictures and play areas.

Children also said institutions were safer when they valued their participation. This is demonstrated in the way adults and children interact, and the value the institution places on understanding children's fears, concerns, needs and wishes. It is also demonstrated by having mechanisms in place for children to complain, shape strategies and provide feedback.

Children and young people believed institutions were safer when they provided a safe physical environment. Children felt most safe in ordered and child-friendly environments. They valued physical signs such as fences, security cameras, cameras and locks. They felt the best way of determining whether the environment is safe is to observe how children behave there.

Children and young people felt institutions were safer when they proactively protected children and young people from unsafe people and experiences. This included identifying issues early and informing children of potential threats and hazards.

It included actively communicating with children and their safety concerns, and employing safe and trusted adults. In addition it included being open to monitoring by an external agency.

Finally, they felt institutions were safer when they employed safe and trusted adults. This included adults who are available when children and young people need them, and who are able to talk about sensitive issues. It included adults who prioritise children's needs and concerns over the needs of other adults and institutions. It also included adults who do what they say they will do.

Earlier this year, we released a report that explores how children and young people with disability view their safety and safety needs within institutions. This research is particularly important. To date research in the child sexual abuse context has paid little attention to the perspectives of children from this cohort.

The study involved 22 children and young people aged between seven and 25, all of whom have a cognitive impairment; many with multiple impairments. Six family members and 10 professionals were also interviewed individually and in small groups.

Researchers used a range of creative research methods to develop an understanding and experience of personal safety in institutions. This included photo elicitation, pictorial mapping, story boards and walk-along interviews.

Not surprisingly, the report found that children and young people expressed being safe as: feeling safe and secure; being protected; not being hurt; not trusting strangers and having some control of their situation.

It found that families and professionals seek to build a sense of safety by providing a loving foundation, and building capacity and confidence. They also create safety by building networks and taking action on behalf of children and young people.

Factors that help children and young people with disability and high support needs feel and be safe included being in a secure space. For most, this was home. Other factors included having friends and feeling known and valued.

However, children and young people said it can be very hard to know what is safe or unsafe. Few remembered learning about safety, either at school or anywhere else. Things that made it difficult for them to feel and be safe included the impact of having experienced various forms of abuse, and peer pressure. Being under-supported through transitions also made it difficult for them to feel and be safe.

Further, families and professionals viewed children's and young people's understanding of safety as limited. They shared concerns about how the ways in which service systems operate make it very difficult for these particular children and young people to identify trustworthy and untrustworthy people in their lives.

We will be publishing research into the views of safety of children in residential care, in due course.

Positive impacts of the Royal Commission

A significant amount of momentum has been created as a result of this Royal Commission. Change has been taking place at individual, organisational and community levels.

Many people who have shared their story either in a private session or in a public hearing have reported feeling unburdened and empowered as a result. Some have described the experience as a positive step towards healing and recovery.

Many organisations that have been charged with the care of children have taken positive steps towards righting wrongs of the past. Since the commencement of the Royal Commission, we have witnessed dozens of apologies from institutions big and small.

Bravehearts have reported a significant increase in the number of participants in the workshops and training programs they conduct. In the 2010/11 financial year Bravehearts trained 375 people in how to better identify and respond to child sexual abuse and other harm.

The number of participants has increased in each year since 2011. In the 2014/15 financial year Bravehearts trained 3,127 people. Bravehearts founder Hetty Johnson attributes this increase to the impact of the Royal Commission.

The Royal Commission has been instrumental in 'changing the conversation' around sexual abuse. Our public hearings in particular have brought widespread attention to the nature and extent of institutional child sexual abuse. In doing so, we have helped reduce the stigma associated with it.

Karen Willis, the chief executive of Rape and Domestic Violence Services Australia, has said that the Royal Commission has helped remove the shame felt by victims of child sexual abuse. She says more people are calling the Rape and Domestic Violence Service as a result. Heartfelt House provides support to adult survivors of childhood sexual abuse, their family and friends on the north coast of NSW.

Executive Director Vicki Atkins says the demand on the service has tripled since the Royal Commission was announced. By November 2014, calls to Adult Survivors of Child Abuse (ASSCA) – now called the Blue Knot Foundation helpline quadrupled since the start of the Royal Commission only the year before. President Dr Cathy Kezelman said the Royal Commission had encouraged more people to come forward.

Our work is leading to significant legislative change. In June this year, ACT Chief Minister Andrew Barr introduced a reportable conduct scheme to the Legislative Assembly- a law designed to force institutions to report abuse complaints to an independent authority.

According to media reports, Mr Barr told the Assembly "The Royal Commission has shown that there are still too many dark places within institutions to hide those who would harm children, and there are still those who draw the blinds rather than face the embarrassment or damage that illumination may bring." The ACT Ombudsman will be given new powers of oversight and scrutiny of internal investigations, essentially allowing it to prevent abuse complaints from being swept under the carpet.

In New South Wales this year the government passed legislation removing time limitations on civil claims for child sexual and serious physical abuse. The changes will apply to past child abuse as well as child abuse that occurs in the future. The impact of this legislative change is significant.

It removes barriers to civil justice for people who have suffered abuse and acknowledges the many years it can take for people to summon the courage to disclose their abuse. The Queensland Government has recently announced that it intends to introduce legislation to remove the statute of limitations for victims of child sexual abuse in institutions, such as schools. Limitation periods for child sexual abuse survivors were abolished in Victoria in 2015.

Whilst our work has generated a momentum for change, we must be aware that the Royal Commission will come to an end. Registrations for private sessions close in six weeks. We have finalised our public hearing schedule. Our work finishes in December next year.

Until then we ask that you remain engaged with our work. There will be further opportunities to be involved in our policy and research initiatives over the next 12 to 18 months. We hope you will take the opportunity to respond to our consultation paper on records and record keeping to be released in August. We expect to publish our consultation paper on criminal justice issues in September. We also expect to release further issues papers, and invite submissions on them. We also plan to hold a research symposium later this year.

As researchers, educators, policy makers, advocates, front line workers and clinicians who are committed to improving the lives of children, it is will be up to you build on the legacy of the Commission and keep up the momentum for change.

We are at an important point in the social history of children in Australia. This Royal Commission represents a one in a lifetime opportunity to acknowledge that we, the entire Australian community, failed to care for so many of our children. A failure that has had often devastating consequences. It also represents an opportunity; the opportunity for us as a nation to commit to the promise made in the 1924 Geneva Declaration – to give to children the best that we have to give.

[1] Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 11 FLR 203.

Legal Aid NSW Criminal Law Conference

Sydney, New South Wales

2 June 2016

Introduction

A Royal Commission is the most significant method of inquiry available to governments. It may investigate individual and institutional conduct. It is often used to determine whether criminal conduct may have been committed. It also provides an opportunity to examine complex issues in a structured manner with the benefit of detailed research.

It enables consultation with people and organisations with the knowledge and experience of issues which the government believes require detailed consideration. Through its forensic work it can identify institutional and individual failures. Its research and policy development programs enable it to bring forward recommendations for change intended to improve future outcomes.

The Royal Commission which I chair has been resourced to perform all of these functions. Apart from examining the behaviour of institutions, which is fundamental to our work, we have the responsibility to bring together the learning across many disciplines; law, policing, education, human behaviour, effective regulation, amongst others, to provide a safer environment for our children.

Apart from the issue of redress, our terms of reference, though broad, provide us with two fundamental objectives: to expose what has happened in the past and to make recommendations aimed at ensuring, so far as possible, that children are not sexually abused in an institutional context in the future.

As many of you would be aware it is typical for Royal Commissions to receive evidence in public. However, conscious of the trauma and suffering associated with child sexual abuse and the difficulties many survivors have in telling their stories the Commonwealth Parliament amended the *Royal Commissions Act 1902* to create a process referred to as a private session.

A private session with one of the six Commissioners provides an opportunity for a survivor, or a survivor's family member, to tell the story of their abuse in a protected and supportive environment. Without such a process the 'bearing witness' and 'truth telling' component of the Royal Commission's work could never have been achieved. The Commissioners have now conducted over 5,000 private sessions. We expect to conduct more than 7,000 before we complete our work in December 2017.

From the information we have gathered, much of it from private sessions, I have referred 1,067 matters to police to investigate with a view to the possible prosecution of an offender. The Royal Commission has now held 39 public hearings. We will begin our fortieth, into Australian Defence Force institutions, later this month. Public hearings have been held in every state and territory in Australia.

Although we have enough information to justify a public hearing into more than 1,000 institutions we will only be able to look at somewhere between 50 and 60 in a public hearing. Decisions about which institutions we choose to examine in a public hearing are informed by whether or not the hearing will advance an understanding of systemic issues and provide an opportunity for institutions to learn from previous mistakes.

In many cases the issues explored, and the lessons to be learned, will have relevance beyond the individual institution being examined. Many institutions who have not themselves been the subject of a public hearing have already responded to the problems revealed in similar institutions and have implemented change or reviews to improve the safety of the children in their care.

Public hearings are also an important means of enhancing the community's awareness and understanding of the nature, circumstances and, the often devastating, impact of child sexual abuse. To allow time for preparation of our final reports our public hearing program will come to an end in early 2017.

In addition to private sessions and public hearings our policy and research program underpins the work of the Royal Commission. This program has the assistance of national and international experts across many disciplines. We are examining a wide range of topics.

These include child safe organisations, diversity and vulnerability, information sharing, mandatory reporting, advocacy and support services, record-keeping and prevention and treatment. As part of this program we have released consultation papers in relation to out of home care and complaint handling and response. Last month we released two research reports. The first examining information-sharing frameworks and the second examining best practice in implementation.

Although our ultimate report is not due to be delivered to government until December next year the Royal Commission has already completed two "final" reports. Both reports contain recommendations to assist people who have been sexually abused and enhance the protection of children in the future.

The first report makes recommendations with respect to Working with Children Checks and was released by the Government on 17 August 2015. The report makes 36 recommendations designed to strengthen Working with Children Check regimes throughout Australia.

The second report discusses Redress and Civil Litigation. The Commissioners made 99 recommendations designed to provide justice to victims of child abuse in an institutional context. The report says that 'in order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.'

The civil litigation recommendations focused on four issues: limitation periods, identification of the proper defendant, the duty of care owed by institutions and model litigant approaches.

Criminal justice project

The criminal justice issues which the Royal Commission must consider cover a broad reach. They extend from reporting to police and police investigations, through all aspects of the prosecution and trial process. We are also looking at sentencing and post-sentencing measures.

There are many aspects of the criminal justice system which present challenges for survivors of child sexual abuse. As many of you would be aware the law has created special rules in relation to the reliability of the evidence of both children and adult sexual assault complainants.

This has given rise to issues relevant to sexual offending including the process by which survivors give evidence and the laws of evidence themselves. Both these issues were considered in our public hearing into criminal justice in March this year. The first week of the public hearing looked at how the criminal justice system deals with allegations against an individual of sexual offending against more than one child.

We considered the admissibility and use of tendency and coincidence evidence and their common law counterparts, propensity and similar fact evidence. We also considered the related issue of whether a joint trial may be held with respect to allegations against an accused made by multiple complainants.

The second week of the public hearing focused on the challenges for the criminal justice system when a very young child, or a person with a disability that impacts on their ability to communicate, complains of being sexually abused.

The difficulties these two groups face by reason of their limited ability to communicate make them some of the community's most vulnerable members. We considered how the requirements of the criminal justice system, including in relation to oral evidence and cross-examination, affect the investigation and prosecution of allegations of child sexual abuse.

In April we held three public roundtables to discuss criminal justice issues. The first roundtable discussed criminal offences for failing to report child sexual abuse, including s 316 of the *Crimes Act 1900* (NSW). This included consideration of the circumstances, if any, in which blind reporting of offences might be permissible.

A blind report is a report that is made to police in which the alleged victim's name or identifying details are withheld. As some of you may be aware the practice of blind reporting has been a matter of some controversy in NSW.

The second roundtable discussed adult sex offender treatment programs currently operating in Australia and internationally, and the effectiveness of these programs.

The third roundtable discussed the issue of DPP complaint and oversight mechanisms. One issue the Commissioners are considering is whether there should be avenues for victims to seek a review of decisions not to prosecute. We are also considering whether there should be external oversight of DPPs.

In the course of the roundtable we heard from the DPP for England and Wales and the Chief Inspector of the Crown Prosecution Service in relation to the complaints and oversight mechanisms operating in that jurisdiction.

We have also released a number of papers as part of our criminal justice program. These include:

- "Sentencing for child sexual abuse in institutional contexts" by Arie Freiberg, Hugh Donnelly and Karen Gelb.
- "The admissibility, and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions" by Associate Professor David Hamer.
- "Tendency, coincidence and joint trials" advice prepared for the Royal Commission by Tim Game SC, Julia Roy and Georgia Huxley.
- "Specialist prosecution units and courts: A review of the literature" by Patrick Parkinson.
- "A systematic review of the efficacy of specialist police investigation units in responding to child sexual abuse" by Nina Westera.
- "The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms" by Dr Jane Bolitho.
- "Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update" by Hayley Boxal and Georgina Fuller of the Australian Institute of Criminology.
- "A statistical analysis for child sexual abuse in institutional contexts" by Dr Karen Gelb.

Jury research

Child sexual abuse offences are generally committed in private, with no eyewitnesses. In many cases there will be no medical or scientific evidence capable of confirming the abuse. Unless the perpetrator has retained recorded images of the abuse (and some do), or admits the abuse, it is likely that the only direct evidence will come from the complainant.

Where the only evidence of the abuse is the complainant's evidence, it can be difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence occurred. There may be evidence that confirms some of the surrounding circumstances, or evidence of first complaint, but the jury is effectively considering the account of one person against the account of another.

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.

As we all know these issues have troubled our courts for many years. The recent Victorian report into jury directions suggests they have caused problems for more than 100 years. In *Pfennig v The Queen* (1995) 182 CLR 461, at 510, Justice McHugh spoke of:

the vexed question as to the circumstances in which the prosecution may prove a criminal charge by tendering evidence that the accused has engaged in criminal conduct on occasions other than that which is the subject of the charge before the court.

The discussion in the first week of our public hearing indicates that this question remains vexed, even in those jurisdictions that have adopted the Uniform Evidence Act.

We heard in the public hearing that the rules governing both the admissibility of tendency and coincidence evidence, and the admission of evidence from other complainants appear to operate differently in different jurisdictions, both internationally and within Australia.

Both the common law and statutory rules share a common origin. They have been significantly informed by judges' assumptions about how juries reason. This is particularly the case in relation to sexual offences, where judges have determined that special care must be taken.

It has been assumed that allegations of sexual offending, particularly, but not only, against children, are likely to arouse unfair prejudice in the jury. As a consequence we have accepted that a person accused of sexual offences, including sexual offences against children, needs careful protection against the risk of the jury being influenced by such prejudice.

In September last year, I gave a paper at the Supreme Court of New South Wales Annual Conference. In that paper I examined the means by which courts can use the learning from other disciplines in relation to the sexual abuse of children in both the trial and sentencing process.

Judges have, for centuries, relied on their own understandings of human behaviour to inform the content of the relevant rules. The difficulty is that, in the absence of research 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. An obvious example is the issue of delay in complaint in sexual assault matters. 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 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.

In my paper to the Supreme Court, I asked the question: 'How is it that judges know juries react in a way that requires them to exercise particular vigilance? Is this an accurate assumption? Is the rationale for the rules that this assumption mandates a valid one?'

The assumptions underlying the common law and legislative rules governing the admissibility of tendency and coincidence evidence and the availability of joint trials have been largely untested.

Last Wednesday in Sydney the Royal Commission launched a major empirical study into how juries reason when deliberating on multiple counts of child sexual abuse. This research, which we commissioned, was conducted by Jane Goodman-Delahunty, Annie Cossins and Natalie Martschuk.

The results are interesting. For some they will be counterintuitive and possibly surprising. They will undoubtedly assist all of us to reflect on whether the current rules are appropriate.

It is the world's largest experimental study of jury behaviour. I anticipate that it will make a significant contribution to our understanding of the accuracy of judges' assumptions. I would like to discuss here this morning some of the interesting, and at times surprising, results of the research.

Before looking at the results I should draw attention to some of the limitations of this research identified by the researchers. The most obvious is that the mock jurors were restricted in relation to the time which they had to deliberate.

Accordingly, it is possible that the results obtained by the researchers would differ from those in a real trial. In a real trial both the presentation of evidence and the jury deliberation would typically proceed more slowly. In a real trial the jurors would also have the capacity to seek clarification from the judge if they required assistance or needed direction.

That opportunity was not available to the mock jurors. The jurors also understood that their decisions would be subject to scrutiny. Despite not being informed of the purpose of the study and the hypotheses sought to be tested it remains a possibility that they modified their reasoning and behaviour because they knew they would be the subject of analysis.

Notwithstanding these matters, the fundamental significance of the study is that it allowed the researchers to observe jurors in discussion of the issues which are the same issues which must be examined in our courts every day. The issues of fact and the weighing of evidence in accordance with the law are the same tasks which all juries must perform in sexual assault trials.

Methodology

1,029 jury eligible citizens, 580 women and 449 men, participated in the study. They were randomly allocated to one of 90 mock juries.

The juries each watched a video of one of ten versions of a trial. Actors played the part of the complainants, witnesses and the defendant. Real barristers played the part of counsel and a real judge played the judge. All the demands of a real trial were included: opening and closing arguments, examination and cross-examination of the relevant witness and the Judge's summing up including the relevant directions.

The mock trial concerned charges brought against the defendant by either one or three complainants who had each made allegations of child sexual abuse. The complainants, now adults, each alleged the defendant, their soccer coach, had abused them at different times in the 1990s.

The complainants were not acquainted. One complainant, Timothy, whose allegations comprised two counts against the defendant (one penetrative and one non-penetrative) was common to every trial type. His case was constructed to be a moderately strong one.

Two other complainants (Simon and Justin), made allegations which were admitted as either uncharged acts in the separate trial of Timothy's allegations, or as counts in the joint trial. Simon and Justin had weak and strong cases respectively.

There were four variations of trial type:

- A separate trial of an adult complainant, Timothy, with moderately strong evidence.
- A separate trial of an adult complainant, Timothy, with moderately strong evidence in which relationship evidence comprised of uncharged acts and grooming behaviour was also admitted.
- A separate trial of an adult complainant, Timothy, with moderately strong evidence in which tendency evidence from two other prosecution witnesses, Simon and Justin, was admitted.

- A joint trial with three adult complainants- Simon, Timothy and Justin- who gave weak, moderately strong and strong evidence.

The trials themselves ranged from 45 to 110 minutes. The mock juries had approximately 90 minutes to reach a unanimous verdict on all counts.

The trials were also varied in relation to the directions given to the juries. Some juries were given specific directions on how they could use tendency and relationship evidence. Some juries were also provided with a fact-based question trail to assist them in their deliberations.

Each juror was given a pre-trial questionnaire to control for biases and general attitudes. They were also given a post-trial questionnaire in order to assist in ascertaining what factors drove the deliberations of individual jurors to come to the verdicts they did.

The deliberations of each of the juries were audiotaped and videotaped. Transcriptions of each jury deliberation were qualitatively and quantitatively analysed. Trained law graduates coded the deliberations and assessed the juries' understanding of the evidence, the juries' understanding of the directions, whether they made factual errors, and whether they demonstrated unfair prejudice against the defendant.

The qualitative and quantitative analysis of the deliberations is an important feature of this research. A key criticism of a number of previous studies examining the effect of joinder was their over reliance on conviction rates as the relevant measure.

Verdicts on their face reveal nothing about the reasoning process that lays behind them. They do not tell us whether any increase in conviction rates is the result of permissible reasoning arising from the availability of more logically probative evidence such as tendency evidence, or whether they are due to impermissible reasoning based on unfair prejudice.

A key task for the researchers was identifying what unfair prejudice in jury reasoning might look like. How is it that joinder is said to infect the reasoning process of jurors so as to produce illogical or unfair outcomes?

The researchers determined to measure the hypotheses of prejudice identified by an American judge in the case of *US v Foutz*, 540 F.2d 733 (4th Cir. 1976). These hypotheses are similar to the judicial concerns in relation to unfair prejudice that have been expressed in the Australian case law.

The first hypothesis was that jurors confuse or conflate the evidence adduced to support different charges in a joint trial. Reformulated as a research question the researchers designed their study to answer the question 'are juries capable of separating the counts against the defendant in reaching their verdicts in a joint trial?'

The second hypothesis was that a defendant in a joint trial is prejudiced because juries assume guilt due to the amount of evidence against them: accumulation prejudice. Reformulated as a question the researchers asked ‘because of the number of complainants against a defendant in a joint trial, will juries deliver similar conviction rates for counts based on weak compared to stronger case evidence?’

The third hypothesis was that jurors use evidence about the defendant’s other criminal misconduct to infer criminality by reasoning ‘if he did it once, he will do it again’. The research question that followed was ‘are juries in joint trials more prone than those in separate trials to convict on the basis that the defendant has a “criminal disposition”?’

The coders analysed the deliberations to determine if any verdicts were motivated by any of these three types of prejudice. Either inter-case conflation of facts, accumulation prejudice or character prejudice.

Outcomes

The major outcomes revealed by the research were:

- Collectively, mock juries were capable of distinguishing between the counts. They also based their verdicts on the evidence that pertained to each count whether it was presented in a separate or joint trial.
- The perceived credibility of the complainant predicted the culpability of the defendant.
- A complainant’s credibility was enhanced when supported by evidence from an independent source.
- The same benefit to a complainant’s credibility was obtained by admitting tendency evidence in a separate and a joint trial.
- Overall, jury reasoning and verdicts were logically related to the probative value of the evidence.
- The results provided little indication of mock juries being susceptible to a joinder effect, and, even if there was such an effect, there was no evidence that decisions to convict were the result of impermissible propensity reasoning.
- Given the verdicts were not based on impermissible reasoning, there was no evidence of unfair prejudice to the defendant.

Importantly, more instances of impermissible reasoning were found in the separate trials and relationship evidence trials than in the more complex trials which contained tendency evidence.

I will explore some of these findings, and discuss some further interesting results, in more detail.

Joinder effect

The researchers defined joinder effect as a statistically significant increase in the conviction rate for an offence when it is tried in a joint trial, compared to the conviction rate for the same offence when it is tried in a separate trial. A previous archival study of conviction rates found an average increase of nine percent in joint trials as compared with separate trials. This study was not, however, limited to child sexual abuse trials and included joint trials for a diverse range of offences.

In order to test the joinder effect hypothesis, the researchers measured the convictions rates for two counts (one penetrative and one non-penetrative) for the complainant with the moderately strong case across all four trial types; separate, separate with relationship evidence, separate with tendency evidence and joint.

They found that the admission of relationship evidence did not increase the conviction rate on either count. The admission of tendency evidence in the separate trial did, however, increase the conviction rates for both counts.

Significant increases in the conviction rates for both counts were also found in the joint trial compared to the separate trial. There were, however, no significant differences between the separate trial with tendency evidence and the joint trial.

The observable pattern was that convictions rates increased when tendency evidence was admitted. Because the increase in conviction rates was observed in both the separate trial with tendency evidence and the joint trial the researchers concluded that it is not the mere fact of joinder itself that increases conviction rates. Rather it is the availability of more independent inculpatory evidence.

Interestingly, further consideration of the conviction rates indicates that both mock jurors individually, and mock juries collectively, were more reticent to convict the defendant on the more serious penetrative account when prosecuted in a separate trial.

There were zero convictions for the penetrative offence when prosecuted as a basic separate trial or a relationship evidence trial. In the separate trial with tendency evidence and the joint trial, however, the conviction rates were 62.5 percent and 75 percent respectively. The researchers suggest that multiple witnesses or multiple complainants appear to make an allegation of penetration more credible.

Unfair prejudice

The next step for the researchers was to identify if the increased conviction rates in trials with tendency evidence, both joint and separate, were the result of impermissible reasoning based on any of the three forms of unfair prejudice.

The researchers found that convictions were not based on inter-case conflation of the evidence.

When measuring the capacity of jurors to recall the facts post-trial, jurors in the separate and relationship evidence trial were the most accurate. Jurors in the tendency and joint trials, who had been exposed to two additional complainants, were more likely to confuse the case facts. These findings indicate that it is the complexity of the trial evidence rather than the mere fact of joinder that predicts factual accuracy.

Importantly, however, qualitative analysis of the jury deliberations revealed that errors made by individual jurors were promptly corrected by other members of the jury. The researchers found no evidence that uncorrected errors had any causal effect on the verdicts delivered by juries in trials containing tendency evidence.

A further interesting finding in relation to conflation was that intra-case errors were more common than inter-case errors. Jurors were more likely to make factual errors in relation to the counts pertaining to the same complainant rather than across the complainants.

In relation to accumulation prejudice the results showed that this was not a basis upon which the juries determined their verdicts. The researchers found that there was no significant difference between the conviction rates in the separate trial with tendency evidence compared with the joint trial for the two counts in the moderately strong case. This suggested that the number of counts for which the defendant had been charged was not influencing the conviction rate.

In order to test whether jurors simply accumulated the number of witnesses and whether this was driving conviction rates two versions of the joint trial were run. In one version four witnesses gave evidence for the Crown. In a second version six witnesses gave evidence. The two additional witnesses gave evidence supporting the complainant with the strong case.

The researchers found no differences in the conviction rates for the charges relating to the moderately strong complainant regardless of how many Crown witnesses gave evidence in the trial. Perhaps most importantly, the presence of additional witnesses did not increase the conviction rate for the count with the weakest evidence.

In relation to the third type of prejudice – character prejudice – analysis of the deliberations revealed that only two jurors out of 1,029 made biased comments. These comments were not made in the separate trial with tendency evidence nor the joint trial.

Conscious of the fact that some jurors may have been inhibited from revealing the true basis for their decision to convict in a group setting, as part of the post-trial questionnaire the jurors were asked to identify the main reason for their verdict. This questionnaire was completed anonymously.

The responses revealed that only three percent of jurors gave reasons that were identified as displaying character prejudice. The three primary reasons identified were witness consistency, identified by 35 percent of jurors, strong evidence, identified by 34 percent of jurors, and a pattern of grooming, identified by 19 percent of jurors.

Jury directions

The research also examined the effectiveness of the mechanisms the law has developed to guard against impermissible reasoning – jury directions and fact-based question trails.

In order to ascertain the influence of jury directions the researchers compared jury reasoning in trials with and without a context direction in the relationship evidence trial, and with and without a tendency direction in the separate trial with tendency evidence and the joint trials.

Our researchers report that previous empirical research examining jury directions designed to limit the way in which evidence can be used has suggested that they may be largely ineffective. The results of the present study were in accordance with that finding.

When subjected to statistical analysis there were few differences between jury reasoning and decisions in the trials accompanied by the specific directions as to the use of relationship and tendency evidence. The error rates in applying the law on relationship evidence or tendency evidence amongst the juries were unaffected by the presence of these directions.

With respect to the context direction, the conviction rates for the non-penetrative offence were not significantly different as between juries that were given the context direction and those that were not. However, juries that were given the context direction were more likely to convict for the penetrative offence than juries who were not given the direction.

In relation to the separate and joint trials the presence of the tendency direction had no significant influence on the verdict.

The researchers hypothesised that if juries had applied the tendency direction in the manner in which they were instructed they would have expected to find increased ratings by the individual jurors of the culpability and criminal intent of the defendant.

They would have expected an increased likelihood of more jurors finding the defendant had a sexual interest in one or more of the complainants which they would use when assessing the defendant's culpability and criminal intent. This did not occur. The researchers found few examples of explicit permissible tendency reasoning in accordance with the direction. They suggest that this is due to the dense legal language with which the direction is expressed.

Because the direction requires juries to make a series of preliminary findings beyond reasonable doubt, juries were concerned that they could not apply it to the first charge by date. This happened to be the weak case. The ambiguity in the direction regarding temporal issues led some juries to ignore tendency evidence rather than misapply it to the first claim.

Jurors indicated in the post-trial questionnaire that they did not find the judge's directions helpful or easy to apply. Compared to jurors who did not receive the context direction jurors who received the context direction found the judge's instructions more confusing, found assessing witness credibility and applying the law more difficult and felt that the instructions made it harder to understand the charges, recall the facts, weigh the evidence and assess the case for the prosecution.

Mock jurors found the tendency evidence directions more difficult to understand than the standard directions and that they required greater cognitive effort. Mock jurors in the joint trial who were given the tendency direction did, however, rate the charges as easier to understand compared to jurors in the joint trial who had not received the tendency direction.

Question trails

A question trail is designed to assist the jury to identify and address the issues which need to be determined in order to determine whether or not the accused should be convicted of the relevant charge.

Question trails were provided to mock jurors in the separate trial with relationship evidence and to the mock jurors in the joint trial. An identical version of each of these trials was also run without a question trail in order to isolate the effects of the question trail itself.

The results demonstrate that the use of a question trial appears to promote a more efficient reasoning process. In relation to the separate trial with relationship evidence juries with a question trail reached a verdict on average 25 minutes faster than juries without a question trail. The jurors who used a question trial also reported that they required significantly less cognitive effort to reach a unanimous verdict.

In the separate trial with relationship evidence mock jurors who used the question trail found the defendant to be less culpable than the jurors without the question trail. This result was reflected in the jury verdicts. The number of hung juries reduced from 44 per cent without the question trail to 20-30 per cent with question trial. The hung juries shifted generally towards acquittals.

Analysis of the jury verdicts indicated that there was no significant difference in the conviction rates as between the juries with the question trail and juries without the question trail for the non-penetrative offence.

There was a statistically significant decrease in conviction rates for the penetrative offence for juries using a question trail compared to juries without a question trail. There are limitations in the question trail data, in particular with respect to the jury verdicts, as only a small number of juries were used to examine the influence of a question trail.

In relation to the joint trial the question trail had no significant influence on perceptions of the defendant's factual culpability or upon conviction rates.

Miscellaneous findings

The post-trial questionnaire asked jurors about their expectations as to what they would have been told about the defendant's prior criminal history.

A majority of the 1,029 jurors reported that they would have expected to be informed of prior charges against the defendant, of evidence of sexual misconduct on other occasions and of any prior convictions for child sexual abuse and other crimes. These expectations were not influenced by the education level of the mock jurors.

And finally, a very unexpected finding. The post-trial questionnaire also asked jurors to do what a judge most definitely should not. It asked them to quantify their understanding of the criminal standard of proof. They were asked what number between zero and 100 represents 'beyond reasonable doubt'.

Perhaps unsurprisingly there were differences in the numerical representation of the threshold amongst the trial types. However, the threshold was lower in the basic separate and relationship evidence trials (less than 90 percent) than in the joint trial (greater than 90 percent).

And whereas the definition in a separate trial without tendency evidence was 85.2 percent, the definition in a separate trial with tendency evidence was 88% and in a joint trial with tendency evidence 92.1%.

One final observation, mine, not the researchers, who did not examine this issue. The size of the study allowed the researchers to run exactly the same trial before multiple juries. That is multiple juries were subjected to exactly the same variant of the mock trial.

They heard exactly the same evidence and instructions on the law. Yet the conviction rates varied. For example in the joint trial 25 percent of juries convicted on the count in the weak case. 75 percent did not. And they had all observed exactly the same trial. If you had been on trial you would be hoping that the odds of one in four played out in your favour.

Researchers, going forward, might seek to uncover what accounts for this differentiation. One benefit of this research is that the deliberations have all been recorded and will be available for future research by others seeking to explore some of these issues.

The Royal Commission's criminal justice project will draw together our research, relevant material from public hearings, and the views of survivors expressed in private sessions. We are in the process of, and will continue, to consult extensively. We will be publishing a consultation paper on criminal justice issues in September this year.

You are all encouraged to consider and respond to the matters addressed in the paper when it is published. I expect that we will publish our final report on criminal justice issues, including any recommendations for reform, as a separate report during 2017.

Jury reasoning in joint and separate trials of institutional child sexual abuse: an empirical study

Launch of Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study - Sydney, New South Wales

25 May 2016

Introduction

I acknowledge the traditional custodians of the land upon which we meet today, the Gadigal people of the Eora nation and pay my respects to their Elders both past and present.

Early in our work we identified Criminal Justice as a key issue for consideration by the Royal Commission. To assist in the Criminal Justice Project we convened a Criminal Justice Working Group, which has members drawn from academics and practitioners. We have particularly sought their advice with respect to the research we should undertake of relevant criminal justice issues.

Our Criminal Justice Project will draw together our research, relevant material from public hearings, and the views of survivors expressed in private sessions. It includes extensive consultation and policy development. We will publish our report on criminal justice issues, including any recommendations for reform, next year.

Child sexual abuse offences are generally committed in private, with no eyewitnesses. In many cases there will be no medical or scientific evidence capable of confirming the abuse. Unless the perpetrator has retained recorded images of the abuse (and some do), or admits the abuse, it is likely that the only direct evidence will come from the complainant.

Where the only evidence of the abuse is the complainant's evidence, it can be difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence occurred. There may be evidence that confirms some of the surrounding circumstances, or evidence of first complaint, but the jury is effectively considering the account of one person against the account of another.

We have heard of many cases where a single offender has offended against multiple victims. This is not surprising. 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.

In March this year, we held a public hearing into criminal justice issues relating to child sexual abuse in an institutional context. The first week of the hearing focused on how the criminal justice system deals with allegations against an individual of sexual offending against more than one child.

We considered whether a joint trial may be held with respect to allegations against an accused made by multiple complainants.

We also considered the circumstances in which other allegations against an accused or evidence of the accused’s ‘bad character’ may be admitted in evidence to help a jury determine whether or not the accused is guilty of the charges on the indictment.

As we all know these issues have troubled our courts for many years. The recent Victorian report into jury directions suggests they have caused problems for more than 100 years. In *Pfennig v The Queen* (1995) 182 CLR 461, at 510, Justice McHugh spoke of:

the vexed question as to the circumstances in which the prosecution may prove a criminal charge by tendering evidence that the accused has engaged in criminal conduct on occasions other than that which is the subject of the charge before the court.

The discussion in the first week of our public hearing indicates that this question remains vexed, even in those jurisdictions that have adopted the Uniform Evidence Act.

We heard in the public hearing that the rules governing both the admissibility of tendency and coincidence evidence, and the admission of evidence from other complainants appear to operate differently in different jurisdictions, both internationally and within Australia.

Both the common law and statutory rules share a common origin. They have been significantly informed by judges’ assumptions about how juries reason. This is particularly the case in relation to sexual offences, where judges have determined that special care must be taken.

It has been assumed that allegations of sexual offending, particularly, but not only, against children, are likely to arouse unfair prejudice in the jury. As a consequence we have accepted that a person accused of sexual offences, including sexual offences against children, needs careful protection against the risk of the jury being influenced by such prejudice.

In September last year, I gave a paper at the Supreme Court of New South Wales Annual Conference. In that paper I examined the means by which courts can use the learning from other disciplines in relation to the sexual abuse of children in both the trial and sentencing process.

Judges have, for centuries, relied on their own understandings of human behaviour to inform the content of the relevant rules. The difficulty is that, in the absence of research 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. An obvious example is the issue of delay in complaint in sexual assault matters. 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 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.

In my paper to the Supreme Court, I asked the question: 'How is it that judges know juries react in a way that requires them to exercise particular vigilance? Is this an accurate assumption? Is the rationale for the rules that this assumption mandates a valid one?'

The assumptions underlying the common law and legislative rules governing the admissibility of tendency and coincidence evidence and the availability of joint trials have been largely untested.

The research that we are releasing today provides evidence about how people who are likely to comprise juries reason on these issues. I anticipate that it will make a significant contribution to our understanding of the accuracy of judges' assumptions.

Of course, research based on mock trials, which is all we can do in Australia, never exactly replicates a real trial. In the absence of access to real juries, however, well-designed research can allow observation of how potential jurors reason on particular issues.

The results are interesting. For some they will be counterintuitive and possibly surprising. They will undoubtedly assist all of us to reflect on whether the current rules are appropriate.

It is not often that primary research on this scale can be commissioned. I am pleased that the Royal Commission has been provided with sufficient resources to enable us to undertake the project.

I encourage everyone with an interest in these issues to consider the research, and contribute their thoughts to the debate.

I should stress that the Commissioners have not formed any concluded views on whether or how the rules should change. We will consider the issues carefully. This research will make an important contribution to our work.

We will be publishing a consultation paper on criminal justice issues in September this year. The paper will address the tendency and coincidence issues as well as a number of other matters.

I encourage all those with an interest in these matters to consider and respond to the consultation paper when it is published. We need the views not only of lawyers but also of members of the wider community.

I thank Jane Goodman-Delahunty, Annie Cossins and Natalie Martschuk – and the team of people they had behind them – for their work on this project. It has been complex and demanding.

I invite Jane Goodman-Delahunty and Annie Cossins to present their findings.

Announcement by the Chair of the Royal Commission

29 April 2016

I am sitting this morning to outline the decisions which the Royal Commission has taken with respect to the completion of its work in private sessions. Although the Royal Commission will not hand down its final report until 15 December next year, as I will explain, it is necessary for us to announce our arrangements for private sessions during the remainder of the life of this Royal Commission.

It is just over three years since the Commonwealth Parliament amended the Royal Commissions Act 1902 to enable the Royal Commission to conduct private sessions. Shortly after the Act was amended I spoke at a hearing in Melbourne when I emphasised that the terms of reference of our inquiry provide, amongst other matters, that it is important that those affected by child sexual abuse can share their experiences to assist with healing and to inform the development of appropriate strategies and responses. The Terms of Reference direct the Commissioners to inquire into the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts and the provision of opportunities for them to share their experiences in appropriate ways. I said on that occasion:

The Commissioners accept that part of the task given to us by the Terms of Reference is to bear witness on behalf of the nation to the abuse and consequential trauma inflicted upon many people who have suffered sexual abuse as children. The bearing of witness is the process of making known what has happened. It involves the telling of personal accounts by those who have experienced child sexual abuse as well as listening to the accounts of others who may have observed these crimes.

There are many examples through history of the importance of this process, especially when an event has provoked great moral outrage. The bearing of witness informs the public consciousness and prepares the community to take steps to prevent abuses from being repeated in the future. The public record will be informed by the process. The memorialisation and archiving of documents for posterity is an important legacy of bearing witness.

For individuals who have been traumatised, giving an account of their experiences and telling their story can be an important part of their own recovery process. The bearing of witness can break the silence over the abuse that a person experienced, in many cases years ago. It allows the person to be heard, understood and have his or her experiences recorded. The information gained can be used to develop better responses for the future.

In April 2013 we could only speculate about the number of people who may come to us for a private session. I said that it seemed likely that at least 5000 people will want to talk to the Commission. This estimate has proved to be conservative.

The Commissioners have now spoken with 5,111 survivors in private session. There are a further 1,544 survivors who have been accepted for a private session and are waiting for a meeting with a Commissioner. The rate at which people come to the Commission seeking a private session shows no present sign of diminishing. It has averaged 37 per week over the past 12 months.

Because each Commissioner must participate in the many tasks required of us by the Terms of Reference and, in particular, case studies and preparing our final report, the amount of time which we can each devote to private sessions is limited. With this in mind if, as seems likely, the present demand for private sessions continues throughout the life of the Commission, unless we close off applications well before we complete our final report, many people who may seek a private session will be disappointed. The Commissioners would not have the time to meet with them. I have made plain to government and confirm that the Commissioners do not believe that it would be appropriate for the Commission to extend beyond its present reporting date of 15 December 2017. In our view it would be intolerable for a survivor to be accepted for a private session only to find we could not meet with them.

The problem which must now be confronted has been under consideration for some time. We have discussed with the Australian Government possible responses including additional resources funded from our existing budget allocation or a process ongoing beyond the Commission to enable people to tell their story. However, there remains an immediate need for us to indicate the course which in the present circumstances the Royal Commission will take.

In order to ensure that any person who is accepted for a private session will have the opportunity to speak to a Commissioner we will close applications for a private session on 30 September this year. In selecting this date we are mindful that announcing a closing date may bring an increase in the number of people who approach us for a private session. We have factored this possibility into the decision to close applications on 30 September this year.

I must stress that the closing date applies only to new applications for a private session. People who have already been accepted for a private session or who apply before 30 September can be assured that they will have an opportunity to meet with a Commissioner. However beyond that date applications for a private session cannot be accepted. There can be no exceptions for any application received after that date. I know this will mean that some people will be disappointed. For that the Commissioners are sorry.

Although applications for a private session will close on 30 September the Royal Commission will still accept written accounts after that date. Furthermore where a survivor requires assistance a Commission Officer will be available to help people over the telephone to put their personal story in writing so that it can be read by a Commissioner. All written accounts will be read and acknowledged by a Commissioner.

As I indicated in April 2013 the Commissioners recognise that for individuals who have been traumatised by sexual abuse giving an account of their experiences and telling their story to a Commissioner is, for many survivors, an important part of their personal journey. We are aware that for a great many people their private session has made a significant contribution to their recovery. The information which the Commission has obtained from survivors has proved to be critical in informing our investigations and will provide a secure foundation for many of our final recommendations.

The Royal Commission provided its report to government in relation to Redress and Civil Litigation in August last year. At that time, although the trend was apparent, the future need for private sessions was not entirely clear. In the months that have passed the continuing demand has required us to make the decision to close applications for private sessions on 30 September.

It is apparent to us that it is likely that there will be an ongoing need for people to tell their story after the Commission has ceased to exist. Whether structured as a "truth telling" process or a form of restorative justice the Commissioners are of the view that when designing a national redress scheme or nationally consistent schemes, government and the relevant institution should ensure that an opportunity is provided for a survivor to be able to give an account of their experience to an appropriate person. Providing an opportunity for survivors to tell their story brings the benefits for the individual to which I have referred. One of those benefits is the acknowledgement to the survivor of both the failure of the individual institution and of our whole society to adequately protect many children.

International Society for the Study of Trauma and Disassociation

Broken Structures, Broken Selves: Complex Trauma in the 21st Century - Sydney, New South Wales

30 November 2015

Introduction

The Great War was to become known as the “war to end all wars”. That prophecy was wrong. The world continues to stumble from one violent tragedy to another.

Although the prophecy was wrong, as with many great events through history, the war stimulated and accelerated social change. Those changes came with a rapid increase in our knowledge and understanding of many issues. From the art of war to our knowledge of medicine, we can see major developments which occurred because of World War 1.

The war also produced great poets. One of them, Siegfried Sassoon gives us an insight into the inadequate contemporary understanding of the impact of the trauma of war. He wrote:

*No doubt they'll soon get well; the shock and strain
Have caused their stammering, disconnected talk.
Of course they're 'longing to go out again', -
These boys with old, scared faces, learning to walk.
They'll soon forget their haunted nights; their cowed
Subjection to the ghosts of friends who died, -
Their dreams that drip with murder; and they'll be proud
Of glorious war that shatter'd all their pride...
Men who went out to battle, grim and glad;
Children, with eyes that hate you, broken and mad.*

The cutting irony of Sassoon's words reflects the experience of many soldiers. A pervasive assumption before the war was that “shell shock” experienced by soldiers in battle was a passing phenomenon from which the affected soldier would soon recover.

The same sentiment can be found in the uninformed response to those who suffer post-traumatic stress disorder or other psychiatric illness as a result of a variety of traumatic experiences, including sexual abuse.

A constant challenge for most of you responsible for diagnosing and treating patients affected by trauma is not only to help the survivor, but to ensure their family and the wider community have an effective understanding of the illness and its consequences.

The cursory, “get over it and get on with life” response of family or the community becomes a significant, and on occasions, insurmountable barrier to the recovery of the victim. The depth of Sassoon’s response to war is reflected in the response of many suffering the consequences of betrayal by a trusted adult who sexually assaulted them when a child.

I recently spoke to a group of Supreme Court Judges at their annual conference. Of course I talked about the work of the Royal Commission.

I also took the opportunity to discuss an issue of fundamental importance to our legal system. As much as your professions have a responsibility to educate the community about the problems faced by those who experience trauma, the legal system and particularly the judges, have a responsibility to listen and understand what you are telling us. When relevant your learning must inform our decisions.

Any outcome which ignores the science may inflict injustice on the litigants. The obligation is readily accepted, its implementation is more difficult.

The inevitable question is how do lawyers learn about the work of other professionals that is relevant to their own functions. How do we ensure that judges make decisions which are informed by and consistent with the learning of scientists from any relevant discipline? How do we ensure that the knowledge you have of human behaviour and the response to trauma is known by the judge when assessing the credibility of a witness, deciding the money damages for a plaintiff or sentencing an offender? It may surprise you to learn that the issue has not often been addressed by lawyers.

The consequence has been that, particularly in relation to sexual assault, there have been some significant difficulties and almost certainly injustices.

The difficulties have not been for lack of opportunity. Opportunity was provided but the law failed to adequately respond.

The law functions through the rules made by both Parliament and by judges. Many of the judges’ rules control civil and criminal trial process, money damages and sentencing outcomes. They are fundamental to our justice system. They are part of our Common Law.

The practice of judges relying on their own understandings of human behaviour, however ill-informed, to determine the content of decisions and judge made legal rules is centuries old. The practice of judges, at least explicitly, relying on scientific research to make decisions and determine legal rules has a much more complicated history.

In the mid-1700s the celebrated English jurist Sir William Blackstone discussed the correct approach to ascertaining the truthfulness of a woman who alleges sexual assault. He said:

“if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place, where the act was alleged to be committed, was where it was possible she might be heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned.”

Similar sentiments can be found in judicial determinations two centuries later.

In 1879 an event occurred of fundamental importance in the development of our understanding of human behaviour. In Leipzig, the first laboratory solely dedicated to psychological research was founded by Wilhelm Wundt. In that laboratory Wundt and his students developed the empirical methodologies that allowed psychology to emerge as a discipline distinct from philosophy.

The question was how would the law respond to the birth of the new science whose area of focus – human behaviour – was central to so many aspects of the law itself.

Matters moved relatively quickly. Less than two decades after the formation of Wundt’s laboratory, a murder trial in Munich, saw what was probably the first expert testimony given by a psychologist. And in Vienna in 1906, Freud gave a series of lectures to judges discussing the lessons psychology might offer the law in the context of fact-finding.

Despite these promising beginnings, by 1908 it was evident that the law was largely indifferent to the way in which psychology might be applied within its domain.

That year Hugo Munsterberg, who had been a student of Wundt’s in Leipzig before moving to the United States to run the psychological laboratory at Harvard, published a book entitled *On the Witness Stand: Essays on Psychology and Crime*. Munsterberg was a strong advocate of forensic psychology and in particular psychological testimony.

He had himself served as psychological consultant in two murder trials in the US. In his book Munsterberg described how experimental psychology had sufficiently matured to the point where it could now be deployed to serve “the practical needs of life”; education, medicine, art, economics and the law. But whilst the other disciplines had embraced psychology:

“The lawyer alone is obdurate. The lawyer and the judge and the jurymen are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made long strides ... They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more.”

As far as the law was concerned human behaviour was directly observable. Our common sense together with a judicial wisdom derived from legal experience was more than adequate.

This sentiment is captured in the words of one judge who said that “[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life.”

Despite the advances psychology was making and the insights it was generating, judges continued to rely on their own observations and assumptions about human behaviour. The evidence of children, for example, was to be treated suspiciously because of “the possibility of a young child having a mistaken recollection of what happened.”

Standard legal texts contained quasi-psychological explanations of criminal behaviour. Discussing the relevance of post offence behaviour to a determination of guilt one Judge referred to the 1940 writings of Professor Wigmore (recognised as a great academic lawyer) who hypothesised that just as the commission of a crime leaves “traces of blood, wounds or rent clothing, which point back to the deed done by him” it will also leave “mental traces” which will manifest in subsequent conduct of the criminal.

Some of the assumptions judges make may be sound. Some accord neatly with a “common sense” view that would be prevalent in the wider community. But how do we know that our assumptions are correct?

The common law developed special rules for dealing with complaint in the context of sexual assault, in particular in circumstances where there was a delay between the occurrence of the assault and the time at which a complaint was made. A judge was required to warn the jury that delayed complaint was relevant to the jury’s assessment of the credibility of the complainant.

The rationale for this rule was the “general assumption that the victim of sexual offences will complain at the first reasonable opportunity, and that, if complaint is not then made a subsequent complaint is likely to be false.” The common law equated delay with falsity because of how judges assumed genuine victims of sexual offences behaved.

The assumption was derived from the medieval doctrine of “hue and cry”. It is found in Sir William Blackstone’s remarks more than two centuries ago.

The issue of what judges know, how they come to know it, and the accuracy of that knowledge is also important in the sentencing process. For example, what judges know, or think they know, about the harm caused by child sexual abuse will, through the application of sentencing law and principle, become a determinative factor in the sentence an offender receives.

The decisions of the NSW Court of Criminal Appeal indicate, particularly from the early 2000’s onwards, a greater willingness by judges to assume that harm flows from the sexual assault of a child, and display a greater level of certainty that this harm will manifest itself over time. However, this has not always been the position.

In a 1990 case^[1] that concerned a charge of homosexual intercourse with a boy under 10, for which the offender was sentenced to a minimum term of imprisonment of two years, the sentencing Judge remarked that the experience had no doubt been traumatic, and that attention paid to details of the offence between time of offending and until trial would have exacerbated the trauma.

Overall however, the Judge, uninformed by other than a layman’s speculation, took the view “that whilst scars may remain they will fade in time.”

A Royal Commission is the most significant method of inquiry available to governments. It allows the investigation of individual and institutional conduct. It is often used to investigate whether criminal conduct may have been committed. It also provides an opportunity to examine complex issues in a structured manner with the benefit of detailed research.

It enables consultation with people and organisations with the knowledge and experience of the issues which the government believes requires detailed consideration.

Through its forensic work it can identify institutional and individual failures. Its research and policy development programs enable it to bring forward recommendations for change aimed at improving future outcomes.

The Royal Commission which I chair has been resourced to perform all of these functions. Apart from examining the behaviour of institutions, which is fundamental to our work, we have the responsibility to bring together the learning across many disciplines; law, policing, education, human behaviour, effective regulation, amongst others, to provide a safer environment for our children.

It is an opportunity for the lawyers to talk with the scientists so that our combined learning can be integrated into effective policy outcomes as well as informed decisions with respect to individuals, be they offender or survivor.

Our methods

As many of you would be aware it is typical for Royal Commissions to receive evidence in public. However, conscious of the trauma and suffering associated with child sexual abuse and the difficulties many survivors have in telling their stories, the Commonwealth Parliament amended the Royal Commission Act 1902.

It created a process that allows Commissioners to hear from survivors in private. It is referred to as a 'private session'. Without such a process the 'bearing witness' and 'truth telling' component of the Royal Commission's work could never have been achieved.

Guided by a trauma-informed approach, private sessions provide a safe, supportive environment where a person can tell their story in confidence to a Commissioner. For some survivors telling their story to a Commissioner in a private session is the first time they have disclosed their abuse.

For others it is the first time in their life they have been believed. For many survivors, private sessions can be a powerful and healing experience.

We gave a lot of thought to how we would conduct private sessions. We need to be careful that we do not inadvertently re-traumatise the survivors. We sought professional advice from psychiatrists, psychologists and social workers and developed the following principles for the sessions:

- We make sure that a survivor's privacy and confidentiality is protected and that they have a clear understanding of the processes involved in sharing their story.
- We conduct the sessions in modest hotel rooms or in special rooms set aside for private sessions in our Sydney office, to avoid creating an intimidating environment.
- We treat survivors attending private sessions as "guests" of the Royal Commission, rather than as clients.
- We tailor the sessions to the needs of the individual survivor. The survivor may opt for someone to speak on their behalf, or to have a support person present.
- Survivors are invited to tell their story in whatever way they like, with minimal questioning or interruptions.
- We have counsellors who work with people who have complex mental health issues who may need help to prepare for their private session.
- We have counsellors who provide a debriefing at the end of the session. Counsellors also follow up with a phone call a week after the private session to check on the survivor's welfare. We make referrals to follow-up counselling and legal services if required.
- Survivors also receive a thank you pack and are invited to write a 'Message to Australia'.

You may be surprised to learn that two thirds of people coming forward to a private session are men, many disclosing for the first time.

We hold private sessions for inmates in correctional centres. And we have conducted targeted individual and group sessions for an Aboriginal Community using a culturally trauma-informed model.

We also hold private sessions for children and young people between the ages of 11 and 17. We need to take extra steps to ensure their wellbeing. A counsellor conducts a child safety and wellbeing assessment, looking at the child's cognitive, linguistic and emotional capacities.

The counsellor also considers whether there are any concerns about risks of harm and whether there are sufficient protective factors within the child or young person's family and/or community to keep them safe and supported.

The Commissioners have already heard from over 4,200 people in private sessions. There are an additional 1,400 on the waiting list. And each week, approximately 40 new people are referred for a private session.

In England and Wales, the Independent Inquiry into Child Sexual Abuse has recently been established to review the extent to which institutions in those countries have discharged their duty of care to protect children against sexual abuse. It is proposing to use many similar methods to those we have employed in Australia including private sessions.

Apart from private sessions, the Commissioners' understanding of child sexual abuse is also gained through public hearings. Public hearings allow us to examine in detail the response of one or more institutions to allegations of abuse. They help advance our understanding of systemic issues.

Those include how institutions recruit, screen, induct and manage staff who work with children; the ways in which institutions deal with staff who have been accused of abuse; and how institutions handle complaints, claims or civil actions. Public hearings reveal the cultures and attitudes that have contributed, and continue to contribute, to the covering up and the "normalisation" of child sexual abuse.

Public hearings also have a significant role in driving institutional and regulatory change. Many institutions who have not themselves been the subject of a public hearing have already responded to the problems revealed in similar institutions and have implemented change or reviews intended to improve the safety of the children in their care.

The Royal Commission has held 34 public hearings. Hearings have been held in every state in Australia. This week we commenced our 35th public hearing – an inquiry into the response of the Catholic Church in the Melbourne Archdiocese to allegations of sexual abuse. We have so far reported on 15 case studies. Others are close to completion. These reports are available on our website as soon as they have been tabled in Parliament.

Apart from private sessions and public hearings, the other significant component of our work is our research and policy development program. This has the assistance of national and international experts across many disciplines. The program has four broad areas of focus: prevention, identification, response and justice for victims.

Many of you here today may have participated in our policy and research initiatives, and I thank you for your contributions. Your experience, expertise and knowledge is highly valued.

Over the next twelve months, the Royal Commission will publish research relating to the following:

- impacts of institutional child sexual abuse on victims/survivors
- trauma-informed approaches and practice for responding to child sexual abuse
- culturally responsive treatment and support for victims from culturally and linguistically diverse backgrounds
- capturing practice learnings from the Royal Commission support model.

Some statistics

You will be interested in some of the information we have gathered to this stage. Our most recent analysis of 2,794 private sessions tells us:

- Around 62% of survivors are male, and around 37% are female.
- Around 30% of survivors are aged between 50 and 59. Almost 25% are aged between 60 and 69. Around 20% are aged between 40 and 49.
- The average age at abuse was just over 10 for males and just under 10 for females.
- The most common decade in which abuse reported to us first occurred was the 1960s (around 28%) followed by the 1970s (23%).
- The most common type of institution in which abuse occurred – at around 45%- was out of home care (this includes orphanages, children’s homes or foster care).
- Around 60% of the institutions in which sexual abuse occurred were faith-based organisations, followed by 23% which were managed by government.
- Most offenders were male- around 89%.

- Half of the abuse involved penetration and around two thirds involved fondling.
- On average, children were abused over a period of 2.8 years.

I must emphasise that these statistics are of those who have made contact with us and come to a private session. It may not be representative of all survivors.

Impacts of child sexual abuse

It would not be a surprise for this audience to learn that an analysis of our private sessions data indicates that impacts on behaviour and mental health functioning are the most commonly reported impacts by survivors. Many people who have been abused report post-traumatic stress disorder, depression, and high rates of alcohol and substance abuse.

An often unrecognised impact of child sexual abuse is the adverse impact on ‘human capital’. These are the skills, knowledge and experience that equip people to engage and participate in society. Compared to non-abused groups, victims of abuse are less likely to achieve secondary school qualifications, gain a higher school certificate, attend university and gain a university degree.^[2]

We have also learnt about problems with sexual identity, sexual adjustment and links to prostitution as a result of being abused as a child.

You all know of the many other impacts including suicide, mood and personality disorders, obsessive compulsive disorders, re-victimisation, parenting difficulties and intergenerational trauma.

My researchers tell me that there is comparatively little research on the specific impacts of child sexual abuse in an institutional context. Although likely to be comparable with the impacts of child sexual abuse that occurs in other contexts, the characteristics of the impacts may be different.

Abuse by a respected priest or teacher may have a different consequence than abuse at home. Trust in all of society’s institutions can be lost. We also know that parents and extended family may experience grief, guilt, shame and rage at not being able to prevent the abuse, not recognising its occurrence or for engaging the child with the institution where the abuse occurred.

These effects may persist over time and are associated with a series of stressful life events. A study of 39 parents of children abused in a day care setting found that many families relocated after the abuse in response to media coverage and the legal process. Parents reported changing jobs, taking excessive time off work due to stress, and losing social connections.^[3]

People who have been abused in religious institutions report spiritual impacts – in particular, negative impacts on their belief in God. They report reduced engagement and involvement with the church. They report feelings of distrust and anger towards the church.

This can lead to a crisis in faith, increasing discomfort with religious rituals, and rage at the church for its perceived role in occasioning and concealing the abuse. For some, this can lead to the abandonment of faith altogether.^[4]

Redress

Given the profoundly damaging and often long lasting impacts of child sexual abuse for some survivors, the question must be asked- how should we respond to people who have been abused? How can we alleviate the devastating effects? Our terms of reference require us to look at justice for victims, including amongst other issues, the provision of redress.

The Royal Commission realised early in our work that the issue of redress was critical for survivors. Many survivors have indicated an urgent need for assistance. They need professional help to heal, and to live a productive and fulfilled life. Many want the institution to be recognised to have failed them. They want it to be required to make a payment in recognition of that failure.

Our redress consultation process was extensive. Our recommendations were developed with the benefit of information gathered from private sessions, public hearings and private roundtables.

The Government released our final report on redress in September. The fundamental need identified in the report is for a single national redress scheme to be established by the Australian Government but funded by the institutions in which survivors were abused.

The national scheme we recommend is an opportunity for governments and institutions to come together to provide justice for survivors. Each institution, whether government, faith-based or secular, would contribute to the scheme in proportion to the number of survivors abused in that institution. Non-government institutions would be required to contribute more than half the costs of redress.

A national scheme fulfils two key requirements necessary to ensure equal justice for survivors. A single national scheme would ensure that the institution in which abuse occurred would not be the decision maker in respect of a survivor's entitlement.

A conflict of this nature has been a troublesome aspect of some redress schemes in the past. The other important requirement is that survivors would be treated equally regardless of the institution, or place in Australia, in which they were abused.

The modelling undertaken by our actuarial consultants indicates that a national scheme may have 60,000 eligible claimants: 21,880 from NSW, 15,980 from Victoria, 8,470 from Queensland, 6,410 from Western Australia, 3,800 from South Australia, 1,750 from Tasmania, 1,130 from the ACT, and 580 from the Northern Territory.

We recommend that a scheme contain three main elements: a direct personal response, counselling and psychological care as and when required, and modest monetary payments. The Commissioners have recommended a minimum payment of \$10,000, a maximum payment of \$200,000 with an average payment of \$65,000.

The funding of counselling and psychological care for survivors when required has not generally been an element of the redress schemes previously provided by some state governments.

We recommend that counselling should be available throughout a survivor's life. As you all know, trauma associated with sexual abuse is not a medical condition that can always be cured at a specific point in time so that it will not recur. Counselling should be available when the need arises.

The Commissioners made a number of recommendations about the professionals who provide counselling and psychological care. We recommend that, without limiting survivor choice, psychological care be provided by practitioners with the qualifications and expertise to work with clients with complex trauma.

And we recommend that survivors be allowed flexibility and choice, with no fixed limits on the counselling and care provided. The Commissioners also recommend that treating practitioners be required to conduct ongoing assessment and review and ensure treatment is necessary and effective.

Some state governments and some institutions have previously responded by making redress payments. The Commissioners decided that, to differing degrees, all previous responses have been inadequate.

Apart from lacking effective psychological care, the monetary payments have been available to only a limited group of people and have, in our view, been less than appropriate. The different state schemes have had inconsistent outcomes and for that reason, amongst others, fail the test of reasonable fairness. Fairness requires equal justice for all survivors.

The Commissioners recognise that some survivors have already received monetary payments through previous or existing schemes.

For that reason, we recommended that any previous payment must be deducted from the monetary payment under a national scheme. Our recommendations are designed to ensure that all survivors are treated fairly, but we also recognise the contributions which some governments and institutions have already made.

I encourage you to take a look at our final recommendations on redress. You will find the report on our website. Our recommendations are now with all Australian governments. I understand that consultation and discussion are underway.

Advocacy and support

During our consideration of redress and civil litigation, it became clear that victims and survivors have a range of needs beyond being able to access counselling and psychological care as part of a redress scheme.

In response to these concerns, the Commission has instigated a separate project to investigate the adequacy of advocacy and support services for victims and survivors. This project will also look at the needs of survivors' family members and broader communities.

Last month we released an issues paper which discusses advocacy and support and therapeutic treatment services for victims and survivors.

You can find details about our issues paper on our website. Our recommendations on this issue will be contained in the Royal Commission's final report in 2017.

Prevention

It would be remiss of me to talk about the treatment of child sexual abuse without reference to prevention.

As I mentioned earlier, prevention is one of four broad areas of focus within the Royal Commission's policy and research program. It includes the sub-themes of primary prevention and preventing recidivism. We are currently exploring a number of questions in this area including:

- How do we prevent people with sexual thoughts about children from committing an act of child sexual abuse?
- How do we prevent children from engaging in problem sexual behaviour, sexually abusive behaviour and/or sexual offending?
- How do we make organisations 'child safe'?
- How do we change community attitudes to better protect children from sexual abuse?

Working With Children Checks

Working With Children Checks are one of a range of strategies needed to make organisations child-safe. The Royal Commission's final report on Working With Children Checks was released by Government on 17 August 2015. The report makes 36 recommendations designed to strengthen Working With Children Check regimes throughout Australia.

As some of you may be aware, each state and territory presently has its own working with children scheme, although the South Australian approach is very modest. Each of the eight schemes operates independently of the others. The schemes are inconsistent and complex. There is inadequate information sharing and monitoring of Working With Children Check cardholders.

This lack of consistency and integration raises significant issues. In a country of 24 million people with mobility amongst those who work with children, the present system means that children are being afforded different levels of protection depending on the state or territory in which they are located.

A further consequence is that if an organisation, say the Scouts, has a national gathering, it cannot guarantee parents that every adult supervisor has the same level of Working With Children accreditation. It means that people who have responsibility for children in more than one jurisdiction must have multiple checks.

I have previously described the lack of a national framework for Working With Children Checks as 'a blight upon the communities' efforts to provide effectively for the protection of children'.

The recommendations in our report seek to remedy these problems. We have recommended a national approach. That approach would involve the establishment of a centralised database similar to, and which could utilise, the present CrimTrac arrangements.

The effect would be one accreditation which would operate across jurisdictions.

Because any Working With Children Check scheme can be constructed to provide that a fee is taken for the service, the proposal would come at a minimal cost to government.

We have asked that governments implement the majority of our recommendations within 12 months. The Commissioners are firm in the view that the current disparate arrangements should be modified to bring consistency and avoid duplication.

We trust that the suggested changes designed to enhance the safety of children can be taken forward through effective negotiation between the Commonwealth and the States and Territories. Although a Working With Children Check is not a guarantee of children's safety, it is accepted as an essential step in constructing a child safe environment.

Positive impacts

The Royal Commission is painting a bleak picture of our communities' past management of the safety of children in some Australian institutions. However, we know that positive changes are taking place in response to our work. I will mention some of them.

Since the Royal Commission began, I have referred over 760 matters to authorities, mostly to the police. This has resulted in a number of arrests and charges. Many police investigations have been instituted.

Organisations working directly with people who are abused tell us that the Royal Commission has encouraged people to talk about abuse. For many the reluctance to talk, a product of the stigma attached to the issue, has been lifted. Survivors are now encouraged to seek support.

Karen Willis, the chief executive of Rape and Domestic Violence Services Australia, has said that the Royal Commission has helped remove the shame felt by victims of child sexual abuse. She says more people are calling the Rape and Domestic Violence Service as a result.

There is a heightened awareness about child safety amongst organisations providing services to children. Both Bravehearts and Child Wise have seen a significant increase in training and child safety certification requests since we commenced our work. Many institutions are reviewing their approach to ensuring the safety of children in their care.

Organisations have taken concrete steps to better protect children.

In September this year, the Catholic Archdiocese of Sydney announced the creation of a new child protection office which follows a widespread Archdiocesan review undertaken since the Royal Commission looked at the Archdiocese.

This new office will work to achieve best practice when dealing with child protection, education, training, working with parishes and responding pastorally to survivors of abuse.

The Australian Olympic Committee has responded. Following the Swimming Australia public hearing the AOC has required Working With Children Checks for all coaches, staff and officials prior to their joining the Australian Olympic Team for the Rio games next year.

The President of the AOC has engaged directly with the Commission to ensure that effective practices and procedures are in place for all of the sports which operate under the banner of the Olympic movement.

Many institutions have come to recognise the traumatic and destructive impact of child sexual abuse. Since our public hearings began, many institutions have taken responsibility for past wrongs and have apologised for the hurt and suffering they caused children in their care.

The most recent apology came from the Salvation Army (Southern Territory)'s Commissioner Floyd Tidd during a public hearing in October into a number of children's homes operating between 1940 and 1990.

Other organisations have offered increased compensation by reopening previously settled cases. In July this year, the Christian Brothers announced a total of 64 Western Australian cases which had previously been settled had been re-examined. Similar responses have come from an Anglican Diocese, the Salvation Army and some Catholic Diocese.

During the public hearing into the Melbourne Response, the Catholic Church response to survivors in the Melbourne Archdiocese, Archbishop Denis Hart announced that he had appointed a former Federal Court Judge to conduct a review of their process.

Changes are also occurring at the legislative level. One example: legislation proposed by the NSW Government that would require chief executives of organisations that deal with children to undergo the same screening as frontline staff. When announcing the proposal, the Minister referred to the Royal Commission's report on Scouts Australia.

Conclusion

We have a long way to go before we can confidently say our institutions are safer, children are better protected, and people who have been abused have access to the treatment and support they may need to lead productive lives.

But the Royal Commission provides a unique opportunity for lawyers and scientists to come together and enable us to develop recommendations that make real and lasting change. In a contemporary society marked by fierce competition for scarce resources, this opportunity does not come about often.

I thank you for your ongoing dedication and commitment to assisting those in the community who suffer sexual abuse. The Royal Commissioners are committed to do what they can to minimise these problems in institutions in the future.

- [1] (R v Muldoon, Unreported. New South Wales Court of Criminal Appeal, Hunt J, 13 December 1990)
- [2] JM Boden, LJ Horwood and DM Fergusson, 'Exposure to childhood sexual and physical abuse and subsequent educational achievement outcomes', *Child Abuse & Neglect*, vol. 31, no. 10, 2007, pp. 1101-1114
- [3] G Dyb et al, 'Alleged sexual abuse at a day care center: impact on parents', *Child Abuse & Neglect*, vol. 27, no. 8, 2003, pp. 939-950
- [4] T Blakemore, JL Herbert and F Arney, *Impacts of institutional child sexual abuse on victims/survivors: A rapid review of research findings*, Sydney, Australian Government (unpublished)

ANZATSA 7th Biennial Conference

Melbourne, Victoria

5 November 2015

Introduction

The Royal Commission first sat in public in April 2013. On that occasion I emphasised that Australians of recent generations have lived through a period of rapid change across many aspects of society. Many changes can be identified. One which is important for the work of the Royal Commission is the preparedness of the community to challenge authority and the actions of those in power in areas where this would not previously have been contemplated.

We have also seen significant changes in the manner in which power is distributed throughout the community. The women's movement and the fact that many women now hold positions of responsibility in government and business are markers of many of the changes that have occurred.

These changes have brought with them a need and capacity to reflect on the functioning of institutions and the behaviour of individuals within those institutions. We have seen both Royal Commissions and Inquiries directed to that end. Some Inquiries have been conducted by Senate Committees.

Inquiries have looked at diverse issues including institutional and out of home care, foster care, child migration, the various child protection systems in the States and Territories, the stolen generations, Aboriginal deaths in custody, child sexual abuse in Indigenous communities and forced adoptions.

Many Inquiries have touched upon the issues raised by the Royal Commission's Terms of Reference. They number more than 40. Some of the inquiries will be familiar to you. They include: in NSW, the Paedophile Inquiry of the Wood Royal Commission; in Queensland, the Forde Inquiry into Abuse of Children in Queensland Institutions; in Victoria, the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations; in South Australia, the Mullighan Inquiry into Children in State Care; in Tasmania, the Select Committee on Child Protection Final Report; and in Western Australia, the Blaxell Inquiry into St Andrew's Hostel Katanning: How the System and Society Failed Our Children.

At the Commonwealth level they include the Senate Inquiry into Children in Institutional Care. That inquiry culminated in the publishing of the Forgotten Australians report in 2004, and an apology to survivors being delivered in Parliament in November 2009.

In addition, there have been a very large number of Inquiries into these issues overseas. As the Royal Commissions and Inquiries that have been held in the last 30 years make plain, the community has come to acknowledge that fundamental wrongs have been committed in the past which have caused great trauma and lasting damage to many people.

Although a painful process, if a community is to move forward, it must come to understand where wrongs have occurred and so far as possible, right those wrongs.

It must develop principles which, when implemented through legislation and changes in the culture and management practices of institutions and the behaviour of individuals, will ensure a better future for subsequent generations.

Our methods

As many of you would be aware it is typical for Royal Commissions to receive evidence in public. However, conscious of the trauma and suffering associated with child sexual abuse and the difficulties many survivors have in telling their stories the Commonwealth Parliament amended the *Royal Commission Act 1902*.

It created a process that allows Commissioner's to hear from survivors in private. It is referred to as a 'private session'. Without such a process the 'bearing witness' and 'truth telling' component of the Royal Commission's work could never have been achieved.

Guided by a trauma-informed approach, private sessions provide a safe, supportive environment where a person can tell their story in confidence to a Commissioner. For some survivors telling their story to a Commissioner in a private session is the first time they have disclosed their abuse.

For others it is the first time in their life they have been believed. One survivor told us, "After 50 years I finally feel I've been heard. People have listened to me before, but no one has really heard me". For many survivors, private sessions can be a powerful and healing experience.

The Commissioners have already heard from over 4,200 people in private sessions. There are an additional 1,400 on the waiting list. And each week, approximately 40 new people are referred for a private session.

In England and Wales the Independent Inquiry into Child Sexual Abuse has recently been established to review the extent to which institutions in those countries have discharged their duty of care to protect children against sexual abuse. It is proposing to use many similar methods to those we have employed in Australia including private sessions.

Apart from private sessions the Commissioners' understanding of child sexual abuse is also gained through public hearings. Public hearings allow us to examine in detail the response of one or more institutions to allegations of abuse. They help advance our understanding of systemic issues.

Those include how institutions recruit, screen, induct and manage staff who work with children; the ways in which institutions deal with staff who have been accused of abuse; and, how institutions handle complaints, claims or civil actions. Public hearings reveal the cultures and attitudes that have contributed, and continue to contribute, to the covering up and the "normalisation" of child sexual abuse.

Public hearings also have a significant role in driving institutional and regulatory change. Many institutions who have not themselves been the subject of a public hearing have already responded to the problems revealed in similar institutions and have implemented change or reviews intended to improve the safety of the children in their care.

The Royal Commission has held 33 public hearings. Hearings have been held in every state in Australia. This week we commenced our 34th public hearing – an inquiry into the experience of former students of Brisbane Grammar and St Paul's School in Brisbane. We have so far reported on 15 case studies. Others are close to completion. These reports are available on our website as soon as they have been tabled in Parliament.

Apart from private sessions and public hearings the other significant component of our work is our research and policy development program. This has the assistance of national and international experts across many disciplines. The program has four broad areas of focus; prevention, identification, response and justice for victims.

Many of you here today may have participated in our policy and research initiatives, and I thank you for your contributions. Your experience, expertise and knowledge is highly valued.

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You will be interested in some of the information we have gathered to this stage. Our most recent analysis of 2,794 private sessions tell us:

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Many people who have been abused report post-traumatic stress disorder, depression, and high rates of alcohol and substance abuse.

An often unrecognised impact of child sexual abuse is the adverse impact on ‘human capital’. These are the skills, knowledge and experience that equip people to engage and participate in society. Compared to non-abused groups, victims of abuse are less likely to achieve secondary school qualifications, gain a higher school certificate, attend university and gain a university degree.^[1]

We have also learnt about problems with sexual identity, sexual adjustment and links to prostitution as a result of being abused as a child.

You all know of the many other impacts including suicide, mood and personality disorders, obsessive compulsive disorders, re-victimisation, parenting difficulties and intergenerational trauma. As one forensic psychologist described the issue to us the impact can be on the whole person.

She said:

It’s not like you can isolate it like, just one organ; not like you've just got kidney damage but your liver is working fine. It's like every part of your person is affected by that, so it's really difficult to separate out. It's almost impossible to know what could have been if it hadn't been for the trauma because every part of your being has been affected by it.

My researchers tell me that there is comparatively little research on the specific impacts of child sexual abuse in an institutional context. Although likely to be comparable with the impacts of child sexual abuse that occurs in other contexts, the characteristics of the impacts may be different. Abuse by a respected priest or teacher may have a different consequence than abuse at home.

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Redress

Given the profoundly damaging and often long lasting impacts of child sexual abuse for some survivors, the question must be asked- how should we respond to people who have been abused? How can we alleviate the devastating effects? Our terms of reference require us to look at justice for victims, including amongst other issues, the provision of redress.

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The Commissioners made a number of recommendations about the professionals who provide counselling and psychological care. We recommend that psychological care be provided by practitioners with the qualifications and expertise to work with clients with complex trauma. And we recommend that survivors be allowed flexibility and choice, with no fixed limits on the counselling and care provided.

The Commissioners also recommend that treating practitioners be required to conduct ongoing assessment and review and ensure treatment is necessary and effective.

Some state governments and some institutions have previously responded by making redress payments. The Commissioners decided that, to differing degrees, all previous responses have been inadequate. Apart from lacking effective psychological care, the monetary payments have been available to only a limited group of people and have, in our view, been less than appropriate.

The different state schemes have had inconsistent outcomes and for that reason, amongst others, fail the test of reasonable fairness. Fairness requires equal justice for all survivors.

The Tasmanian Government's redress scheme made average payments of \$30,000 (not adjusted for inflation) across all categories of abuse. 1,848 payments were made. A total of \$55 million was spent by the Tasmanian Government on redress payments.

The Western Australian Government's redress schemes made average payments of \$23,000 (not adjusted for inflation) across all categories of abuse, with higher average payments for applications involving sexual abuse. 5,302 payments were made. A total of \$120 million was spent by the Western Australian Government on redress payments.

The South Australian Government has made average payments of \$14,100 (not adjusted for inflation) per person for persons sexually abused as children in state care. As at 31 December 2014, 96 offers have been made with 85 having been accepted. Approximately \$1.2 million has been spent by the South Australian Government on redress payments under the statutory victims of crime compensation scheme.

The Queensland Government's redress scheme made average payments of \$13,000 (not adjusted for inflation) across all categories of abuse, with higher average payments for applications involving sexual abuse. 7,168 payments were made. A total of \$96 million was spent by the Queensland Government on redress payments.

In relation to the redress schemes of institutions the data shows average payments of \$48,300 by the Catholic Church under 'Towards Healing'; average payments of \$38,800 by the Catholic Church under the 'Melbourne Response'; and average payments of \$51,000 by the Salvation Army under its various redress procedures. These include payments in response to abuse that did not include sexual abuse.

The Commissioners recognise that some survivors have already received monetary payments through previous or existing schemes. For that reason, we recommended that any previous payment must be deducted from the monetary payment under a national scheme. Our recommendations are designed to ensure that all survivors are treated fairly, but we also recognise the contributions which some institutions have already made.

I encourage you to take a look at our final recommendations on redress. You will find the report on our website. Our recommendations are now with all Australian governments. I understand that consultation and discussion are underway.

Advocacy and support

During our consideration of redress and civil litigation, it became clear that victims and survivors have a range of needs beyond being able to access counselling and psychological care as part of a redress scheme.

In response to these concerns the Commission has instigated a separate project to investigate the adequacy of advocacy and support services for victims and survivors.

This project will also look at the needs of survivors' family members and broader communities. Last month we released an issues paper which discusses advocacy and support and therapeutic treatment services for victims and survivors.

You can find details about our issues paper on our website. Our recommendations on this issue will be contained in the Royal Commission's final report in 2017.

Prevention

It would be remiss of me to talk about the treatment of child sexual abuse without reference to prevention.

As I mentioned earlier, prevention is one of four broad areas of focus within the Royal Commission's policy and research program. It includes the sub-themes of primary prevention and preventing recidivism. We are currently exploring a number of questions in this area including:

- How do we prevent people with sexual thoughts about children from committing an act of child sexual abuse?
- How do we prevent re-offending and how do we treat those who are convicted of a sexual offence?
- How do we prevent children from engaging in problem sexual behaviour, sexually abusive behaviour and/or sexual offending?
- How do we make organisations 'child safe'?
- How do we change community attitudes to better protect children from sexual abuse?

Working With Children Checks

Working With Children Checks are one of a range of strategies needed to make organisations child-safe. The Royal Commission's final report on Working With Children Checks was released by Government on 17 August 2015. The report makes 36 recommendations designed to strengthen Working With Children Check regimes throughout Australia.

As some of you may be aware each state and territory presently has its own working with children scheme, although the South Australian approach is very modest. Each of the eight schemes operates independently of the others. The schemes are inconsistent and complex. There is inadequate information sharing and monitoring of Working With Children Check cardholders.

This lack of consistency and integration raises significant issues. In a country of 24 million people with mobility amongst those who work with children, the present system means that children are being afforded different levels of protection depending on the state or territory in which they are located.

A further consequence is that if an organisation, say the Scouts, has a national gathering it cannot guarantee parents that every adult supervisor has the same level of Working With Children accreditation. It means that people who have responsibility for children in more than one jurisdiction must have multiple checks.

I have previously described the lack of a national framework for Working With Children Checks as 'a blight upon the communities' efforts to provide effectively for the protection of children'.

The recommendations in our report seek to remedy these problems. We have recommended a national approach. That approach would involve the establishment of a centralised database similar to, and which could utilise, the present CrimTrac arrangements. The effect would be one accreditation which would operate across jurisdictions.

Because any Working With Children Check scheme can be constructed to provide that a fee is taken for the service the proposal would come at a minimal cost to government.

We have asked that governments implement the majority of our recommendations within 12 months. The Commissioners are firm in the view that the current disparate arrangements should be modified to bring consistency and avoid duplication.

We trust that the suggested changes designed to enhance the safety of children can be taken forward through effective negotiation between the Commonwealth and the States and Territories. Although a Working With Children Check is not a guarantee of children's safety it is accepted as an essential step in constructing a child safe environment.

Positive impacts

The Royal Commission is painting a bleak picture of our communities' past management of the safety of children in some Australian institutions. However, we know that positive changes are taking place in response to our work. I will mention some of them.

Since the Royal Commission began, I have referred over 760 matters to authorities, mostly to the police. This has resulted in a number of arrests and charges. Many police investigations have been instituted.

Organisations working directly with people who are abused tell us that the Royal Commission has encouraged people to talk about abuse. For many the reluctance to talk, a product of the stigma attached to the issue, has been lifted. Survivors are now encouraged to seek support.

Karen Willis, the chief executive of Rape and Domestic Violence Services Australia, has said that the Royal Commission has helped remove the shame felt by victims of child sexual abuse. She says more people are calling the Rape and Domestic Violence Service as a result.

There is a heightened awareness about child safety amongst organisations providing services to children. Both Bravehearts and Child Wise have seen a significant increase in training and child safety certification requests since we commenced our work. Many institutions are reviewing their approach to ensuring the safety of children in their care.

Organisations have taken concrete steps to better protect children.

In September this year, the Catholic Archdiocese of Sydney announced the creation of a new child protection office which follows a widespread Archdiocesan review undertaken since the Royal Commission looked at the Archdiocese. This new office will work to achieve best practice when dealing with child protection, education, training, working with parishes and responding pastorally to survivors of abuse.

The Australian Olympic Committee has responded. Following the Swimming Australia public hearing the AOC has required Working with Children Checks for all coaches, staff and officials prior to their joining the Australian Olympic Team for the Rio games next year.

The President of the AOC has engaged directly with the Commission to ensure that effective practices and procedures are in place for all of the sports which operate under the banner of the Olympic movement.

Many institutions have come to recognise the traumatic and destructive impact of child sexual abuse. Since public hearings began, many institutions have taken responsibility for past wrongs, and have apologised for the hurt and suffering they caused children in their care.

The most recent apology came from the Salvation Army (Southern Territory)'s Commissioner Floyd Tidd during a public hearing in October into a number of children's homes operating between 1940 and 1990.

Other organisations have offered increased compensation by reopening previously settled cases. In July this year, the Christian Brothers announced a total of 64 Western Australian cases which had previously been settled had been re-examined. Similar responses have come from an Anglican Diocese, the Salvation Army and some Catholic Diocese.

During the public hearing into the Melbourne Response, the Catholic Church response to survivors in the Melbourne Archdiocese, Archbishop Denis Hart announced that he had appointed a former Federal Court judge to conduct a review of their process.

Changes are also occurring at the legislative level. One example, legislation proposed by the NSW Government that would require chief executives of organisations that deal with children to undergo the same screening as front line staff. In announcing the proposal the Minister referred to the Royal Commission's report on Scouts Australia.

Conclusion

We have a long way to go before we can confidently say our institutions are safer, children are better protected, and people who have been abused are receiving the treatment and support they need to lead productive lives.

But the Royal Commission provides a unique opportunity to develop recommendations that make real and lasting change. In a contemporary society marked by fierce competition for scarce resources, this opportunity does not come about often.

I thank you for your ongoing dedication and commitment to assisting those in the community who suffer sexual abuse. The Royal Commissioners are committed to do what they can to minimise these problems in institutions in the future.

- [1] JM Boden, LJ Horwood and DM Fergusson, 'Exposure to childhood sexual and physical abuse and subsequent educational achievement outcomes', *Child Abuse & Neglect*, vol. 31, no. 10, 2007, pp. 1101-1114
- [2] G Dyb et al, 'Alleged sexual abuse at a day care center: impact on parents', *Child Abuse & Neglect*, vol. 27, no. 8, 2003, pp. 939-950
- [3] T Blakemore, JL Herbert and F Arney, *Impacts of institutional child sexual abuse on victims/survivors: A rapid review of research findings*, Sydney, Australian Government (unpublished)

National Council of Churches in Australia Conference

Sydney, New South Wales

10 September 2015

Introduction

I recently conducted a private session with the mother of a boy from a Catholic school. The events the mother related occurred only a few years ago. The boy was an active and keen student and along with many of his colleagues would often arrive at school well before class.

One of the Brothers at the school, who was responsible for the sick bay, had implemented a 'measuring program' on a group of students. The program was not authorised by the school, in fact the school authorities did not know it was happening. The program involved the teacher measuring each male student in every part of their body including the upper thigh.

The intention was to measure each of the participating boys at intervals throughout their time at the school.

The son of the mother who came to the Royal Commission was recruited to the program in year 7. One day he happened to tell his mother what was occurring. She was immediately concerned. Although her son did not see the program as being out of the ordinary his mother suspected that it may have been grooming behavior which could lead to very serious problems.

She raised the matter with both her husband and her son contemplating that she would take the issue to the school headmaster. They did not want this to happen. They were concerned about an adverse reaction from the school community which may rebound upon the child. But the mother did not stop.

That would have been the easy way. She was so concerned for her son and the other boys in the program she kept going. The initial response from the school was not good, but again she persevered. Only through her perseverance did the school come to realise that there was a serious problem which required an effective response.

Ultimately the Brother was taken from the school and assigned responsibilities away from any children.

I tell this story for two reasons. Firstly, it underlines the need within the community to increase the knowledge of parents and others with responsibility for children about the type of behaviour which may constitute grooming and which can lead to very serious problems for children.

Only if parents understand what may be happening to their children can they play an effective part in their protection.

Secondly, it is essential that those in responsible positions in institutions understand that what may seem to be innocent behavior may be otherwise. Institutions must encourage both children and parents to bring issues of concern to their attention.

They must ensure that parents understand that even if their concerns ultimately turn out not to be justified it is important that those concerns be brought to the attention of the institution. I will return to these issues shortly.

A private session with one of our Commissioners provides an opportunity for a survivor, or a survivor's family member, to tell their story of abuse in a protected and supportive environment. It is the primary way for the Commissioners to bear witness to the abuse and trauma inflicted on children who suffered sexual abuse in an institutional context.

On 19 August 2015 one of the Commissioners, Commissioner Milroy, conducted the Royal Commission's 4,000th private session. As it happens that private session was conducted with a prisoner in a NSW prison who was sexually abused as a child.

In addition to the more than 4,000 private sessions we have now conducted, there are currently about 1,500 people waiting in the queue. We continue to receive requests for private sessions at a rate of 40 per week.

As some of you may be aware in the United Kingdom the Independent Inquiry into Child Sexual Abuse has been established to review the extent to which institutions in England and Wales have discharged their duty of care to protect children against sexual abuse.

I was pleased to see that in her opening statement the Chair, Justice Goddard, discussed that inquiry's 'Truth Project'; the mechanism it will use to hear from victims and survivors. Indicating they will follow a similar process to our private sessions, Her Honour said:

"Anyone who doubts the value of establishing a truth process of this kind need only consider the effectiveness of the private sessions run by the Australian Royal Commission to appreciate the intrinsic merits of this exercise. The Truth Project we are putting in place closely follows the successful arrangements adopted in Australia, where the response has been remarkable."

We have now held 32 public hearings into a wide range of institutions. We have held them in every state and territory. Each public hearing is preceded by a period of intensive investigation and research.

Although the hearing itself may only occupy a limited number of days, the preparatory work which must be completed by Royal Commission staff and by parties with an interest in the public hearing can be very significant.

Decisions about which institutions we choose to examine in a public hearing are informed by whether or not the hearing will advance an understanding of systemic issues and provide an opportunity for institutions to learn from previous mistakes.

The Commissioners are mindful of the need to ensure that any findings and recommendations we make have a secure foundation. In many cases the issues explored, and the lessons to be learnt, will have relevance beyond the individual institution being examined.

Public hearings are also an important means of enhancing the community's awareness and understanding of the nature, circumstances and, the often devastating, impact of child sexual abuse.

The Royal Commission has now received a total of 16,361 allegations. Of these we have confirmed that 11,988 allegations of abuse are both within our terms of reference and relate to an identified institution.

There are many allegations which we receive where, for readily understood reasons, a person cannot be precise in identifying the institution in which they were abused. We have received allegations in relation to 3,566 institutions. Of the 11,988 allegations, 7,049 allegations relate to faith based institutions. 3,612 relate to government institutions.

A further breakdown of the 11,988 allegations reveals that we have received 4,418 allegations relating to Catholic Church institutions and 871 relating to Anglican institutions. We have received 411 allegations relating to Uniting Church institutions. There are an additional 123 allegations relating to Presbyterian institutions and 69 allegations relating to Methodist institutions.

The Commission has received 519 allegations in relation to Salvation Army institutions. A public hearing to inquire into the experiences of former child residents of a number of institutions operated by The Salvation Army (Southern Territory) between 1940 and 1990 will be held in October in Adelaide.

We have received 137 allegations relating to Jehovah's Witness institutions. The Royal Commission held a public hearing to inquire into the Jehovah's Witnesses and Watchtower Bible and Tract Society of Australia Ltd in July this year.

The Commission has received 80 allegations relating to Jewish institutions, 59 relating to Baptist institutions, 56 relating to Seventh Day Adventist institutions, 50 relating to Australian Christian Churches institutions, 32 relating to Lutheran institutions, 30 relating to Brethren institutions, 18 relating to Mormon institutions, 4 relating to Coptic Orthodox institutions and 2 relating to Greek Orthodox institutions.

I have now referred 727 matters to police to investigate with a view to the possible prosecution of an offender.

The Royal Commission will finish its work on 15 December 2017. To allow time for preparation of our final reports our public hearing program will come to an end in early 2017. This will allow us sufficient time for the completion of reports into public hearings. It will also allow us to complete as many private sessions as possible, and finalise our recommendations to government.

Apart from private sessions and public hearings our policy and research program underpins the work of the Commission. We are examining a diverse range of topics. These include child safe organisations, diversity and vulnerability, information sharing, mandatory reporting, advocacy and support services, complaint handling and response, records, information sharing, prevention and treatment and what I refer to as the “why” question.

The Royal Commission has now completed two final reports, both of which contain recommendations to assist people who have been sexually abused and enhance the protection of children in the future.

Those reports are the Working With Children Checks report and the Redress and civil litigation report.

Working With Children Checks report

The Royal Commission’s final report on Working With Children Checks was released by Government on 17 August 2015. The report makes 36 recommendations designed to strengthen Working With Children Check regimes throughout Australia.

As some of you may be aware each state and territory presently has its own scheme, although the South Australian approach is very modest. Each of the eight schemes operates independently of the others. The schemes are inconsistent and complex. There is inadequate information sharing and monitoring of Working With Children Check cardholders.

This lack of consistency and integration raises significant issues. In a country of 24 million people with mobility amongst those who work with children, the present system means that children are being afforded different levels of protection depending on the state or territory in which they are located.

A further consequence is that if an organisation, say the Scouts, has a national gathering it cannot guarantee parents that every adult supervisor has the same level of Working With Children accreditation. It means that people who have responsibility for children in more than one jurisdiction must have multiple checks.

I have previously described the lack of a national framework for Working With Children Checks as ‘a blight upon the communities’ efforts to provide effectively for the protection of children’.

The recommendations in our report seek to remedy these problems. We have recommended a national approach. That approach would involve the establishment of a centralised database similar to, and which could utilise, the present CrimTrac arrangements. The effect would be one accreditation which would operate across jurisdictions.

To further facilitate a national framework we have identified a set of standards so that key aspects of Working With Children Checks regimes are dealt with in the same way.

There would be consistency with respect to who requires a check and how a person’s records are accessed. Our recommendation is that state and territory governments amend their schemes to accommodate these standards.

Because any Working With Children Check scheme can be constructed to provide that a fee is taken for the service the proposal would come at a minimal cost to government.

Amongst other changes this reform would bring a common approach to the issue of who needs a Working With Children Check. It will be of interest to many here today that we have recommended that all religious leaders and officers or personnel of religious organisations be required to have a Working With Children Check.

We have asked that governments implement the majority of our recommendations within 12 months. For those who may be interested the full report can be accessed via the Royal Commission’s website. The Commissioners are firm in the view that the current disparate arrangements should be modified to bring consistency and avoid duplication.

We trust that the suggested changes designed to enhance the safety of children can be taken forward through effective negotiation between the Commonwealth and the States and Territories. Although a Working With Children Check is not a guarantee of children’s safety it is accepted as an essential step in constructing a child safe environment.

Redress and civil litigation

On the 31st of August the Royal Commission delivered its Redress and civil litigation report to the Governor-General. This report contains the Commission’s final recommendations on these issues. I will say nothing about redress today. The matter is now with the various governments.

In its consideration of the civil law the Commission focused on three key areas which impact on survivors: limitation periods, the duty of institutions, and the proper defendant to civil claims.

It was clear from a number of our public hearings that the limitation periods prescribed by the statutes of the various states and territories present a considerable, and sometimes an insurmountable, burden for survivors wishing to commence civil proceedings. The lack of uniformity in the length of the limitation periods across the jurisdictions raises issues of fairness for survivors.

It may also lead to more complex and prolonged litigation as disputes may arise as to the appropriate forum in which to hear the relevant claim.

Historically, the policy rationale for limiting the period a potential claimant had to commence civil proceedings was to prevent a person from 'sleeping on their rights'. They were intended to ensure claims are brought in a timely fashion. Applying that rationale to survivors of child sexual abuse is clearly inappropriate. Many survivors are unable to disclose their abuse for many years. Victims of child sexual abuse often wrongly blame themselves and are embarrassed and ashamed.

This can make disclosure very difficult. Many survivors will need psychological care and assistance when they do disclose. It is likely to take a lengthy time before a survivor can even contemplate commencing legal proceedings.

The second issue in the civil litigation context concerns the duty of institutions. Should vicarious, or strict, liability be imposed on an institution if a child entrusted to its care was sexually abused by a member or person associated with that institution?

The law in both England and Canada has been developed so that, depending on the circumstances, an institution can be liable for the deliberate criminal act of a member of that institution, even when the institution has not itself been negligent.

This issue is often framed in terms of whether it is fair for an institution, which has not been negligent, to be made liable for the criminal act of a member. However, it should be born in mind that the relationship between a child and an institution will typically come about because of an offer made by the institution to care, and provide a safe environment, for the child.

The issue was starkly illustrated by the discussion in one of our roundtables. A senior manager of a child care provider was asked the question as to what she believed was the appropriate response of the law in the event that a child was sexually abused while in care. She responded that as a manager of such an enterprise, without negligence by the provider, she would not want the provider to be liable for the deliberate criminal act of a member or employee of the institution.

Her position was different when she looked from the position of a mother. As a mother of the child who she had placed in the care of the provider she would definitely want the provider to be liable even if it had not itself been negligent.

A further issue arising in the civil litigation context is the availability of a defendant that a survivor can sue. This issue is particularly acute for survivors who were abused by persons associated with faith-based institutions. While it is true that a survivor will always have a cause of action against their abuser, there are a number of practical reasons why they may either prefer, or only be able, to sue the institution in which their abuse occurred.

Their abuser may be dead, have no money or, particularly when the abuse occurred when the survivor was very young, the abuser may not be able to be accurately identified.

Under the law in Australia unincorporated associations, including many religious organisations, do not have a distinct legal personality. As a result they cannot be sued. It is common for their assets to be subject to a trust created by statute. This can result in a significant impediment for survivors who wish to pursue legal proceedings against some faith based institutions.

This issue has arisen in a number of the Royal Commission's case studies, including case study 8 in which we heard evidence concerning Mr John Ellis' attempts to recover damages for the abuse committed against him by an Assistant Priest from the Sydney Archdiocese, and case study 11 where we heard of similar difficulties faced by claimants in proceedings against the Christian Brothers in institutions in Western Australia.

I am pleased to see that some institutions have already responded to these problems. In his evidence to the Royal Commission in the case study concerning the Melbourne Response Denis Hart, the Archbishop of Melbourne, stated that the Melbourne Archdiocese has recommended that the Church, throughout Australia, provide an entity for survivors to sue.

The Archbishop of Sydney, Anthony Fisher, has stated publicly that it is the 'agreed position of every Bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters' and that 'anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements.'^[1]

The Wangaratta Anglican Diocese has recently agreed to become incorporated. Wangaratta is the third Anglican Diocese in Victoria to take this step. The Bendigo and Ballarat Anglican Dioceses have already determined to incorporate.

Criminal justice

With the delivery to government of our Final Report on Redress and Civil Litigation the Commission has now turned to consider, in relation to justice issues, the criminal law.

The Commissioners have heard in private sessions of the importance many survivors place on criminal justice. It is more important to some survivors than compensation or other forms of redress. These survivors understand that the criminal justice system serves not merely to punish the offender. It is a vehicle through which the community can be made aware that the offender is someone other than the upstanding person they may have been perceived to be.

They see it as a mechanism through which the offender can be forced to publically acknowledge the significant harm they have caused.

A number of our public hearings have raised issues related to our work in criminal justice. Those hearings include our inquiries into Scouts Australia, YMCA NSW, St Ann's Special School in Adelaide, Christian Brothers' residential institutions in Western Australia, Swimming Australia, the Retta Dixon home in the Northern Territory and Bethcar Children's Home.

Through our public hearings and from private sessions we are generating significant insights into the impact of abuse on survivors. These insights are transforming not just the understanding the Commissioners have of the impacts of abuse, but the understanding of the wider community.

What we are learning about impacts has particular relevance in our work in relation to criminal justice. Acts which the various criminal codes and law enforcement agencies, including the judiciary, have considered to be relatively minor can, for some, have devastating and lifelong impacts.

The research evidence, as well as the experience of mental health professionals, also suggests that the assumption the law has made that the more serious the abuse the greater the harm is not always the case.

The Royal Commission has recently published a comprehensive report on Sentencing for Child Sexual Abuse in Institutional Contexts. Professor Arie Frieberg, Hugh Donnelly and Karen Gelb were engaged to undertake this research. The report examines sentencing law, practice, standards and principles.

A further issue explored in the report is whether the institution itself should be held criminally liable, in certain circumstances, for the sexual abuse committed by a person associated with that institution. The report can be accessed through the Royal Commission's website.

Other research projects in relation to criminal justice issues we have commissioned include:

- The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases;
- The use and effectiveness of alternative means or ‘special measures’ for complainants to give evidence in child sexual abuse trials; and
- The admissibility of tendency and coincidence evidence, jury decision making and the conduct of joint or separate trials.

To assist in our understanding of how jurors make decisions we are conducting a major jury research program, involving multiple mock trials. A trial has been filmed involving multiple counts with multiple complainants.

The film has then been edited to allow trials with varying numbers of counts or complainants and appropriate directions to be shown to jurors. The jurors’ deliberations have been both observed and filmed and are now being analysed.

This process will allow us to look at the different trial outcomes of joint and separate trials. The study will also allow us to consider and compare the relationship between jurors’ perceptions or misconceptions about child sexual abuse, as well as modes of jury deliberation.

The voice of children

The Royal Commission’s Terms of Reference require us to inquire into ‘what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts’. I know that this is a question that confronts many here today.

I have spoken on previous occasions of the power that the institution has had, in the past, to silence the child. While recognising that the sexual abuse of children remains an issue in contemporary times, there was a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for the authority of institutions by adults coalesced to create the high risk environment in which thousands of children were abused.

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 which 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, be they youth worker, teacher, residential supervisor or cleric, the power imbalance was entrenched to the inevitable detriment of many children.

We must ensure that in the future the institution does not silence the child. The institution must work to ensure that the child can be heard. Institutions must ensure that there is a mechanism available through which the children in their care feel comfortable reporting abuse.

This message was reinforced by another of our recently published research projects: 'Taking Us Seriously: Children and Young People Talk about Safety and Institutional Responses to their Safety Concerns'.

Some key messages given by children and young people to the Royal Commission were that 'some adults need to develop their skills and institutions need to better deal with some safety concerns' and that 'children and young people want to be involved in identifying and dealing with safety issues and believe that, in partnership with adults and institutions, issues such as child sexual abuse can be better dealt with.'

Those in positions of management in institutions have particular responsibilities. They need to ensure that there are rules and appropriate practices in place to govern the interactions their staff, and others associated with the institution, have with the children in their care.

Management should also ensure that those in responsible positions in the institution are trained to understand and recognise that abuse is occurring.

The Royal Commission is currently conducting a research project to identify and explore the elements that make an institution 'child safe'.

Impacts

There are many changes which are already occurring in institutions as a consequence of the work of the Royal Commission. I can mention a few.

The Royal Commission has learnt that many institutions are already taking up training programs being offered by the private sector centred upon child safety.

Bravehearts have reported a significant increase in the number of participants in the workshops and training programs they conduct. In the 2010/11 financial year Bravehearts trained 375 people in how to better identify and respond to child sexual abuse and other harm.

The number of participants has increased in each year since 2011. In the last financial year Bravehearts trained 3,127 people. Bravehearts founder Hetty Johnson attributes this increase to the impact of the Royal Commission.

Similarly, Child Wise has seen a significant increase in training and child safety certification requests since the Royal Commission commenced its work. Child Wise provided training to 3,278 participants in the 2014/15 financial year. This represents around 25,000 hours of training.

Child Wise considers that the increase in activity and training, education and certification signals a shift within the community. That shift, they believe, is primarily the result of the increased focus in the community on child sexual abuse; that increased focus being attributable to the work of the Royal Commission.

Of course Bravehearts and Child Wise are only two examples of organisations conducting training of this sort. The Australian Childhood Foundation is also a major auditor and child safe trainer. ACF have reported that demand from organisations seeking accreditation under their safeguarding children program has spiked by more than 60%.

ACF are scoping a significant audit project with the Australian Sports Commission which oversees 62 different sporting codes.

The Australian Olympic Committee has also responded. Following the Swimming Australia public hearing the AOC has required Working With Children Checks for all coaches, staff and officials prior to their joining the Australian Olympic Team for the Rio games next year.

The President of the AOC has engaged directly with the Commission to ensure that effective practices and procedures are in place for all of the sports which operate under the banner of the Olympic movement.

There are many other examples of institutions responding to our work. A number of those institutions are represented here today.

The Salvation Army has restructured its professional standards office and reviewed its response to individual survivors. Similarly the Christian brothers have indicated that following the cases study in Western Australia they would reopen cases already settled and examine whether the previous response was appropriate.

During the public hearing into the Melbourne Response, the Catholic Church response to survivors in the Melbourne Archdiocese, Archbishop Denis Hart announced that he had appointed a former Federal Court judge to conduct a review of their process.

Sydney Archbishop Andrew Fisher ordered a review of the professional standards of the Sydney Archdiocese in May this year.

Following the release of the Royal Commissions' case study report into the North Coast Children's Home, the Anglican Diocese of Grafton pledged to implement 'fully and completely' the recommendations for them to review professional standards procedures and investigate disciplinary action against the Rev Campbell Brown.[2]

I have been informed that the Uniting Church has reviewed its practices and policies to better identify and minimise the risk of children being harmed. The Church has also made changes to the manner in which it responds to survivors.

Changes are also occurring at the legislative level. For example, the NSW Government has proposed legislation that would require chief executives of organisations that deal with children to undergo the same screening as front line staff. In announcing the proposal the Minister referred to the Royal Commission's report on Scouts Australia.

These are encouraging signs. They indicate that the investment which the Commonwealth Government has made in the work of the Royal Commission is already bringing real change for the nation's children.

There can be no doubt that the work we are doing has brought these issues to the forefront of everyone's minds.

It is of fundamental importance that both governments and institutions resolve to accept the responsibility and apply the resources to bring lasting improvement in the lives of those who have been abused and more effectively protect children from the possibility of abuse in institutions in the future.

[1] https://sydneycatholic.org/people/archbishop/addresses/2015/2015522_1900.shtml

[2] <http://www.graftondiocese.org.au/#!/diocesan-news/cmcm>

Supreme Court of New South Wales Annual Conference 2015

Bowral, New South Wales

4 September 2015

When delivering the Mayo Lecture at James Cook University in 1996, Sir Anthony Mason commenced by reminding his audience that judges do make law.^[1] By that time the theory, which had its supporters, that judges merely discover the law had been authoritatively assigned by Lord Reid to the land of fairy tales.

Recognition that judges make law brings with it significant questions. How should judges undertake the task? What rules, if any, should apply to them? Do they have the resources necessary to make the “right” laws? In his speech Sir Anthony acknowledged the benefit to law making which judges gain from their work. Describing judges as having “a unique window on their community”,^[2] Sir Anthony said

“I do not suggest that it is enough for the judge to rely on his or her own experience and common sense. When it comes to the shaping of important legal principles, the judge, more particularly the appellate judge, must take advantage of the learning and techniques of other disciplines, including philosophy, history, economics and social science. These disciplines must supplement the basic foundation which the law (not excluding comparative law) itself provides.”^[3]

No one could seriously question Sir Anthony’s proposition. But it begs another question. When judges are making law how can they access and use the learning of other professions? What should the rules be? When considering whether the obligation of a party to exercise reasonable care for another should be confined to a duty to act without negligence, or whether vicarious or strict liability are appropriate, what information can a court rely on to make the “right” decision? When defining the content of the directions to be given to a jury either generally, or in relation to a particular category of offence, or just in a particular case, how is a court to use the learning from other disciplines to come up with the “right” outcome?

There are of course many issues which judges decide by applying their own knowledge. Matters which we accept as being within the course of ordinary human experience pass without comment. However, the concern will always be whether what is accepted to be within ordinary human experience is consistent with the science, if any, relevant to that issue.

I have some questions to raise today. The answers to them are not entirely apparent.

The Royal Commission

The Royal Commission which I chair is required by its Letters Patent to inquire into institutional responses to allegations and instances of child sexual abuse. As part of our work we must make recommendations to ensure justice for victims by, amongst other means, the provision of redress and through the investigation and prosecution of allegations of abuse.

There are three elements to our work: private sessions, public hearings and research and policy. Private sessions are conducted in accordance with the provisions inserted into the Commonwealth Royal Commissions Act to enable any Commissioner to receive an account of a person's history of abuse.

We have now held more than 4,000 private sessions. We anticipate requests for many thousands more. There are 1,500 already approved and waiting in the queue for their private session.

To date we have held 30 public hearings. Although we have enough material to justify more than 1,000 public hearings we will only be able to hold between 50 and 60.

Our research and policy work covers many topics. A significant component looks at the impacts of abuse on individuals – a matter relevant to both civil and criminal justice. We are also looking at relevant aspects of the criminal trial process, including the troublesome issues of joint trials and tendency and coincidence evidence.

One significant issue is the means by which the courts can use the available learning in relation to the sexual abuse of children in the trial and sentencing process. Before I turn to consider that issue I should tell you of some of the research work we have undertaken.

The impacts of child sexual abuse

Our work with respect to the impact of abuse has a number of components. Considerable work has been done in gathering and analysing the relevant literature. Beyond this each private session provides an opportunity for a Commissioner to understand an individual's history of abuse and the impact it has had upon them.

An individual's account in a private session cannot be influenced by any expectation of financial gain or retribution for the abuser. The individuals' stories we hear reveal similar behaviour of many perpetrators; they offend in the same way, with similar, frequently significant, and sometimes catastrophic consequences for the victims.

The personal accounts of the consequences of abuse are consistent with the conclusions of the academic research.

Sexually abusive behaviour covers a wide range of acts. It is common to hear of the fondling of genitals, masturbation and oral sex. Although less common, vaginal and anal penetration are frequently reported; both digital and by a penis. In some institutions sexual abuse is accompanied by extraordinary physical brutality and emotional cruelty.

The prevalence of child sexual abuse is difficult to measure. It is believed that as many as 60% of victims never disclose their abuse and only 5-6% ever report to the authorities.^[4]

When victims do disclose their abuse, it is often after significant delay, sometimes taking more than 20 years and sometimes many years more. Males are less likely to disclose their abuse, and are likely to take longer to disclose than females.^[5]

Although there are difficulties in gathering accurate statistics the best Australian evidence suggests that at least 1.4% and possibly as high as 8% of male children experience penetrative sexual abuse. Non-penetrative abuse is more prevalent – the low estimate being 5.7% and the highest 16%.^[6]

The estimates for girls are higher than for boys. The low estimate for penetrative abuse of girls is 4%, the high 12%. The low estimate for non-penetrative abuse is 13.9% the higher being 36%. The estimates are consistent with international research. The lowest prevalence of child sexual abuse is observed in Asia. For males the highest is in Africa. For females the highest is Australia.^[7]

Of significance for today's discussion is the knowledge we have of the impact of abuse. The assumption that various criminal codes and law enforcement agencies, including the judiciary, and I suspect the majority of the community, make is that sexual abuse with penetration leads to the worst outcomes for victims.

The true picture is far more complex. The research evidence as well as the experience of mental health professionals finds conflicting support for the assumption that penetration leads to more severe impacts for victims.

One study found that children who had been touched in a sexual way without penetration were more anxious than those who had experienced penetrative abuse.^[8] Other research indicates that penetration can be a particular risk factor for later developing severe mental disturbance.

The research also suggests that penetration is only one factor affecting the outcome of abuse. Other factors include the betrayal of trust, the amount of violence, and the resulting psychological coercion.^[9]

The experience of sexual abuse appears to be different for boys and girls. Girls are more likely than boys to be sexually abused, and unlike most other forms of child victimisation, this risk does not change through the course of childhood and early adolescence.^[10]

Girls are more likely to experience sexual touching, whereas boys are more likely to experience masturbation and oral and anal abuse. Girls are more likely to be abused by family members – most commonly a stepfather. Boys are more likely to be abused by someone outside of the family – most commonly a family friend.

While stranger abuse is a rare event, some studies suggest that boys are about three times more likely to be abused by strangers. Finally, while the abuse of girls tends to be more frequent and occur over a longer time, boys are more likely to be abused by multiple perpetrators.^[11]

Abuse that is accompanied by other forms of maltreatment such as physical and emotional abuse and neglect tends to be related to worse outcomes for victims.^[12]

The sense of betrayal when a child is abused, even abuse which we would categorise as being at the low end of criminality, by a person who they may have trusted and the shock accompanying that betrayal can be the trigger for significant and sometimes catastrophic psychological trauma.

It is important to appreciate that not all children who experience sexual abuse go on to experience poor outcomes in the short or long term. Recent reviews suggest that up to 50 percent of survivors do not experience clinically significant symptoms.^[13]

The long-term psychological impacts of abuse are the most commonly studied. This research consistently points to a strong relationship between child sexual abuse and poor mental health in later life. Victims of child sexual abuse are almost four times more likely to have contact with a public mental health facility compared with people in the general community.^[14] However, the emergence of symptoms may be significantly delayed.

Many victims do not experience psychological problems until an event in their middle life or older ages triggers psychiatric illness which is conclusively diagnosed as being the consequence of their abuse as a child.

The most commonly reported impacts of child sexual abuse are post-traumatic stress disorder, sexualised behaviours and suicidality and self-harm.^[15] A recent study reported the prevalence of PTSD among a sample of sexual abuse survivors to be almost 50 per cent.^[16]

Other research suggests that victims of child sexual abuse are 18 times more likely than people in the general population to die as a result of self-harm, and almost 50 times more likely to die as a result of accidental drug overdose.^[17]

Some research indicates that individuals with a history of sexual abuse are more than six times more likely to have a diagnosis of psychosis than those who have not experienced this trauma.^[18]

Other research indicates that abuse involving penetration is a particular risk factor for developing psychotic and schizophrenic symptoms.^[19]

Child sexual abuse is associated with increased levels of neurological dysfunction.^[20]

Exposure to abuse or neglect in childhood can modify brain regions as a consequence of excessive exposure to stress hormones and over-activation of neurotransmitter systems, especially if the exposure occurs during a key developmental period.^[21]

In women with a history of child sexual abuse who were diagnosed with major depression, the hormone responsible for the release of cortisol displayed a six times greater response to stress than controls of the same age.^[22]

In a sample of university-aged participants, girls who were sexually abused but not maltreated in other ways in comparison with girls who had not been abused at all showed a reduction in grey matter volume in the area of the brain responsible for processing visual information.^[23]

Victims of child sexual abuse are more likely to abuse alcohol and other drugs.^[24]

Guilt, shame and anger are commonly reported symptoms among victims of child sexual abuse. This is not surprising given the betrayal of trust and violation of personal boundaries involved in sexual abuse.^[25]

These early experiences can affect the way children and then adults understand the motives and behaviours of other people and how they handle stressful life events. The affects can be life-long.

The marital and intimate partner relationships of victims of sexual abuse are often characterised as being unstable and unhealthy. Compared with people who have not been abused, victims report lower relationship satisfaction and poorer communication with partners.^[26]

Research also suggests that pregnancy, childbirth and motherhood can trigger emotional distress and a lack of confidence and self-esteem among female survivors. This anxiety and lack of confidence in parenting can contribute to poorer relationships with their children and affect their children's adjustment.

There has been comparatively less research with fathers, although the available evidence indicates that male survivors report being over-protective, nervous about physical contact with their children, and fearful of becoming abusers themselves.^[27]

Victims of sexual abuse are more likely to exhibit sexually risky behaviour later in life. Studies have found that child sexual abuse is associated with a greater likelihood of having unprotected sexual intercourse, a greater number of sexual partners, exchanging sex for money, drugs or shelter, and being sexually assaulted later in life.^[28]

Other research suggests that victims of sexual abuse are likely to be younger when they first have intercourse, be younger when they are first diagnosed with a sexually transmitted infection, more likely to have an unintended pregnancy, and less likely to interrupt intercourse despite the risk of pregnancy and sexually transmitted infections.^[29]

Research suggests that children who have been sexually abused are at a greater risk for behavioural problems, running away, vandalism and juvenile offending than those who have not been abused.^[30] Running away also makes children more likely to commit survival crimes including stealing and becoming prostitutes.

The victim-offender relationship was examined in a large scale Australian study.^[31] The researchers examined almost 3,000 cases of child sexual abuse reported to authorities between 1964 and 1995, and compared them with a non-abused group matched for age and gender. They found that almost a quarter (24%) of child sexual abuse victims had recorded an offence, compared with only 6% of the comparison group.

According to the study being sexually abused as a child appears to be a risk factor for sexual offending for males, but not for females. Specifically, the study found that 5% (one in twenty) of the male victims of child sexual abuse were subsequently convicted of a sexual offence, compared with 0.6% in the comparison group (6 in 1000).

The difference was even greater for boys who had been abused after the age of 12: almost one in ten of these victims were convicted of a sexual offence. By contrast, the probability of being convicted of a sexual offence was low for girls (0.1% or 1 in 1000), regardless of whether they had been abused or not.^[32]

An often unrecognised impact of child sexual abuse is the adverse effect it can have on the human capital of victims and survivors.^[33] While there has been comparatively less research in this area, there is some evidence to suggest that victims of abuse experience poorer academic achievement: they are less likely to achieve secondary school qualifications, gain a higher school certificate, attend university and gain a university degree.^[34]

Maltreatment more broadly has been shown to affect later earnings, with victims of child maltreatment more likely to have very low incomes (less than \$12,000 per year) compared with non-maltreated groups.^[35]

A vexed issue for the criminal justice system is the difficulties posed by the trial of an accused where multiple occasions of offending are alleged. This task is complicated where there are multiple complainants and the prosecution seeks to prove a tendency or pattern of behaviour of the offender.

This issue is particularly challenging in the context of sexual offences as the common law has considered offences of this kind to be a class for which special care needs to be taken. There is an assumption that allegations of sexual offending are particularly likely to arouse prejudice in the jury.^[36]

The tension between the assumptions by judges and evidence based decision making is particularly found in this area of offending. How is it that judges know juries react in a way that requires them to exercise particular vigilance? Is this an accurate assumption? Is the rationale for the rules that this assumption mandates a valid one?

To assist in our understanding of how jurors may reason we are conducting a major jury research program, involving multiple mock trials.^[37] A trial has been filmed involving multiple counts with multiple complainants.

The film has then been edited to allow trials with varying numbers of counts or complainants and appropriate directions to be shown to jurors. The jurors' deliberations have been both observed and filmed and are now being analysed.

This process will allow us to look at the different trial outcomes of joint and separate trials. The study will also allow us to consider and compare the relationship between jurors' perceptions or misconceptions about child sexual abuse, as well as modes of jury deliberation.

The study is also looking at the impact of question trails on juries' reasoning and decisions.

The study uses separate cases of different degrees of prosecutorial strength: one being weak, another being medium and another being strong. There are 1027 individual jurors and 90 juries in total.^[38] The trials in which the individual juries participated vary.

They included a mix of separate and joint trials, some with relationship or tendency evidence. One variant used a question trail. In some instances juries were given relationship and tendency directions, and in others they were not.^[39] In addition to the in-person jury simulation the study was also conducted in an online form.

The preliminary results from the online study shed some light on juror expectations about the information which they expected would be made available to them.

For example, an almost equal proportion expected that they would have been informed if there were other charges against the defendant (48% yes vs 52% no). A similar proportion considered they would have been informed if the defendant had been sexually abusive on other occasions (49% yes vs 51% no).

Nearly 47% of jurors in the online study thought they would have been informed if the defendant had prior convictions for child sexual assault.

40% thought they would have been told if the defendant had any prior convictions for any other crime.

There are further interesting results from the online study. When the strong case, which contained three counts of varying degrees of seriousness against a single complainant, was run jointly with the weaker cases the conviction rates for the less serious charges in the strong case fell.

For example, with respect to count 1 in the strong case – masturbation of the complainant – when the strong case was run as a separate trial the conviction rate for this count was 72%. In the joint trial the conviction rate for this count was 59%. However, for the most serious count in the strong case, the conviction rate increased slightly when the trials were joined: up from 58.5% in the separate trial to 61% in the joint trial.

The early results from the in-person juries are also returning some interesting findings. One of the most interesting is that there may be a difference in case outcomes where jurors are given a question trail. Two of the separate trials included tendency evidence, but in one of those the jury was also given a question trail.

The preliminary analysis indicates that in a weak case using a question trail increases the rate of acquittal. In relation to both a strong and a moderate Crown case the indications are that using a question trail may lead to a greater conviction rate.

Perhaps less surprising is the finding that trials where relationship evidence was adduced resulted in an increased number of convictions, and trials where tendency evidence was led more guilty verdicts were returned.

Researchers observing the in-person deliberations noted that legal terminology was challenging for some juries. Numbers are still being analysed, but some juries construed oral evidence as hearsay, and considered it an inadequate basis upon which to deliver a guilty verdict. Some juries were confused by the counts involving digital and oral penetration being defined as “sexual intercourse”.

The researchers are still in the early stages of analysing the results from the in-person studies. By October 2015 we should have a detailed quantitative results from all 90 juries. We hope to learn more about the impact of joint trials on trial outcomes compared with trials run separately.

We are also keen to know whether there were any in-person juries in joint trials that did not consider either individual complainants or individual counts. We will also have the researchers’ analysis in relation to the manner in which juries used tendency and relationship evidence, as well as any thoughts on why question trails led to significantly higher numbers of “not guilty” verdicts.

The capacity of the Royal Commission to undertake a research project of this type is of course not, at least presently, available to courts. However both best practice and informed reflection confirm that we need a mechanism by which judges can absorb knowledge from disciplines outside the law that should legitimately inform its content.

If legal rules and policy are based on understandings of human behaviour that are misguided or erroneous this must affect the capacity of the criminal justice system to secure justice.

Law and psychology- A history

The practice of judges relying on their own understandings of human behaviour to inform the content of legal rules is centuries old. The practice of judges, at least explicitly, relying on scientific research to inform legal rules has a much more complicated history.

In the mid-1700s the English jurist Sir William Blackstone discussed the common law approach to a provoked killing. His words reflect the values of the 18th century but remain relevant, at least in some Australian states, today. He said “if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor” then the law “pa[id] ... regard to human frailty” and the killer was convicted of manslaughter.

If, however, there was “a sufficient cooling-time for passion to subside and reason to interpose” then the defence would fail and the killing would be murder.^[40]

Contrast the contemporary relevance of those words about provocation with Blackstone’s understanding of the truthfulness of a woman alleging sexual assault. He said:

“if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place, where the act was alleged to be committed, was where it was possible she might be heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned.”^[41]

The seeds of later and erroneous approaches to issues of sexual assault can be seen in these remarks. Approximately two centuries later a majority of the High Court cited with approval the following statement:

“it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these Courts girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute.”^[42]

In 1879 an event occurred of fundamental importance in the development of our understanding of human behaviour. In Leipzig, the first laboratory solely dedicated to psychological research was founded by Wilhelm Wundt.

In that laboratory Wundt and his students developed the empirical methodologies that allowed psychology to emerge as a discipline distinct from philosophy.^[43] The question was how would the law respond to the birth of the new science whose area of focus – human behaviour – was central to so many aspects of the law itself.

Matters moved relatively quickly. Less than two decades after the formation of Wundt’s laboratory, a murder trial in Munich, saw what was probably the first testimony given by a psychological expert.^[44] And in Vienna, in 1906 Freud gave a series of lectures to judges discussing the lessons psychology might offer the law in the context of fact-finding.^[45]

Despite these promising beginnings, by 1908 it was evident that the law was largely indifferent to the way in which psychology might be applied within its domain.

That year Hugo Munsterberg, who had been a student of Wundt’s in Leipzig^[46] before moving to the United States to run the psychological laboratory at Harvard, published a book entitled *On the Witness Stand: Essays on Psychology and Crime*. Munsterberg was a strong advocate of forensic psychology and in particular psychological testimony. He had himself served as psychological consultant in two murder trials in the US.^[47]

In his book Munsterberg described how experimental psychology had sufficiently matured to the point where it could now be deployed to serve “the practical needs of life”;^[48] education, medicine, art, economics and the law.^[49] But whilst the other disciplines had embraced psychology:

“The lawyer alone is obdurate. The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made long strides ... They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more.”^[50]

As far as the law was concerned human behaviour was directly observable. Our common sense together with a judicial wisdom derived from legal experience was more than adequate. This sentiment is captured in the words of Lawton LJ in *R v Turner* who said that “[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life.”^[51]

Despite the advances psychology was making and the insights it was generating, judges continued to rely on their own observations and assumptions about human behaviour. The evidence of children, for example, was to be treated suspiciously because of “the possibility of a young child having a mistaken recollection of what happened.”^[52]

Standard legal texts contained quasi-psychological explanations of criminal behaviour. Discussing the relevance of post offence behaviour to a determination of guilt in *Zoneff*, Kirby J referred to the 1940 writings of Wigmore who hypothesised that just as the commission of a crime leaves “traces of blood, wounds or rent clothing, which point back to the deed done by him” it will also leave “mental traces” which will manifest in subsequent conduct of the criminal.^[53]

Some of the assumptions judges make may be sound. Some accord neatly with a “common sense” view that would be prevalent in the wider community. But how do we know that our assumptions are correct?

Judicial notice and legislative facts

The common law developed the concept of judicial notice to allow judges to draw on their own knowledge when deciding the facts in an individual case. It also allows them to deploy their knowledge of the world when developing the law.

The doctrine has been justified as both time saving and necessary to prevent a party from inducing a false result in a case. It has also been justified as being of assistance to a court when defining and developing the common law or when determining the constitutional validity of legislation.

The academic literature and judicial pronouncements, although limited, have defined two types of facts – adjudicative facts and legislative facts. Adjudicative facts are facts which are in issue or relevant to a fact in issue.^[54] Legislative facts are those which help to determine what a common law rule should be or how a statute should be construed.^[55]

In *Aytugrul v The Queen*, Heydon J described legislative facts as revealing “how existing rules work and how rules which do not exist might work if they were adopted.”^[56] Legislative facts are sometimes referred to as “social policy information” although to my mind this tends to diminish their real character.

In 1955 the American legal academic Kenneth Culp Davis published an article titled “Judicial Notice” in the *Columbia Law Review*. The purpose, for Davis, in writing this article was to express his concern with judicial notice provisions then being proposed in the US for the Model Code of Evidence and the Uniform Rules of Evidence; provisions Davis regarded as “seriously and fundamentally unsound.”^[57]

Davis was concerned that the distinction between legislative and adjudicative facts should be recognised and maintained because the formulation of law and policy “obviously gains strength to the extent that information replaces guesswork or ignorance or intuition or general impressions. Questions of law and policy often yield to comprehensive factual study.”^[58]

Rule 201 of the United States Federal Rules of Evidence was made in 1975. The rule deals with adjudicative facts, but expressly excludes legislative facts.

Under rule 201 before judicial notice may be taken of an adjudicative fact it must be a fact “that is not subject to reasonable dispute.”^[59] Subclause (e) provides a right to be heard “on the propriety of taking judicial notice and the nature of the fact to be noticed”.

Of passing interest is the obligation in subclause (f) which requires the jury in a civil case to accept the noticed fact as conclusive. The jury has the option of not accepting the fact as conclusive in a criminal trial.

The Notes to the rule are instructive. Drawing upon the work of Professor Davis the authors discuss the reason for distinguishing legislative and adjudicative facts. The concern is that judge made law may stop growing if judges could rely only on matters “clearly within the domain of the indisputable”.

When considering questions of law and policy judges should take into account facts they believe. In the words of Professor Davis, “[f]acts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.”^[60]

Judicial notice of Australia

Close analysis of the role of judicial notice, both the actual process and any possible modifications, seems to have come later in Australia than in the United States. The distinction has, however, had particular significance in the realm of constitutional law for many decades.^[61]

The High Court has long held that the court is not bound by ordinary rules of evidence when ascertaining the facts required to make assessments of constitutional validity.^[62]

More significantly, for present purposes, in *Woods v Multi-Sport Holdings Pty Ltd*, McHugh J said:

“As Brennan J pointed out in *Gerhardy v Brown*, a court that is considering the validity or scope of a law ‘is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties’. Whether the law is a Constitution, a legislative enactment or a principle or rule of the common law or equity the ‘validity and scope of a law cannot be made to depend on the course of private litigation.’”^[63]

Similarly, in *R v Henry* Spigelman CJ said that:

“The means of acquiring information for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to a particular case.”^[64]

In *Woods* McHugh J further stated that “[o]n countless occasions, Justices of this Court have used material, extraneous to the record, in determining the validity and scope of legal rules and principles. They have frequently relied on reports, studies, articles and books resulting from their own research after the case has been reserved and parties have made their submissions.”^[65]

Other judges, for example Callinan J, have taken a different view.^[66] His Honour would “resist any suggestion that the same degree of caution is not required when extrinsic facts are so called legislative facts”.^[67] This was so for two reasons. The first was that procedural fairness required parties to be given an opportunity to deal with all matters regarded as material by the court. The second was “that rarely is there any universal acceptance of what are true history, politics and social ethics.”^[68]

The search for consistency in the application of the common law doctrine of judicial notice to fact-finding in Australia is destined for failure. It is a matter on which judicial minds have differed. The application of the doctrine by the High Court has been described as “erratic”^[69] and has been criticised on the basis that “many of the cases appear to have departed from the principle in pursuit of convenience.”^[70]

It also provides little clarity for counsel as to what, if any, non-legal material they should put before the court. The former Chief Justice of South Australia John Doyle once described it as: “a hit and miss affair, depending on the predilections and interests of the counsel and solicitors involved. Certainly there is no protocol or systemic approach governing the matter. ...

The patchy approach to informing the Court on non-legal matters casts a shadow over the Court’s claim to discern and interpret the values and social interests involved.”^[71]

“Ordinary human behaviour” is a particular category of fact that traditionally may be judicially noticed without inquiry. In *M v The Queen* Gaudron J noticed that child victims of sexual assault may be reluctant to resist the offender or to protest, and reluctant also to complain for fear that they may be rejected or punished by the offender.^[72]

It is interesting that her Honour considered such an observation so notorious and well accepted that it fell into the judicial notice exception. It was of course contrary to decades of judicial comment in respect of absence of complaint which assumed the very opposite. I will say more about this later.

What reflects “ordinary human behaviour” is, without knowledge from science, a matter of subjective opinion. Consider differences in the way judges approach their capacity to “know” how teenagers behave.

M v The Queen, was an appeal against conviction for a number of sexual offences committed against a complainant who was 13 years old at the time of the alleged offences. In that case McHugh J expressed doubt as to the capacity of judges to assess teenage behaviour stating:

“Attitudes towards sexual matters and behaviour of young people have changed so much in recent years that in many instances the views of appellate judges about how teenagers behave, derived from their own past conduct with teenagers, may well be out of date.”^[73]

For McHugh J the jury, with its assumed collective experience, was in a better position than the High Court, to evaluate the evidence and conduct of a 13 year old.

The contrary position was taken by the Full Court of the High Court in *Phillips v The Queen*.^[74] In that case the Court relied on its own assessment of how teenagers behave to determine that the accused’s pattern of behaviour was not sufficiently unusual, and therefore not sufficiently probative to justify its admission as similar fact evidence.

This decision precluded the jury from making its own assessment of the behaviour of the accused and its possible probative value.

Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ stated:

“The similarities relied on were not merely not “striking”, they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant’s desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon.”^[75]

Delayed complaint

The common law developed special rules for dealing with complaint in the context of sexual assault, in particular in circumstances where there was a delay between the occurrence of the assault and the time at which a complaint was made. A judge was required to warn the jury that delayed complaint was relevant to the jury’s assessment of the credibility of the complainant.^[76]

To take a concrete example, the following remarks were made by a judge of the NSW District Court in a sexual assault trial in the mid-1990s:

“If events such as these occur one expects some complaint to be made and that such a complaint is made within a reasonably early stage of the events themselves. Take for example an allegation that someone was raped and the complaint is made a year later. That, in the eyes of everybody, would cast some suspicion on the acceptability of the allegation.”^[77]

The rationale for this rule was the “general assumption that the victim of sexual offences will complain at the first reasonable opportunity, and that, if complaint is not then made a subsequent complaint is likely to be false.”^[78] The common law equated delay with falsity because of how judges assumed genuine victims of sexual offences behaved. The assumption was derived from the medieval doctrine of “hue and cry”.^[79]

Research, including work being undertaken by the Royal Commission, has discredited this assumption.^[80] Delay in complaint is typical rather than unusual, particularly in the context of child sexual abuse.^[81]

Most children who are sexually abused do not reveal their abuse in childhood.^[82] Research has eroded any factual basis on which a general requirement to direct a jury that delay is relevant to credibility could have been justified.

In response to concerns about the assumptions in the common law, state parliaments enacted legislation requiring judges to warn juries that delay in complaint was not necessarily indicative that an allegation was false and that there may be good reasons for a complainant to delay making a complaint. The effect of these provisions was modified by decisions of the High Court, particularly *Crofts v The Queen*.^[83]

The Court in *Crofts*^[84] held that the relevant legislative amendments had not abrogated the common law requirement to give what had become known as a *Kilby* direction.^[85] Failure to give a direction in accordance with *Kilby* – that delay in complaint was a relevant matter in assessing the complainant’s credibility – meant that the direction given by the trial judge was “unbalanced”.^[86] The joint reasons said:

“It would require much clearer language ... to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, *on ordinary human experience*, would be material to the evaluation of those acts”^[87]

Post *Crofts* amendments were made to the *Crimes Act 1958* (Vic) to add a “sufficient evidence” test. A Victorian court could no longer warn, or suggest to the jury that the credibility of the complainant was affected by delay unless the judge was satisfied that there was sufficient evidence to suggest that the credibility of the complainant was so affected to justify the giving of a such a warning.^[88]

The sufficient evidence test has found its way into similar provisions in New South Wales.^[89] In order to determine whether to give a warning judges must have an accurate understanding of the relevance of delay to an assessment of the complainant’s credibility. Without this it is difficult to give content to a “sufficient evidence” test.

The law with respect to delayed complaint has also favoured the accused as a consequence of the decision in *Longman*^[90] and the subsequent decisions that confirmed and extended its application.^[91] The alleged abuse in *Longman* occurred when the complainant was aged between six and ten.

The Court determined that a strongly worded warning should be given in circumstances of delayed complaint as the accused would have inevitably suffered a forensic disadvantage which the jury would not be aware of without the assistance of the judge.^[92]

The precise content to be given to a *Longman* warning was a matter that judges had some difficulty grappling with. The warning set out in the joint reasons was complicated by observations made by Justices Deane and McHugh in their respective judgments as to why they each felt a warning was necessary in that case.

Deane J said “[t]he possibility of child fantasy about sexual matters, particularly in relation to occurrences when the child is half-asleep or between periods of sleep, cannot be ignored” and stated that “[t]he long passage of time can harden fantasy or semi-fantasy into the absolute conviction of reality.”^[93]

McHugh J stated that “[t]he fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to ‘remember’ is well documented” and that “[r]ecollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine.”^[94]

For these remarks Justices Deane and McHugh cite no judicial authority. Deane J cites no scientific or extra-judicial material. McHugh J cites a single book, “Memory”, published in 1964. These observations were subsequently shown by evidence to be of doubtful accuracy.^[95]

In *Crampton v The Queen*, Gaudron, Gummow and Callinan JJ appeared to state that the observations of Deane and McHugh JJ should be incorporated into the *Longman* warning. Their Honours held that this was a case in which the trial judge should have drawn to the attention of the jury the “additional considerations mentioned by Deane and McHugh JJ in *Longman*”; specifically, “the fragility of youthful recollection” and “the possibility of distortion.”^[96]

The observations made by Deane and McHugh JJ about childhood memory have not been accepted without critical judicial comment. In *JJB v R Spigelman* CJ stated:

“Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background. This has been shown to be so in sexual assault cases.”^[97]

Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in *Longman* reflect a similar legal tradition that treated children as unreliable witness. ...

There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence.^[98] These are complex issues, as reflected in reviews of the research on the ability of young children to distinguish fantasy from reality.^[99] The same is true of research about a child's ability to recall accurately stressful events.^[100]

The complexity of these issues is not reflected in the observations of Deane J and McHugh J in *Longman*, which should, accordingly, be treated with caution."^[101]

The decisions in *Longman* and *Crofts* had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time at which they were assaulted. They derive from what judges' thought they knew about how genuine complainants behaved and what they thought they knew about how memory worked.

Those assumptions have turned out, with the benefit of empirical research, to be flawed. However, they became embedded in the fabric of the common law and proved difficult even for Parliament to dislodge.

The assessment of harm and the sentencing process

The issue of what judges know, how they come to know it, and the accuracy of that knowledge is also important in the sentencing process. For example what judges know, or think they know, about the harm caused by child sexual abuse will, through the application of sentencing law and principle, become a determinative factor in the sentence an offender receives.

When imposing a judicial evaluation on the evidence of harm are we in fact taking judicial notice of the relationship between abuse and harm?

At common law regard may be had to the harm done to the victim for the purposes of sentencing.^[102] Sentencing legislation also provides for harm to the victim to be taken into account.^[103] A judge's understanding of the harm suffered by a victim of child sexual assault, or indeed of any offence, will be an important factor in determining the sentence the offender receives.

The decisions of the NSW Court of Criminal Appeal indicate, particularly from the early 2000's onwards, a greater willingness by judges to assume that harm flows from the sexual assault of a child, and display a greater level of certainty that this harm will manifest itself over time.

This was not the position in 1990 when Hunt J wrote the leading judgment in *R v Muldoon*.^[104] That case concerned a charge of homosexual intercourse with a boy under 10 for which the offender was sentenced to minimum term of imprisonment of two years with an additional six months. The victim impact statement before the trial judge at the time of sentence was silent on the possible emotional and psychological effects of the abuse on the victim in the future.

The trial judge's sentencing remarks, as described by Hunt J, were that the experience had no doubt been traumatic, and that attention paid to details of the offence between time of offending and until trial would have exacerbated the trauma. Overall, however, the judge took the view "that whilst scars may remain they will fade in time."

Hunt J held that that finding "was one which was open to the judge upon the quite unsatisfactory material placed before him". Commenting on the material placed before the sentencing judge Hunt J said:

"What would be of far more assistance to sentencing judges in these cases than the shallow, trite and apparently wholly unqualified observations produced in this case would be the results of studies conducted over a significantly broad base and over a significant period of time into the lasting effects of sexual abuse upon young children."

In 2007 in *DBW v R*, Spigelman CJ said of *Muldoon*:

"The most significant thing about this judgment is its date. Unfortunately, over the last few years, the public and the courts have become much more aware of, and knowledgeable about, the effects of child sexual abuse. His Honour's observations in *Muldoon* are of no assistance today."^[105]

That shift in awareness is evident in the comments of Mason P in the 2002 case of *R v MJR*, which concerned the issue of whether an offender should be sentenced in accordance with the sentencing practice adopted at the time of the commission of the offences, or whether the court should apply current practice notwithstanding a higher level of sentencing severity.

Mason P stated that over time the pattern of sentences for child sexual assaults had increased and that "this putative increase has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes."^[106]

In 2009 the Court of Criminal Appeal effectively indicated that unless there was evidence to the contrary harm should be assumed. In *R v King*^[107] the court said "[i]t should be assumed that there is a real risk of some harm of more than a transitory nature occurring."^[108]

Whilst *R v King* was concerned with the sentencing judge's failure to adequately appreciate the harm that flowed from the sexual assault, in *Stewart v R*^[109] the sentence was challenged on the basis that a lack of reference to a victim impact statement in the Judge's sentencing remarks led to the conclusion that the judge had "presumed harm".

The judge's presumption, it was argued, was irrelevant. Although remarking that findings based on the evidence would be preferable Button J stated that "sentencing judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences"^[110]

The issue has been revisited on a number of occasions with the court adopting an increasingly firm position.^[111]

The current position was stated in *R v Gavel*:^[112]

“This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the “*long term and serious harm, both physical and psychological, which premature sexual activity can do*”.

The evolution in the reasoning of the court is marked. Plainly the law has been catching up with the science, although as I have already identified not every abused child will be profoundly harmed. But are we following the rules when we assume these consequences?

Whilst the greater recognition of the harm that results from child sexual assault by the courts is appropriate, the assessment of harm in the individual case can still give rise to problems.

In *RP* the Court of Criminal Appeal held that the sentencing judge had erred in giving too much weight to a victim impact statement; “uncritically” accepting it.^[113] What was said to demonstrate error was an assessment by the appellate court that the contents of the victim’s statement “went well beyond what might be regarded as the type of harm expected from the circumstances of the applicant’s offending.”^[114]

In those circumstances it was erroneous for the sentencing judge to rely on it as he did. The court cites no authority, judicial, medical or otherwise, for its assessment that the harm went well beyond that which might be expected.

RP was cited in *Tuala*^[115] which raised squarely the issue of the weight to be given to a victim impact statement when seeking to prove an aggravating factor. In the course of examining the authorities Simpson J made some observations about the court’s shifting approach to assuming harm in the context of child sexual assault.

The decisions of *Slack*^[116] and *Muldoon*, her Honour stated, were a product of their time. In the early 1990s judges did not have the experience of dealing with child sexual abuse victims they now do. Her Honour concluded that “[s]uch damage is now assumed.”^[117]

Simpson J went on to consider the role of a victim impact statement. Her Honour held that courts attached considerable weight to the forensic choices made by the parties during the sentencing process. Where no objections are made to the victim impact statement, where no questions are raised with respect to the weight to be attributed to it, and no request made to limit its use a court would be more likely to accept it as evidence of substantial harm.^[118]

And where the statement confirmed other evidence before the court or where the harm is of the kind that might be expected a victim impact statement may be readily accepted.^[119]

Her Honour suggested that factors which dictated that caution should be exercised before using the statement to establish substantial harm included where there was a dispute as to the facts attested to in the statement, where the credibility of the victim is in question, where the content of the statement is the only evidence of harm and, importantly and with specific reference to *RP*, where the harm asserted in the statement “goes well beyond that which might ordinarily be expected” of the offence in question.^[120]

With respect there will be difficulties if a victim impact statement can only be of assistance if it is consistent with a judge’s understanding of likely impacts with the result that if it differs it is either given less weight or set aside altogether.

Where that occurs judges are taking judicial notice of their own perceptions of harm whatever may be the source of their present understanding. The very significant consequences of the abuse reported by the complainant in *RP* would come as no surprise to any of the Commissioners or counsellors of the Royal Commission.

Section 144 – a contemporary problem?

With respect to the capacity for judges to consult knowledge from other relevant disciplines, a significant development occurred with the enacting, in some jurisdictions, of the uniform evidence legislation.^[121]

The precise scope of judicial notice with respect to legislative facts was a matter on which some judicial minds appeared to differ, as the differing views of Justices McHugh and Callinan in *Woods* demonstrate. This being the case the certainty provided by a statutory provision could be considered an advantageous development. But do we have the best provision?

The two core Evidence Act provisions are ss 143 and 144. Section 143 provides a judge with the capacity to inform him or herself about the law, and, as such, is not particularly relevant in the present context. The key provision is s 144 which provides:

Matters of common knowledge

1. Proof is not required about knowledge that is not reasonably open to question and is:
 - a. common knowledge in the locality in which the proceeding is being held or generally; or
 - b. capable of verification by reference to a document the authority of which cannot be reasonably questioned.

2. The judge may acquire knowledge of that kind in any way the judge thinks fit.
3. The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
4. The judge is to give a party, such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

At the very least s 144 requires that the relevant knowledge cannot be reasonably open to question. If that condition is satisfied it must then be either common knowledge or knowledge capable of being verified by reference to an authoritative document which cannot be reasonably questioned.^[122]

Like the proposed provision of the US Federal Rules of Evidence that provoked the criticism of Davis, section 144 does not appear to recognise the distinction between adjudicative and legislative facts. The ALRC appeared to indicate that it intended the section to apply to both legislative and adjudicative facts.

It acknowledged that s 144 “may have the effect of limiting the material presently relied upon by the courts in constitutional cases.”^[123]

There are, however, a number of commentators who have indicated that the section need not be read as applying to legislative facts. Justice Mullane, then a judge of the Family Court, wrote in 1998, that such an interpretation was unlikely given the restriction this would place on the way the High Court conducts constitutional interpretation.^[124]

The author of *Cross on Evidence* also contends that s 144 can be construed so that it would not incorporate judicial notice of legislative facts. He contends that:

“The effect of s 56(1) [of the Evidence Act] is to render admissible all evidence that is relevant, except as is otherwise provided by the legislation. Section 144 does not in terms prohibit the reception of evidence judicially noticed at common law: it is facultative, not prohibitory. Its language does not ‘cover the field.’”^[125]

It is difficult, however, to reconcile this narrow reading with two decisions of the High Court: *Gattellaro* and *Aytugrul*.

In *Gattellaro v Westpac Banking Corp*^[126] Gleeson CJ, McHugh, Hayne and Heydon JJ said “there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment.” This is also the position that is taken in the joint judgment in *Aytugrul v The Queen*.^[127]

In *Aytugrul*, French CJ, Hayne, Crennan and Bell JJ held that s 144 prevented judicial notice being taken of psychological research examining the relative persuasive power of different forms of expression of statistical information in the context of DNA evidence.

That material was consulted for the purpose of resolving the question whether the prosecution could rely on certain forms of statistical information where that information might be considered unfairly prejudicial to the accused.

However, notwithstanding that he joined with the other members of the court in *Gattelaro*, Heydon J pointed out in his judgment the process involved was judicial notice of legislative facts, which his Honour considered may not be controlled by section 144.^[128]

If the decisions in *Gattelaro* and *Aytugrul* are to be read as stating that, after the enacting of s 144, the common law of judicial notice no longer operates in Evidence Act jurisdictions, there may be significant problems for how the High Court deals with certain constitutional questions.

Given that legislative facts are relevant to statutory interpretation and fundamental to many aspects of the common law, including the rules of a criminal trial, this approach has significance well beyond the constitutional context. In short, we have a problem.

Some commentators have argued that the broad scope and application of the provision creates a “serious impediment” to reliance by appellate courts on published research pertaining to legislative facts, and doubt that this can be considered a satisfactory outcome.^[129] They argue that this interpretation of s 144 fails to recognise the law-making aspect of the judicial function.

Flowing from the High Court’s interpretation of s 144, and of particular concern, is the requirement that the material be “not reasonably open to question.” As Heydon J recognised in *Aytugrul* this had not been a requirement for the reception of legislative facts at common law. This aspect of the rule gives rise to a special problem.

Scientific knowledge is often disputed; “complete agreement and stability ... are not the attributes of science.”^[130] In *Maloney*, a case in which the common law rules applied, Gageler J stated that the material relied upon need only be “sufficiently probative.”^[131]

There also appears to be a need for a mechanism to allow for non-legal material relevant to the formulation and application of legal rules to be considered by judges beyond the material adduced by the parties.^[132] A system that requires that all material relevant to legislative fact finding be presented by the parties before it may be considered by the judge creates difficulties. The aim of the advocate is to win the case not the ascertainment of any empirical truth.^[133]

This will inevitably colour the material counsel put forward. The adversarial system has traditionally sought the truth through mechanisms such as cross-examination and the evaluation of witness credibility. These methods appear ill-suited to legislative fact-finding.

One possible option is to reformulate the rules. That is, craft provisions that recognise the distinction between legislative and adjudicative facts. It has been suggested that Rule 201 could serve as a model.^[134] Excluding legislative facts from the rules, however, may not be an appropriate solution, unless the common law rules are themselves clarified.

In 1969 Professor Davis was again preoccupied with the form of Rule 201. The proposed rule had now been redrafted so that it applied only to adjudicative facts – a development he described as “highly commendable”.^[135] He was, however, troubled by the lack of clarity with respect to the rules applicable to legislative facts.

Davis considered that “[t]he basic objective of a good system of judicial notice should be to achieve the maximum possible convenience that is consistent with procedural fairness.”^[136] He believed that a well-drafted statutory provision was the most appropriate way of pursuing that objective.

Such a rule would not require noticed facts to be indisputable but would ensure there was adequate opportunity for parties to be heard.^[137] This is of course at odds with the manner in which some judges have previously approached the task.^[138]

Procedural fairness to parties is important. However, as some commentators, including Professor Davis, have acknowledged procedural fairness may take different forms. Procedural safeguards could be less rigid when the court is dealing with legislative rather than adjudicative facts.^[139]

An alternative has been proposed by Justice Kirby. His Honour has suggested that judges should adopt a protocol for the judicial function which could expand the opportunities for select groups to be heard and assist the court in its rule-making function.^[140] This approach has some support in the commentary.^[141]

Other options put forward include the maintenance, by courts, of their own research facilities, more liberal use of interveners and the power for the Court to appoint an inquirer to inquire and report back to it.^[142]

Absent procedural reform one possible way to ensure that judges are applying law informed by scientific knowledge is for parliaments to provide through law reform commissions or other processes for the development of draft legislation modifying the substantive law in areas where Parliament perceives that the law has lagged behind.

The *Jury Directions Act 2015* passed by the Victorian Parliament is a recent example. The reforms made by the Act were, in part, based on the results of project led by Justice Weinberg of the Victorian Court of Appeal.

Scientists across every discipline are continually adding to the knowledge which can assist our judicial processes and outcomes. Our objective must be to ensure that the law has both the capacity and the flexibility to respond in an informed and beneficial manner to those changes.

- [1] Sir Anthony Mason, "The Judge as Law-maker" (1996) 3 James Cook University Law Review 1, 1.
- [2] Ibid 15.
- [3] Ibid.
- [4] Blakemore, T., Herbert, J. L., & Arney, F. (unpublished). Impacts of institutional child sexual abuse on victims/survivors: A rapid review of research findings. Sydney: Australian Government.
- [5] Ibid.
- [6] Australian Institute of Family Studies. (2013). The prevalence of child abuse and neglect. CFCA Resource Sheet, (July 2013). <https://www3.aifs.gov.au/cfca/publications/prevalence-child-abuse-and-neglect>
- [7] Stoltenborgh, M., van Ijzendoorn, M. H., Euser, E. M., & Bakermans-Kranenburg, M. J. (2011). A global perspective on child sexual abuse: meta-analysis of prevalence around the world. *Child Maltreat*, 16(2), 79-101. doi: 10.1177/1077559511403920
- [8] Tufts' New England Medical Center. (1984). Sexually exploited children: Service and research project. Washington, DC: US Department of Justice.
- [9] Finkelhor, D. (1994). Current information on the scope and nature of child sexual abuse. *The future of children*, 4(2), 31-53.
- [10] Smallbone, S., Marshall, W. L., & Wortley, R. (2013). Preventing child sexual abuse: Evidence, policy and practice: Routledge.
- [11] Ibid.
- [12] For example, compared with women who have not been abused, women with a history of sexual abuse are four times more likely to experience complex trauma later in life. Women who suffered both sexual and physical abuse were more than 14 times more likely to experience complex trauma: Roth et al. (1997). Complex PTSD in victims exposed to sexual and physical abuse: Results from the DSM-IV field trial for posttraumatic stress disorder. *Journal of Trauma & Stress*, 10(4), 539-555.
- [13] Domhardt et al. (2014). Resilience in survivors of child sexual abuse: A systematic review of the literature. *Trauma, Violence & Abuse*. 1, 1-14.
- [14] Cutajar, M. C., Mullen, P. E., Ogloff, J., Thomas, S. D., Wells, D. L., & Spataro, J. (2010a). Suicide and fatal drug overdose in child sexual abuse victims: a historical cohort study. *Med J Aust*, 192(4), 184-187.
- [15] Blakemore, T., Herbert, J. L., & Arney, F. above n 5.
- [16] Tolin, D. F., & Foa, E. B. (2006). Sex differences in trauma and posttraumatic stress disorder: a quantitative review of 25 years of research. *Psychological Bulletin*, 132(6), 959.
- [17] Cutajar, M. C., et al, above n 15.
- [18] Houston, J., Murphy, J., Shevlin, M., & Adamson, G. (2011). Cannabis use and psychosis: re-visiting the role of childhood trauma. *Psychological medicine*, 41(11), 2339-2348.
- [19] Cashmore, J., & Shackel, R. (2013). The long-term effects of child sexual abuse: Australian Institute of Family Studies.
- [20] Nunes, S. O. V., Watanabe, M. A. E., Morimoto, H. K., Moriya, R., & Reiche, E. M. V. (2010). The impact of childhood sexual abuse on activation of immunological and neuroendocrine response. *Aggression and Violent Behavior*, 15(6), 440-445
- [21] Tomoda, A., Navalta, C. P., Polcari, A., Sadato, N., & Teicher, M. H. (2009). Childhood sexual abuse is associated with reduced grey matter volume in visual cortex of young women. *Biological psychiatry*, 66(7), 642-648.
- [22] Heim, C., Newport, D. J., Heit, S., Graham, Y. P., Wilcox, M., Bonsall, R., Nemeroff, C. B. (2000). Pituitary-adrenal and autonomic responses to stress in women after sexual and physical abuse in childhood. *The Journal of the American Medical Association*, 284(5), 592-597.
- [23] Tomoda, A., et al, above n 22.
- [24] For example, a study conducted with 5,995 Australian twins found that male victims of sexual abuse were almost twice as likely to experience alcohol dependence compared with males with no history of sexual abuse. The effect was even higher for females: compared with non-abused females, females with a history of sexual abuse were almost 3 times more likely to develop alcohol dependence: Dinwiddie et al. (2000). Early sexual abuse and lifetime psychopathology: a co-twin-control study. *Psychological medicine*, 30(01), 41-52.
- [25] Cashmore, J., & Shackel, R, above n 20.
- [26] Roberts, R., O'Connor, T., Dunn, J., Golding, J., & The ALSPAC Study Team. (2004). The effects of child sexual abuse in later family life; mental health, parenting and adjustment of offspring. *Child Abuse & Neglect*, 28(5), 525-545.
- [27] Cashmore, J., & Shackel, R, above n 20.
- [28] Arriola, K. R., Loudon, T., Doldren, M. A., & Fortenberry, R. M. (2005). A meta-analysis of the relationship of child sexual abuse to HIV risk behavior among women. *Child Abuse & Neglect*, 29(6), 725-746.
- [29] Steel, J. L., & Herlitz, C. A. (2005). The association between childhood and adolescent sexual abuse and proxies for sexual risk behavior: A random sample of the general population of Sweden. *Child Abuse & Neglect*, 29(10), 1141-1153.
- [30] Cashmore, J., & Shackel, R, above n 20.
- [31] Ogloff, J. R., Cutajar, M. C., Mann, E., Mullen, P., Wei, F. T. Y., Hassan, H. A. B., & Yih, T. H. (2012). Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study.

- [32] Ibid.
- [33] Blakemore, T., et al, above n 5.
- [34] Boden, J. M., Horwood, L. J., & Fergusson, D. M. (2007). Exposure to childhood sexual and physical abuse and subsequent educational achievement outcomes. *Child Abuse and Neglect*, 31(10), 1101-1114. doi: 10.1016/j.chiabu.2007.03.022
- [35] Mersky, J. P., & Topitzes, J. (2010). Comparing early adult outcomes of maltreated and non-maltreated children: A prospective longitudinal investigation. *Children and Youth Services Review*, 32(8), 1086-1096. doi: <http://dx.doi.org/10.1016/j.childyouth.2009.10.018>
- [36] In *KRM v The Queen* (2001) 206 CLR 221, 254 [97] Kirby J stated that cases involving sexual offences require “particular vigilance” because the circumstances are “peculiarly likely to arouse feelings of prejudice and revulsion”, and that these difficulties become especially acute “where there are multiple counts involving numerous events and especially where there is more than one complainant.” Judges are obliged, in these circumstances, to act affirmatively to protect the accused in order to secure a fair trial. See also *De Jesus v The Queen* (1986) 68 ALR 1, 4-5 (Gibbs CJ).
- [37] The research is being conducted by Professor Jane Goodman-Delahunty of Griffith University and Dr Annie Cossins of the University of New South Wales.
- [38] Each juror completed pre- and post- trial questionnaires. The jury deliberations are also being subjected to qualitative and quantitative analyses based on researcher observations and transcripts.
- [39] Although the latter does not reflect practice, that is to say in matters where such evidence is adduced it would always require a judicial direction, the inclusion of these additions allows the researches to assess the impact of directions on the juries’ reasoning. Similarly, with joint trials, a range of conditions were used to test the impact of tendency evidence and question trails on juries’ reasoning.
- [40] Blackstone’s Commentaries on the Laws of England, 1st ed, bk 4, c 14, 191.
- [41] Blackstone’s Commentaries on the Laws of England, 1st ed, bk 4, c 15, 213-4.
- [42] *Reg v Henry; Reg v Manning* (1968) 53 Cr App R 150, 153 (Lord Salmon) cited with approval by a majority of the High Court in *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ), 553 (Gibbs J), 559 (Mason J).
- [43] Stanford Encyclopedia of Philosophy. <http://plato.stanford.edu/entries/wilhelm-wundt/#OrdKno>
- [44] R D Mackay, A M Colman and P Thorton, ‘The Admissibility of Expert Psychological and Psychiatric Testimony’ in A Heaton-Armstrong, E Shepherd and D Wolchover (eds) *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (1999, Oxford University Press), 322.
- [45] A Kapardis, *Psychology and the Law: A Critical Introduction* (2014, 4th ed, Cambridge University Press), 3.
- [46] Hugo Munsterberg, *On the Witness Stand: Essays on Psychology and Crime*(1908, The McClure Co), 4.
- [47] R D Mackay, A M Colman and P Thorton, above n 45, 322.
- [48] Hugo Munsterberg, *On the Witness Stand: Essays on Psychology and Crime* (1908, McClure Company), 8.
- [49] Ibid 9
- [50] Ibid, 10-11
- [51] [1975] QB 834, 841.
- [52] *R v Pitts* (1912) 8 Cr App 126
- [53] *Zoneff v The Queen* (2000) 200 CLR 234, 258-9 [61] citing *Wigmore on Evidence* (3rd ed, 1940).
- [54] *Aytugrul v The Queen* (2012) 247 CLR 170, 200 [70] (Heydon J).
- [55] *Aytugrul v The Queen* (2012) 247 CLR 170, 201 [71] (Heydon J).
- [56] *Aytugrul v The Queen* (2012) 247 CLR 170, 201 [71] (Heydon J).
- [57] Kenneth Culp Davis, “Judicial Notice” (1955) 55 *Columbia Law Review* 945, 945.
- [58] Kenneth Culp Davis, “Judicial Notice” (1955) 55 *Columbia Law Review* 945, 953. Similarly Carter has stated: “why should a judge, when seeking to make himself better qualified to formulate a rational and policy-orientated proposition of law, be restricted in his relevant factual investigations to consideration of facts which are either notorious or readily ascertainable? Conscientious and worthwhile research knows no such limits. Judicial notice of legislative facts is a misnomer, for it is undesirable that a judge, when surveying what may well be a wide range of facts of possible significance in the law making process, should (and indeed unrealistic to suppose he could) draw any rigid distinction or clear-cut distinction between facts which, were they in issue or relevant, would have to be proved and those which he would notice without proof. An attempt to clothe legislative fact-finding in the strait-jacket which befits judicial notice of adjudicative facts is not apt and is barely meaningful.”: P B Carter, “Judicial Notice: Related and Unrelated Matters” (eds) E Campbell and L Waller, *Well and Truly Tried* (1982) 93-94 cited in J D Heydon, *Cross on Evidence* (2015, 10th ed) 218.
- [59] Federal Rules of Evidence, r 201(b) (US).
- [60] Davis, ‘A System of Judicial Notice Based on Fairness and Convenience’ in *Perspectives of Law* (1964) 82 cited in Notes of Advisory Committee on Proposed Rules. The dilemma is illustrated by the decision in *Hawkins v United States*, 358 US 74 (1958). In that case the Court refused to overturn the rule at common law that one spouse could not testify against the other stating “[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy any marriage.” The notes to rule 201 assert that this factual assertion is “scarcely indisputable”.
- [61] See Heydon, above n 59, 199-209; Bradley Selway, ‘The Use of History and Other Facts in the Reasoning of the High Court in Australia’ (2002) 20 *University of Tasmania Law Review* 129.
- [62] See *Breen v Sneddon* (1961) 106 CLR 406, 411-12 (Dixon CJ): “the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters

of the latter description cannot and do not form issues between parties to be tried like the former questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts. In *Commonwealth Freighters Pty. Ltd. v. Sneddon* the following passage in what I said deals with the question: "Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law. ...if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity." See also *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559, 622 (Jacobs J): "The court reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part. The supplementing of that knowledge is a process which does not readily lend itself to the normal procedures for the reception of evidence."; the judgments of Brennan J in *South Australia v Tanner* (1989) 166 CLR 161, 179 and as Chief Justice in *Levy v Victoria* (1997) 189 CLR 579, 598-599; the judgment of Gageler J in *Maloney v The Queen* (2013) 252 CLR 168, 298-299 [351]; and the judgment of Gaudron, Gummow and Hayne JJ in *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124].

- [63] (2002) 208 CLR 460, 478-479 [65]. See also *Maloney v The Queen* (2013) 252 CLR 168, 299 [352]-[353] (Gageler J): "The nature of legislative facts and the nature of the duty of a court to ascertain them tell against any a priori constraint on the sources from which the court may inform itself. The sources may, but need not, be 'official'. It is desirable, but not inevitable, that they be 'public or authoritative'. ... Subject to the requirements of procedural fairness inherent in the judicial process, the ultimate criterion governing the use of information from any source is that a court is able to consider the material sufficiently probative of the legislative fact to be found."
- [64] (1999) 46 NSWLR 346, 362-363 [60].
- [65] (2002) 208 CLR 460, 480 [67]. See also *Doggett v The Queen* (2001) 208 CLR 343, 377 [126] (Kirby J): "[i]t would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic contests, and other data supporting the reflections about memory, mentioned in Longman. Judges, on the other hand are, or should be, aware of such matters."
- [66] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 510-511 [163]; See also Heydon, above n 59, 162-163.
- [67] (2002) 208 CLR 460, 510 [163].
- [68] (2002) 208 CLR 460, 511 [165]. However, not all judges have taken the view that, in the legislative fact context, in order for judicial notice to be taken, the facts must be universally accepted. Heydon J has said that courts "have resorted to legislative facts even though they could not be said to be 'not reasonably open to question' because minds differ about them": *Aytugrul v The Queen* (2012) 247 CLR 170, [74].
- [69] Freckelton 'Judicial Notice' in Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2013, 5th ed) 164.
- [70] *Ibid*, 165. See also K Burns, "The Way the World is: Social Facts in High Court negligence cases" (2004) 12 *Torts Law Journal* 215, 221.
- [71] JJ Doyle, 'Judicial Law Making – Is Honesty the Best Policy' (1995) 17 *Adelaide Law Review* 161, 208.
- [72] (1994) 181 CLR 487, 515. This is cited by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 479 [66] as an example of 'Notorious facts judicially noticed without inquiry' and in Heydon, above n 59, 167.
- [73] (1994) 181 CLR 487, 529.
- [74] (2006) 225 CLR 303
- [75] (2006) 225 CLR 303, 321 [56]
- [76] The rule as stated by Barwick CJ in *Kilby v The Queen* (1973) 129 CLR 460, 465 was that "[i]t would be no doubt proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given."
- [77] NSW Department of Women, "Heroines of Fortitude: The experience of women in court as victims of sexual assault" (November 1996), 211. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.
- [78] *Graham v The Queen* (1988) 195 CLR 606, 610 [12] (Gaudron, Gummow and Hayne JJ).
- [79] Australian Law Reform Commission, *Uniform Evidence Law*, Report No. 102 (2005), [18.72]. This was a joint report of the ALRC, NSWLRC and VLRC.
- [80] *Ibid*, [18.153], [18.155], [18.169]-[18.170].
- [81] *Ibid*; Annie Cossins, "Time Out for Longman: Myths, Science and the Common Law" (2010) 34 *Melbourne University Law Review* 69, 70-83.
- [82] K London, M Bruck, S Ceci, D Shuman, "Disclosure of Child Sexual Abuse: What does the research tell us about the ways children tell?" (2005) 11(1) *Psychology, Public Policy and Law*, 194 cited in Hugh Donnelly, "Delay and the Credibility of Complainants in Sexual Assault Proceedings" (April 2007) 19(3) *Judicial Officers Bulletin*.
- [83] See ALRC, above n 80, [18.74].
- [84] (1996) 186 CLR 427.
- [85] (1996) 186 CLR 427, 451.
- [86] (1996) 186 CLR 427, 452.

- [87] Crofts v The Queen (1996) 186 CLR 427, 451 (Toohey, Gaudron, Gummow and Kirby JJ) (emphasis added). That Crofts itself was a case that required a balancing direction has proved controversial. As the complainant was aged between ten and sixteen at the time of the alleged offences Crofts became authority for proposition that a Kilby direction should generally be given in the child sexual assault context. This application of Kilby has attracted criticism from other members of the judiciary, on the basis that there was no valid reason to justify this direction being given in this context, in particular Howie J in R v LTP [2004] NSWCCA 109 [123] and Wood CJ at CL in R v Markuleski (2001) 52 NSWLR 82, 132-133 [244]
- [88] Section 61(1)(b)(ii). These provisions have since been repealed. The regime set out in the Jury Directions Act 2015 (Vic), Pt 5 Div 2 now applies.
- [89] Criminal Procedure Act 1986 (NSW) s 294(2)(c).
- [90] (1989) 168 CLR 79.
- [91] See Crampton v The Queen (2000) 206 CLR 161; Doggett v The Queen (2001) 208 CLR 343.
- [92] (1989) 168 CLR 79, 91.
- [93] (1989) 168 CLR 79, 101.
- [94] (1989) 168 CLR 79, 107-108.
- [95] ALRC, above n 80, [18.126].
- [96] (2000) 206 CLR 161 181-182 [45].
- [97] See R v Johnston (1998) 45 NSWLR 362 at 367-368.
- [98] See eg the references in Ligertwood Australian Evidence (4th ed) LexisNexis Butterworths Australia 2004 para 7.31 fc 10 and 11.
- [99] See J D Woolley "Thinking About Fantasy: Are Children Fundamentally Different Thinkers and Believers from Adults" (1997) 68 Child Development 991; M Taylor "The Role of Creative Control and Culture in Children's Fantasy/Reality Judgments" (1997) 68 Child Development 1015; T Sharon and J D Wolley "Do Monsters Dream? Young Children's Understanding of the Fantasy/Reality Distinction" (2004) 24 British Journal of Developmental Psychology 293 at 294-296
- [100] See Richard J McNally Remembering Trauma Harvard Uni P, Cambridge Mass 2003 at pp 58-62.
- [101] (2006) 161 A Crim R 187, 188 [3]-[8].
- [102] Siganto v The Queen (1998) 194 CLR 656, 666 [29].
- [103] In NSW, section 3A of the Crimes (Sentencing Procedure) Act 1999 provides that one of the purposes of sentencing is to recognise the harm done to the victim of the crime and the community. Section 21A(2)(g) provides that an aggravating factor to be taken into account in sentencing an offender is that the injury, emotional harm, loss or damage caused by the offence was substantial.
- [104] (Unreported. New South Wales Court of Criminal Appeal, Hunt J, 13 December 1990).
- [105] [2007] NSWCCA 236, [39].
- [106] (2002) 54 NSWLR 368, 377 [57].
- [107] [2009] NSWCCA 117.
- [108] [2009] NSWCCA 117, [41] (emphasis added).
- [109] [2012] NSWCCA 183
- [110] [2012] NSWCCA 183, [61]-[62] (emphasis added).
- [111] See SW v R [2013] NSWCCA 255, [52].
- [112] [2014] NSWCCA 56, [110] (emphasis added).
- [113] [2013] NSWCCA 192, [27].
- [114] [2013] NSWCCA 192, [27].
- [115] [2015] NSWCCA 8.
- [116] [2004] NSWCCA 128.
- [117] [2015] NSWCCA 8 [56].
- [118] [2015] NSWCCA 8, [78].
- [119] [2015] NSWCCA 8, [79].
- [120] [2015] NSWCCA 8, [80]-[81].
- [121] Those jurisdictions are the Commonwealth: Evidence Act 1995; NSW: Evidence Act 1995; Victoria: Evidence Act 2008; ACT: Evidence Act 2011
- [122] McGregor & McGregor [2012] FamCAFC 69, [74]: "[i]t is not open to a judge to use s 144 of the Evidence Act to 'inform' him or herself of matters in respect of which reasonable minds might differ."
- [123] Australian Law Reform Commission, Evidence (Interim), Report No. 26 (1985), [977]. See also S Odgers, Uniform Evidence Law (11th ed, 2014) 926-927.
- [124] Graham Mullane, "Evidence of Social Science Research: Law, Practice and Options in the Family Court of Australia" (1998) 72 Australian Law Journal 434, 443: "There is no particular indication in the Evidence Act itself of an intention to change or end the common law in relation to legislative fact. At common law the rules of evidence did not apply to courts determining legislative facts. The likelihood is that the courts will find that their wide common law powers to inform themselves regarding legislative facts have not been affected by the passing of the Evidence Act. Certainly the High Court seems unlikely to concede such powers in relation to constitutional facts where the legislature has not stated a clear intention to remove such power."
- [125] Heydon, above n 59, 223.
- [126] (2004) 78 ALJR 394, 397 [17]. See also, discussion of this issue in Odgers, above n 124, 926-927.
- [127] (2012) 247 CLR 170.

- [128] (2012) 247 CLR 170, 201, [71]. The joint reasons stated “[b]efore a court could take judicial notice of such a general proposition, the provisions of s 144 of the Evidence Act would have to be met.” (at 183, [21]). They cited Gattellaro as authority for this proposition. Their Honours said that it had not been demonstrated that the methods used, and the results expressed, in the studies had attained such a degree of acceptance in the relevant disciplines to permit judicial notice of a general proposition about human understanding or behaviour this literature was said to reveal (at 183 [20]). They held that “In this case, knowledge of the proposition in question could not be said to be “not reasonably open to question” and “common knowledge” or “capable of verification by reference to a document the authority of which cannot reasonably be questioned.”” (at 183-184, [21]).
- [129] Odgers, above n 124, 927; Burns, above n 71, 224.
- [130] Peter Sperlich, “Social Science Evidence and the Courts: Reaching Beyond the Adversary Process” (1980) 63 *Judicature* 280, 283.
- [131] (2013) 252 CLR 168, 299 [353].
- [132] See Monahan & Walker ‘A Judges’ Guide to Using Social Science’ (2007) 43 *Court Review* 156, 163: “The exponential growth of social science research dealing with questions of relevance to the law and the increasing practice of courts in incorporating that research into legal decisions combine to make the development of a coherent scheme for the judicial management of social science information a priority for courts and scholars.”
- [133] Paul Rosen, *The Supreme Court and Social Science* (1972, University of Illinois Press) 87 cited in Sperlich, above n 131, 286-7.
- [134] Andrew Serpell ‘Social Policy Information: Recent Decisions of the High Court of Australia’ (2011) 21 *Journal of Judicial Administration* 109, 124.
- [135] Kenneth Davis, “Judicial Notice” [1969] *Law and the Social Order* 513, 524.
- [136] *Ibid* 515.
- [137] *Ibid* 526.
- [138] See Callinan J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 510-511 [163]-[165].
- [139] Davis, above n 136, 527; C Neeley, “Judicial Notice: Rule 201 of the Federal Rules of Evidence” (1976) 28 *University of Florida Law Review* 723, 754-755; Sperlich, above n 131, 286.
- [140] M Kirby, “Judicial Activism” (1997) 27 *Western Australian Law Review* 1, 18.
- [141] Serpell, above n 135, 124-125.
- [142] Doyle, above n 72, 209.

Triennial Assembly of the Uniting Church in Australia

Perth, West Australia

15 July 2015

I speak to you today as the Royal Commission enters the second half of its five year term. As you are probably aware the Commission was originally tasked to finish at the end of this year. However, the many and complex issues that we are required to examine led the Commissioners to ask the government for a further two years to complete our work.

The Commission will now conclude at the end of 2017. I have told the government that there will definitely be no request for a further extension.

Our terms of reference provide us with two fundamental objectives: to expose what has happened in the past and to make recommendations aimed at ensuring, so far as possible, that children are not sexually abused in an institutional context in the future.

As with any Royal Commission a significant part of our work is done through public hearings. A public hearing will be preceded by intensive investigation and research. Although it may only occupy a limited number of days of hearing time, the preparatory work which must be completed by Royal Commission staff and by parties with an interest in the public hearing can be very significant.

The Royal Commission is aware that sexual abuse of children has occurred in many institutions, all of which could be investigated in a public hearing. However, if we were to attempt that task, a great many more resources would need to be applied over an indeterminate, but lengthy, period of time.

For this reason the Commissioners have accepted criteria by which appropriate matters are brought forward to a public hearing 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 for institutions to learn from previous mistakes. We must ensure that any findings and recommendations for future change that the Royal Commission makes 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. However, in most cases they will have relevance to many similar institutions in different parts of Australia.

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

When the 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 sexual abuse. As a result the Commonwealth Parliament amended the *Royal Commission Act 1902* to create a process called a 'private session.'

A private session is conducted by one or two Commissioners and is an opportunity for a person to tell their story of abuse in a protected and supportive environment. We have now completed 3,766 private sessions.

There are presently 1,527 people waiting in the queue. We receive applications for private sessions at a rate of almost 50 per week. I can also indicate that I have now referred 666 matters, most coming from private sessions, to police to investigate with a view to prosecution of an offender.

The people who we talk to in private sessions cover a broad spectrum of Australian society. Each of them has been betrayed by a trusted adult. Each of their individual experiences has left a mark on their lives. For some the lifelong consequences have been catastrophic.

Each person's story is unique with impacts of greater or lesser significance in their life journey and with differing impacts upon their psychological and physical well-being. It is also reported to us that there are many people who cannot tell their story. They have taken their own lives.

Commissioners sometimes hear the stories of people who, despite traumatic childhood experiences have never lost their capacity to love and care for others.

We have witnessed humour and ingenuity among survivors. But we have also seen profound sorrow, grief and pain that for many may never go away. The label Post-Traumatic Stress Disorder does not convey the full extent of the suffering of these people.

The link between childhood sexual abuse and physical and mental health problems later in life is well-established. Both Australian and international studies have found that, amongst other debilitating effects, childhood sexual abuse results in higher rates of depression, eating disorders and social anxiety. Child sexual abuse has been linked to psychotic disorders, including schizophrenia.

Although the impact of sexual abuse on survivors has been the subject of academic research it has not, in my view, been well understood in the general community. The assumption that penetrative sexual abuse of a child leads to the worst outcomes for survivors has only limited empirical support.

That assumption is embedded in the criminal law of the various states and territories. In fact abuse which many lawyers and others have traditionally regarded as relatively minor can have devastating and lifelong consequences for some survivors.

Commissioners have heard many stories from family members who have told the story of a loved one who has committed suicide. What is perhaps lesser known about the links between child sexual abuse and mental health is that it is not only the impact of the abuse itself that can lead to devastating outcomes for survivors.

There are impacts on the survivor's family and others in the community which may be just as critical.

It is now apparent that when our task is complete we will have documented a period in Australian society when institutions failed the children in their care. I do not mean to condemn every institution. It is clear that many were managed and sustained by the efforts of both volunteers and paid workers who understood how to manage an institution that provides for the welfare of children.

But even then we can recognise that many well-intentioned people did not understand and did not respond to failures which should have been obvious in the institutions of which they were part. Although some institutions operated as single entities most have some integrated or overarching management arrangement or doctrinal regime.

Failures may have been evident in the actions of one or a number of people but that does not excuse those in responsible positions who failed to provide appropriate policies to guide the institution and practices to inhibit the actions of offenders.

From the work we have done we know that there have been failures to protect children in residential facilities, schools, including boarding schools, Christian churches of every character, Jewish organisations, kindergartens, after school care, sporting organisations, dance classes, music organisations, scouts, hospitals and other institutions.

There is no difference in the nature of the allegations nor in the mechanism for institutional failure between institutions conducted by the government and those in the private sector. When the institution provided residential care it is common to find sexual abuse accompanied by high levels of physical abuse and exploitation of the children's labour, often for little if any reward.

A picture is emerging for us that although sexual abuse of children is not confined in time – it is happening today – there has been 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.

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 which 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, be they youth worker, teacher, residential supervisor or cleric, the power imbalance was entrenched to the inevitable detriment of many children.

When, amongst adults, who are given the power, there are people with an impaired psycho-sexual development, a volatile mix is created.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and mechanisms which were available to regulate and control aberrant behaviour failed.

This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions.

It is confirmed by the development, in recent years, of regulatory control by government over many institutions which provide for children, and the development of education programs and mechanisms by which problems can be more readily brought to attention.

The most obvious is Working with Children regulations, but there are many others. I am sure that we all hope that from the tragic personal stories and institutional failures revealed in our public hearings the community will be reminded that both individual institutions and governments failed in their responsibility for children.

Where once silence was demanded, a child's complaint, however tentative in its communication, must be heard and given an appropriate response. Whatever the nature of the institution and however its members are respected by the community we must all accept that there may be members of trusted institutions who fail in their duty towards children.

The power of the institution must never again be allowed to silence a child or diminish the preparedness or capacity of adults to act to protect children.

The Royal Commission has, so far, received 13,256 allegations within our terms of reference. Approximately half of those allegations relate to faith based institutions. We have received 399 allegations in respect of abuse by members of Uniting Church institutions.

This figure represents approximately 3% of the total number of allegations. In addition we have received 106 allegations in respect of abuse by members of Presbyterian Church institutions and 62 in respect of abuse by members of Methodist Church institutions, the majority of which relate to incidents occurring prior to 1977. Of the 399 allegations 173 relate to institutions involved in out of home care. 164 relate to boarding schools.

The Uniting Church institution with the highest number of allegations is Knox Grammar School with 137 allegations. That school was the subject of a public hearing of the Royal Commission in February this year. In total we have received allegations in relation to 132 institutions which are either Uniting Church, Presbyterian or Methodist institutions.

During the course of our work the Commissioners have learnt much about the way in which an institution's culture may contribute to, or facilitate, the abuse of children in its care. We know that enhancing institutional accountability encourages positive changes in institutional behaviour.

The inevitable question, is in what circumstances, if any, should an institution be made responsible for the sexual abuse of a child by a member of that institution? If it is the case that an institution should be made responsible how, as a society, should we require the institution to take responsibility? Is it preferable that survivors use the civil justice system? Is that system operating fairly for survivors of child sexual abuse? Should we create a redress scheme? And what about the criminal law?

These are issues the Royal Commission must consider. I wish to speak a little on each of these issues today.

Our terms of reference require us to consider justice for survivors. There are three avenues through which justice can be provided. The first two are the civil and criminal justice systems. However, legal proceedings often present insurmountable challenges, both financial and emotional, to survivors.

There can be no doubt that for many people their only opportunity for justice will be through an effective redress scheme.

The issue of redress raises many complex questions. They include who should be eligible, how should a scheme be funded, who should manage it, and what benefits should it provide.

Two key requirements have been identified. The first is that the scheme must be structured in a way to ensure its independence. The institution in which abuse occurred should not be the scheme's decision maker. A conflict of this nature has been a troublesome aspect of some redress schemes in the past. The second is that survivors should be treated equally regardless of the institution in which they were abused.

There are a number of forms that a redress scheme might take. One approach favoured by almost all of the institutions and survivor groups consulted with is a national scheme administered by the Commonwealth but funded by the relevant institutions, including the various governments where institutional failures have occurred.

This is self-evidently the approach which will meet the objective of equal justice for survivors. Each institution's contribution to the cost of the scheme, including its administration, should be in proportion to the number of survivors abused in that institution. Of course some survivors will have been abused in institutions which no longer exist or which have no money. Ensuring funding for these survivors is a fundamental requirement of a just scheme.

For redress to be effective it must respond to the ongoing needs of survivors. It is clear that survivors need an apology from the institution. There must also be funding for counselling and psychological care. A money sum which adequately recognises the wrong done to the individual is also essential.

It is now accepted that abuse can impact a survivor's personal development in a number of ways. It can affect an individual's ability to complete their education, to maintain a job and to establish personal relationships.

A monetary payment by the institution can serve the dual purpose of both recognising the harm suffered by the survivor, as well as providing financial assistance to the many people who, as a result of their abuse, are struggling to secure the basics of life.

Our recommendations on redress will be made public after the publishing of the Commission's Final Report on Redress and Civil Litigation very soon. Our report will be provided to government within a few weeks.

In the last twenty years there have, in some countries, been significant developments in the law relating to the liability of institutions for the sexual abuse of children by members of that institution. The courts in both the United Kingdom and Canada have developed the law so that, depending on the circumstances, an institution can be made liable for the deliberate criminal act of a member of that institution, even when the institution itself has acted without negligence. This is not currently the position under Australian law.

While the High Court judges in *Lepore*, the leading Australian case on this issue, divided in their reasoning, a majority did not consider that vicarious, or strict, liability should be imposed on an institution if a child entrusted to its care was sexually abused.

This issue is often framed in terms of whether it is fair for an institution, which has not been negligent, to be made liable for the criminal act of a member. However, it should be born in mind that the relationship between a child and an institution will typically come about because of an offer made by the institution to care, and provide a safe environment, for the child.

Prior to its consideration by the High Court, the *Lepore* case passed through the New South Wales Court of Appeal. The Court of Appeal, by a majority, held that the state of New South Wales, was liable for the sexual abuse committed against a pupil by a teacher employed by the State.

President Mason addressed the fairness issue directly. His Honour stated that arguments that it is unfair that an employer should be held responsible lose their force when it is recognised that most employers will not bear the costs personally (the insurer will), and that while an employer may be innocent, so too is the plaintiff.

The issue was starkly illustrated by the discussion in one of our roundtables. A woman with a senior management role in a child care provider was asked the question as to what she believed was the appropriate response of the law in the event that a child was sexually abused while in care.

She responded that as a manager of such an enterprise, without negligence by the provider, she would not want the provider to be liable for the deliberate criminal act of a member or employee of the institution.

Her position was different when she looked from the position of a mother. As a mother of the child who she had placed in the care of the provider she would definitely want the provider to be liable even if it had not itself been negligent.

The Commissioner's recommendations on this issue will be made plain when the report is published.

A second issue that has arisen in the civil litigation context is the availability of a defendant that a survivor can sue. This issue is particularly acute for survivors who were abused by persons associated with faith-based institutions.

While it is true that a survivor will always have a cause of action against their abuser, there are a number of practical reasons why they may either prefer, or only be able, to sue the institution in which their abuse occurred. Their abuser may be dead, have no money or, particularly when the abuse occurred when the survivor was very young, the abuser may not be able to be accurately identified.

Under the law in Australia unincorporated associations, including many religious organisations, do not have a distinct legal personality. As a result they cannot be sued. It is common for their assets to be subject to a trust created by statute. This can result in a significant impediment for survivors who wish to pursue legal proceedings against some faith based institutions.

This issue has arisen in a number of the Royal Commission's case studies. In case study 8 we heard evidence concerning Mr John Ellis' attempts to recover damages for the abuse committed against him by an Assistant Priest from the Sydney Archdiocese. Mr Ellis could not sue the Catholic Archdiocese of Sydney because of its unincorporated status.

As a result he commenced proceedings against alternative defendants including the Trustees of the Roman Catholic Church, a statutory body corporate established under the *Roman Catholic Church Trust Property Act 1936* (NSW), and the Archbishop of Sydney.

The New South Wales Court of Appeal held that the Trustees were not liable for Mr Ellis' abuse as they played no role in the appointment or oversight of priests at the relevant time. Nor could Mr Ellis sue the then Archbishop of Sydney who had not held that position at the time of the abuse.

In another case study the Commission heard of similar difficulties faced by claimants in proceedings against the Christian Brothers in institutions in Western Australia. The Court in that case held that the Archbishop of Perth could not be liable for the abuse suffered by the claimants.

He was not liable as a natural person as he was not in the position of Archbishop at the time at which the abuse occurred. Nor was he liable as the corporation sole which was responsible only for land holding and not for the operation of the relevant institutions.

The Royal Commission sought submissions on this issue in a consultation paper. Our Final Report on Redress and Civil Litigation which will be with government by the end of August will contain recommendations on this issue.

I will not pre-empt them today. However, I am pleased to see that some institutions, including some Roman Catholic and Anglican Church dioceses, have already made changes to make it easier for survivors to pursue claims against them.

In his evidence to the Royal Commission in the case study concerning the Melbourne Response Denis Hart, the Archbishop of Melbourne, stated that the Melbourne Archdiocese has recommended that the Church, throughout Australia, provide an entity for survivors to sue.

The Truth Justice and Healing Council, in submissions to the Commission, has recommended that legislation be enacted requiring unincorporated institutions to establish or nominate an entity to be the proper defendant to any claims of child sexual abuse brought against the institution.

The Archbishop of Sydney, Anthony Fisher, has stated publicly that it is the 'agreed position of every Bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters' and that 'anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements.'^[1]

The Wangaratta Anglican Diocese has recently agreed to become incorporated. Bishop John Parkes has stated that the need for the diocese to take this step was demonstrated in the redress and civil litigation consultation paper released by the Commission. Wangaratta is the third Anglican Diocese in Victoria to take this step. The Bendigo and Ballarat Anglican Dioceses have already determined to incorporate.

As we pass our half way point, and with the publishing of our Final Report on Redress and Civil Litigation, the Royal Commission will shift its focus to the criminal justice issues that our terms of reference require us to consider.

We will soon publish a comprehensive research paper on sentencing for child sexual abuse in institutional contexts written by Professor Arie Frieberg, Hugh Donnelly and Karen Gelb. One

issue explored in their paper is whether an institution should be held criminally liable, in certain circumstances, for the sexual abuse committed by a person associated with that institution.

Historically the criminal law has been concerned with the criminal responsibility of the person or entity which commits the relevant act. However, while criminalising institutional behaviour may seem like a significant step, it is not without precedent. Organisational criminal liability has been a tool deployed to enhance organisational discipline and drive organisational change in a number of areas of the law. This is the case with respect to environmental law and workplace safety legislation.

One option put forward in the paper is to recast offences that currently impose criminal liability on individuals so that they apply to institutions. For example s 49C(2) of the Victorian Crimes Act provides that a person in an organisation who has the power or responsibility to reduce or remove a substantial risk that a child will become the victim of a child sexual abuse offence committed by an adult associated with that organisation, and who knows that there is a substantial risk that the person will commit a sexual offence against a child, must not negligently fail to reduce or remove that risk.

When introduced to Parliament the Victorian Attorney General stated that one of the key aims of the new offence was the promotion of cultural change in the way in which organisations who care for and supervise children deal with the risk of child sexual abuse. This aim could be further pursued by having the offence apply to the institution itself.

It is obvious that the sanctions that would apply to an institution must differ from those that apply to individuals. Imprisonment is not an option and the fine, which may appear an obvious tool, may have unwarranted and deleterious effects on non-profit organisations. But again the law is already pointing the way.

The authors identify that probation orders have been developed as a sanction in the regulatory context. Probation orders operate so as to prevent a person from engaging in certain types of conduct for the period of that order. Examples, are found in the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Act 2001* (Cth).

In the transport industry supervisory intervention orders have been used as a sanction against persistent offenders. These forms of sanction represent creative ways of sanctioning an offending institution with the focus of the sanction being the reform of institutional behaviour and the promotion of institutional change.

Changes in the civil and criminal liability of institutions may operate to drive effective change and create a more responsive culture in institutions that care for and supervise children.

The purpose is to impose a greater discipline on institutions to ensure that adequate policies and procedures are in place to limit the risk to children in their care, and ensure that they respond appropriately and effectively to any risk that might emerge.

Apart from the work we are doing in public hearings and private sessions the Royal Commission has an extensive research program with a team dedicated to the development of appropriate policy outcomes. In the next few weeks we will provide government with our report in relation to Working with Children Checks.

This report addresses the paragraph of the Letters Patent, which requires the Royal Commission to inquire into: What institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future.

Adequate recruitment, selection and screening practices are key elements of a child-safe organisation. Working with Children Checks are one tool that helps to ensure the right people are selected to work with children. They have been considered in public hearings conducted by the Commission and have been a focus of investigation as part of our policy and research program.

This is the first step in the development of comprehensive recommendations designed to create a safe environment for children in an institution.

Many other issues are being addressed by our research and policy program. Amongst others we are addressing complaint handling and support services. We also have projects addressing regulation and oversight of institutions and other projects addressing advocacy and support services for victim survivors.

You can expect that over the coming months we will ask the Uniting Church and many other institutions to assist in developing appropriate policy outcomes.

The work of the Royal Commission has already brought a significant response from many institutions which provide services to children. The Australian Childhood Foundation reports a significant increase in requests for its 'child safe' audits from institutions providing services to children. ACF are scoping a significant audit project with the Australian Sports Commission which oversees 62 different sporting codes.

This follows similar efforts by the Australian Olympic Committee. Following the Swimming Australia public hearing the AOC has required Working with Children Checks for all coaches, staff and officials prior to their joining the Australian Olympic Team for the Rio games next year.

The President of the AOC has engaged directly with the Commission to ensure that effective practices and procedures are in place for all of the sports which operate under the banner of the Olympic movement.

There are many other examples of institutions responding to the work of the Commission.

Following the YMCA hearing into after school care in Sydney that organisation has responded through its national body to review its management practices and organisational culture in relation to children. It has engaged an independent consultant to assist in the process.

We have completed two studies of the Salvation Army in Australia which looked at its eastern command. A further case study will examine the southern command. Following our first case study the Salvation Army has restructured its professional standards office and reviewed its response to individual survivors.

Similarly the Christian brothers have indicated that following the cases study in Western Australia they would reopen cases already settled and examine whether the previous response was appropriate.

The Royal Commission held a public hearing into the Melbourne response, which is the Catholic Church response to survivors in the Melbourne Archdiocese. During the hearing Archbishop Denis Hart announced that he had appointed a former Federal Court judge to conduct a review of their process.

Following the public hearing into the Retta Dixon Home in Darwin the head of Australian Indigenous Ministries agreed to sell AIM property to help fund compensation for survivors abused in that institution. It also offered a national apology.

After the hearing into St Joseph's Orphanage, Neerkol, the Rockhampton Diocese have appointed a coordinator to respond to allegations and complaints of abuse.

In October last year the Anglican Diocese of Grafton accepted the Royal Commission's two recommendations contained in its case study report into North Coast Children's Home. It has pledged to implement 'fully and completely' the recommendations for them to review professional standards procedures and investigate disciplinary action against the Rev Campbell Brown. ^[2]

During the Ballarat hearing in May, Sydney Archbishop Andrew Fisher order a review of the professional standards of the Sydney Archdiocese.

The impact of the Royal Commission has extended beyond its impact on institutions entrusted with the care of children. For example, the NSW Government has proposed legislation that would require chief executives of organisations that deal with children to undergo the same screening as front line staff. In announcing the proposal the Minister referred to the Royal Commission's report on Scouts Australia.

I am also aware of the response which the Uniting Church has made to the work of the Royal Commission. I have been told that the Church has reviewed its practices and policies and, where thought necessary, introduced new policies to safeguard children.

I also understand that the Church has focused on an appropriate education program to increase awareness of child safe programs. Other significant changes including the response of the Church to survivors have been made.

I am grateful for the invitation to speak to you today. I also express my sincere thanks for the time and effort your leaders have taken to ensure the Royal Commission is assisted in its work by the Uniting Church.

I anticipate that all of you here today have been deeply affected by learning of the abuse of many children in various institutions and the damage, in many cases catastrophic, to so many lives.

I greatly value your support as we together endeavour to change the culture, policies and management within Australian institutions, so that as far as possible, the sexual abuse of children in institutional settings is eliminated.

[1] https://sydneycatholic.org/people/archbishop/addresses/2015/2015522_1900.shtml

[2] <http://www.graftondiocese.org.au/#!/diocesan-news/cmcm>

Care Leavers Australia Network (CLAN)

Geelong, Victoria

4 July 2015

One year has passed since I spoke with you in Sydney. At that time the Commonwealth Government had just received the Royal Commission's interim report which detailed both the work we had already completed and the work we believed necessary to fulfil our terms of reference.

When I spoke with you previously the government had not announced its response to our request to extend the time for the Commission. That announcement was made in September. The Royal Commission will now have until the end of 2017 to complete its many tasks.

It would be possible to continue further, there are so many institutions where there are problems. However, I have informed the Attorney-General that in the Commissioners' view the five year term for the Royal Commission will enable us to complete the research and policy work necessary to make comprehensive and effective recommendations for the future.

At the time of the interim report I was aware that within our original three year time frame we would only be able to conduct about 30 public hearings. With the additional time we will of course be able to increase that number. However, I emphasise, as I have previously emphasised, that although we have enough information to justify a public hearing into more than 1000 institutions we will only be able to look at somewhere between 50 and 60 in a public hearing.

The institutions we have chosen to examine in a public hearing have been selected to enable us to provide an understanding of the problems which have existed across different types of institutions and in different parts of Australia. Although those public hearings will enable us to draw some general conclusions in relation to the failure of institutions I appreciate that many people will be disappointed because the institution in which they were abused will not be publicly examined.

The additional time for the Commission will also enable us to hold more private sessions. At present we estimate that the maximum number of private sessions we can complete could be in the order of 7000.

We have already completed in excess of 3600. Whether this will be sufficient private sessions to enable everyone who wants to tell us their personal story to meet with a Commissioner is uncertain. I am concerned that it may not be. It will not be long before we have to confront the issue and determine with government the appropriate response.

As you know private sessions were created by an amendment to the Royal Commissions Act 1902 (Cth). The Parliament took this step so that survivors would be able to tell their personal stories in a confidential meeting with Commissioners. It is an opportunity for those who have suffered to tell of their abuse and have it accepted.

Private sessions provide us with valuable information which we use when selecting the institution to examine in a public hearing.

The Royal Commission also holds private hearings. These hearings have a different purpose and take a different form to private sessions. Whereas private sessions are informal, private hearings are a formal process. Witnesses are sworn to tell the truth. Private hearings are normally held to assist the investigation process.

Witnesses who give evidence in a private hearing will often be required to give evidence at a public hearing. Apart from aiding the investigative process private hearings also provide the Commission with an opportunity to evaluate a witness's evidence and determine whether it is responsible to allow that person to give evidence in a public hearing.

The private hearing procedures of the Royal Commission are similar to those which have been used by Royal Commissions and permanent commissions of inquiry for many years. They have been used in the course of the Ballarat investigation to which I will return shortly.

As of today the Royal Commission has conducted 28 public hearings. Twelve reports of those hearings have been forwarded to government. We have a program of public hearings which will cease early in 2017. It will be necessary to bring them to an end by then in order to allow the Commissioners sufficient time to complete reports of public hearings, increase the number of private sessions that can be undertaken, and finalise our recommendations.

I am sure you are aware that in recent weeks the Commission commenced a public hearing into the Catholic diocese of Ballarat. There are a number of reasons why this diocese was chosen for a public hearing, not the least of which is the number of perpetrators and survivors who come from that area.

Before we commenced the public hearing the Commissioners had conducted a number of private sessions in Ballarat and met with survivor groups. It became clear that there was a significant need, not only for us to look at issues in Ballarat but to conduct a public hearing in the local courthouse. Because so many people have been abused the fabric of the community, particularly the Catholic community, has been significantly impacted.

I have been told that there are some people in the Ballarat community who would deny that abuse occurred at all. There are others who do not want it spoken about. However, as I said at the hearing in Ballarat unless the criminal conduct of abusers is talked about and acknowledged and the true position understood the capacity for healing of the community is significantly diminished.

And that is true of all the work the Royal Commission is doing in public hearings and private sessions. Talking about and acknowledging the past is bringing with it a resolve by many people and institutions to make changes for the better protection of children.

As you know it was decided to call perpetrators to give evidence in the Ballarat hearing. Gerard Ridsdale has been called and others will be called later. The Commission gave considerable thought to the issues surrounding perpetrators giving evidence before deciding to take that step.

We were conscious of the possibility that survivors would be troubled by seeing perpetrators and hearing their evidence. For this reason we took steps through our community engagement staff, including counsellors, to ensure any possible impacts were addressed.

The evidence of perpetrators is of considerable significance in our work. They have a capacity to tell us of the relationship between themselves and more senior members of their institutions, including the bishop or archbishop if they come from a religious institution.

They can tell us if others knew of their offending conduct and help us to understand how the church responded or failed to respond to that conduct. They also have the potential to provide us with valuable information to assist us in answering what I have previously described as the 'why' question.

Our data reveals that at least one third of the private sessions, and at least 37% of the allegations we have received, relate to Catholic institutions. We would be remiss if we did not attempt to understand whether there were particular characteristics within the Catholic Church, including the selection, training and management of priests, which increased the likelihood that ordained members of the Church would become abusers of children.

If we are to provide a satisfactory answer to the 'why' question we have to be able to understand the characteristics of offenders and any short comings in their personality, training and management which contributed to their abusing young children. Abusing priests are also the primary source of information about Catholic Church treatment programs and their effectiveness.

Apart from the Ballarat hearing we have heard from abusers in other hearings. Abusers gave evidence in the Marist Brothers hearing as well as in the Knox Grammar hearing. Each of these hearings has brought forward evidence which is material to our understanding of the response of institutions to abuse and its management by the relevant institutions.

I have been told by Royal Commission staff who are working with survivors that the concerns which some may have held about the calling of Gerard Ridsdale did not materialise. Indeed my staff have indicated that many survivors were comfortable with Ridsdale giving evidence. They have welcomed the fact that, as they see it, Ridsdale has been called to give a public account of his offending.

There are other aspects of the Ballarat hearing which could be discussed but I do not have time. However I should mention one quite remarkable event which has occurred. In the days immediately following the hearing parents, parishioners and other community members have been conducting what has become known as the 'loud fence' campaign.

They have been tying bright ribbons to the fences of the former St Alipius Boys School and St Patrick's College as a sign of support for survivors and their families affected by sexual abuse. The 'loud fence' stands in contrast with the silence that was imposed on survivors as children.

The local newspaper has reported that ribbons have been tied on fences in Ballarat, in NSW and in Queensland. But it has not stopped there. I understand that the 'loud fence' campaign has reached Bali and Westminster Abbey in London.

As you may know the Commissioners decided that there were two areas of our policy work which required early consideration. The first one was the system of working with children checks, presently a state responsibility, and with different regimes in each state.

I have previously expressed the Commissioners' concern that we do not have a national scheme of working with children checks and do not even have a capacity for effective exchange of information between the states. I previously said

'A national framework for working with children checks is long overdue. Its absence is a blight upon the communities' efforts to provide effectively for the protection of children.'

Nothing which the Commissioners have learnt on this issue would cause me to alter this assessment. Those sentiments are shared by all of the Commissioners.

The Commissioners have now agreed the recommendations which should be made on these issues and I expect the report will go to government next month. The issues raised in the report are complex and will require careful consideration by both government and institutions.

The second area to which we have given priority is redress and civil litigation. The issues with respect to redress are well understood and have received a deal of public discussion. I do not need to say more about them today. However I do want to talk a little about the issues raised in our consideration of civil liability.

Some of you may be familiar with our discussion paper which raised three issues in this area. The first issue is concerned with whether change should be made to statutes of limitation to either extend the period in which proceedings can be commenced or remove any limitation period at all for those who are sexually abused in an institutional context.

It is plain to anyone familiar with the difficulties faced by survivors that because of the nature of their experience it is common for them to take many years before they are able to speak of their

difficulties. Conventional limitation periods operate so that many sexual abuse victims with a valid claim may not be able to bring it to court.

In recognition of this problem the Victorian government has legislated to remove the limitation period. If the other states do not follow the Victorian initiative survivors may receive different outcomes depending on the state in which they were abused or the state in which they brought proceedings.

The second and third issues in the civil litigation context are concerned with the duty of an institution to care for a child. One option discussed is to reverse onus of proof, requiring an institution to prove that it conducted itself without negligence. The other option considers whether an institution should be strictly liable for the actions of its members or employees. It is this matter that I wish to briefly discuss today.

The issues are complex and arise from the nature of the relationship between a child and the institution in which they may have been sexually abused. In many of the cases we have looked at children were removed by the state from their family home and placed in institutional care. If the institution was well managed their personal circumstances may have been improved. But for numbers of children the experience was tragically damaging.

Other children will have been voluntarily placed in the care of an institution by their parents. Some of those children will have been placed in full time residential care including boarding schools, and others will have attended schools or other institutions whose fundamental role is to provide care and ensure the education of children.

In each case, whether voluntary or otherwise, the essence of the relationship between the child and the institution comes from the offer made by the institution to care for the child. In response to the offer either the state or the parent gives over day to day care and responsibility to provide a safe environment for the child to the institution. The institution has a different character to a voluntary association, particularly, one which is created by parents coming together to provide incidental recreational facilities for their children.

Provided a survivor is not barred by a statute of limitation from suing an institution in which they were abused the law in Australia presently requires a claimant to prove that the institution negligently failed to discharge its duty of care to them. In the ordinary case a claimant would have to show that the institution either failed to appreciate and respond in a reasonable fashion to the risk of harm to the child or, more likely, knew that a member of the institution was a danger to children but refused to take steps to remove the danger by dealing with the member.

The law in Australia does not presently impose either vicarious liability, or what the law refers to as strict liability, on the institution if a child is sexually abused. This is the position following a decision of our High Court known as *Lepore*^[1] to which I will return in a moment. A question for the Royal Commission and ultimately for the Australian community is whether this position should remain.

The issue has been addressed in Canada and in the United Kingdom. It is unnecessary to discuss today the precise way in which liability has been redefined in those countries. However, in essence an institution in Canada or the United Kingdom must accept liability if a child is sexually abused by a member of that institution.

The common law, which remains the source for many of the obligations which members of the community owe to each other, has considered the issue of vicarious and strict liability in the past in the context of property. As far back as the 18th century Sir John Holt held a merchant liable for the sale, by his agent, of a more inferior product than was sought to be purchased by the buyer. The merchant had no knowledge of his agent's deception.^[2]

The approach which Sir John took has been taken up in other cases. In one case the House of Lords held a firm of solicitors liable to their client for a fraud committed on the client by their managing clerk.^[3] It is striking that although the common law has, in some circumstances, imposed liability on an innocent principal in relation to personal property it has not, at least in Australia, taken the same step in relation to individuals, much less children.

The essence of the property cases which have imposed liability on the principal is the offer that the principal makes to an individual to safely care for that person's property.

There will be judges, academics and others in the community who have a different perspective, but it is a short step from imposing liability on the principal when the agent or servant deliberately damages or steals a person's property to imposing a similar liability on an institution when a child is harmed by the wrongdoing of a member of that institution when in its care.

Indeed, if the law protects property in this manner but not children, some people may believe that our priorities as a community are misplaced.

The issue was starkly illustrated by the discussion in one of our roundtables. A person with a senior management role in a child care provider was asked the question as to what she believed was the appropriate response of the law in the event that a child was sexually abused while in care.

She responded that as a manager of such an enterprise, without negligence by the provider, she would not want the provider to be liable for the deliberate criminal act of a member or employee of the institution. Her position was different when she looked from the position of a mother.

As a mother of the child who she had placed in the care of the provider she would definitely want the provider to be liable even if it had not itself been negligent.

The most important case on these issues in Australia is known as *Lepore*.^[4] It progressed through the New South Wales Court of Appeal to the High Court. In the Court of Appeal President Mason said that arguments that it is unfair that an employer should be held responsible for the harm flowing from the commission of a deliberate tort of an employee lose their force when it is recognised that few employers bear the costs personally.

Furthermore, although an employer may be morally innocent, so too is the plaintiff: 'the contest is between two equally innocent parties'.^[5]

The issues are complex and require careful consideration. There have been suggestions by some commentators that resolution of the problem should be left to the High Court. This could be done but as we can see from *Lepore*,^[6] where the judges divided on the various issues, the Court may not be able to provide an authoritative or consistent resolution of the issue.

More significantly, if the High Court was to make the change which has been made in the United Kingdom it would have retrospective operation with uncertain and potentially significant financial impacts upon institutions and insurance companies. It is common place for inquiries such as Law Reform Commissions, Royal Commissions or other forms of special inquiry to be tasked with considering issues with a view to recommending legislative change.

In the Commissioners' view the significance of the issues justifies the consideration of the way forward by the Parliaments of the states and territories who, if they choose, can legislate for change and also define the limits within which change will occur.

Furthermore, and importantly, unlike the High Court, they could provide that if change is made it will only operate for the future and not for the past. It is for this reason that the Commissioners considered it appropriate to address this issue. Our views will be made plain when the report is published.

During the course of one of our public hearings the question was raised as to whether an institution could be insured against the risk of a deliberate criminal act of a member of the institution. Although there have been suggestions otherwise the answer is that it can.

In fact since that public hearing when the issue arose we have gained a better understanding of the insurance situation. Institutions not only can but some, including the Catholic Church, presently do have such insurance.

Through our research and policy development we are intending to publish detailed primary information and possible conclusions across a range of issues raised by our terms of reference. The work we are doing to identify the principles for insuring child safe places and work practices is fundamental.

To assist us in that area we have a program which will ensure that the voice of children themselves is received and their perspectives and expectations incorporated into our recommendations. Listening to children is a way of ensuring that our work is relevant to their concerns and responds to their needs.

I have previously commented upon the community's failure to listen to children. Those failures have contributed in significant ways to the abuse of children. We must make sure that we listen to children and that institutional structures, management and culture ensure that children will never again suffer sexual abuse in silence.

As I have mentioned we will soon present to government our recommendations in relation to civil litigation. We will then turn our attention to the criminal law. To assist our work in this area we are publishing a comprehensive research paper on sentencing.

We are also considering the issues of tendency and coincidence evidence and issues relating to multiple allegations in criminal trials which continue to be controversial. To assist our work in this area we are conducting a major study of jury responses to different trial structures, including individual allegations as well as multiple allegations.

The jury project has been conducted by filming a trial, including the judge's directions to the jury. The film is then edited so that when shown to jurors. Some of the trials will involve multiple counts with different victims. Other trials will have a lesser number of counts but will use exactly the same evidence in relation to the relevant counts.

Apart from providing information about a juror's capacity to understand and apply the directions of a trial judge, we will also gain some understanding of how juries, both individual jurors and collectively, analyse evidence and make decisions about the credibility of witnesses.

Each of the juries' deliberations has been viewed by researchers as it is happening and has also been filmed. By using the film researchers will be able to analyse the trials from a variety of perspectives.

Although not entirely novel the study will add significantly to our knowledge of juries generally as well as being a source to guide us in relation to the appropriate structure and jury directions in sexual assault trials.

The project is not small. Approximately 1200 people have been included in the various jury panels. Some have been chosen from people who were randomly called for jury service in Sydney but did not participate in any trial. The remainder come from a random process managed by a market research group.

Inevitably the research settings will differ from a real trial, the time taken for each trial being one significant difference. Notwithstanding the differences I have no doubt that the information gained will prove useful to researchers and others concerned with understanding the functioning of the jury system in the context of sexual assault trials.

The Royal Commission has already looked at the criminal justice process in several case studies, the YMCA, Scouts, Christian Brothers, St Ann's special school, Swimming Australia, and the Retta Dixon Home. The latter two involve consideration of the prosecution process and the operation of the Offices of the Director of Public Prosecutions in NSW, Queensland and the Northern Territory.

Significant issues relating to the effective decision-making within those bodies have been raised. Similar issues were considered in the Christian Brothers hearing which concerns offending in Western Australia. We will look at those issues as part of our criminal justice work during which we will consult with DPPs and others involved in the prosecution of sexual offending.

At the half way point of our task it is possible to identify changes which are already occurring in the community. Following the YMCA hearing into after school care in Sydney that organisation has responded through its national body to review its management practices and organisational culture in relation to children. It has engaged an independent consultant to assist in the process.

We have completed two studies of the Salvation Army in Australia which looked at its eastern command. A further case study will examine the southern command. Following our first case study the Salvation Army has restructured its professional standards office and reviewed its response to individual survivors.

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The hearings in relation to the Retta Dixon home in Darwin also brought a review of its response from the Australian Indigenous Ministries.

In the wake of the Yeshivah hearings the body responsible for establishing Shabad centres around the world announced that it would review their child protection procedures and protocols to see how they can be improved and enhanced.

Sydney's synagogue presidents and rabbis have also responded. In a meeting of representatives of orthodox synagogues they agreed to offer better training to rabbis and community leaders and implement an accreditation process for synagogue presidents.

I have spoken with many leaders of the various churches across Australia. In those conversations I have been told of the concerns in their communities which have been raised through the public hearings of the Royal Commission. Many leaders have both publically, and also personally with me, given an assurance that they are listening to the work of the Royal Commission and are prepared to implement changes in accordance with our recommendations.

Those recommendations will ultimately cover the range of institutions which engage with children across Australia.

Some months ago we were contacted by the President of the Australian Olympic Committee concerned to engage with us to ensure that all of the sports which form part of the Olympic movement have effective practices and policies to protect children. That work is now well progressed. I understand similar work is also being undertaken by the Australian Sports Commission.

The Royal Commission provides an opportunity to consider and bring forward recommendations for change to protect children in our community.

I am conscious of the considerable resources which the government has made available to us to do our work. The opportunity which the Commission has to bring about change does not often come in contemporary society in which there is always competition for scarce resources.

The Commissioners are committed to ensuring that our resources are utilised so that, so far as we are able, society's institutions and structures are safe for children, and provide appropriate justice for those who have been tragically abused when they were children.

[1] NSW v Lepore (2003) 212 CLR 511.

[2] *Hern v Nichols* (Undated, c. 1700) 1 Salk 289 cited in *Lloyd v Grace Smith & Co* [1912] AC 716, 727.

[3] *Lloyd v Grace Smith & Co* [1912] AC 716.

[4] NSW v Lepore (2003) 212 CLR 511.

[5] *Lepore v State of New South Wales* (2001) 52 NSWLR 420, 431 (Mason P) citing Swanton, 'Master's Liability for the Wilful Tortious Conduct of His Servant' (1985) 16 *University of Western Australia Law Review* 1, 29.

[6] NSW v Lepore (2003) 212 CLR 511.

14th Australasian Conference on Child Abuse and Neglect

Auckland, New Zealand

31 March 2015

The Royal Commission has now been in operation for more than two years. We have completed the public hearings for 25 case studies which in most cases have been concerned with the failure of institutions to manage their affairs to adequately protect the children in their care.

We have looked at churches, religious schools, and state run institutions. We recently looked at issues in relation to out of home care. But we have many more and varied tasks to complete.

One of the obligations in our Terms of Reference requires the Commissioners to consider what “institutions and governments should do to address, or alleviate the impact of past and future child sexual abuse ... including, in particular, in ensuring justice for victims through the provision of redress by institutions, process for referral for investigation and prosecution and support services.

Justice for victims is an elusive concept. In the civil context redress schemes providing modest money compensation without the need to prove a breach of a duty of care are commonly believed to be appropriate. Otherwise in the civil context there are difficulties in defining the content of a duty of care.

Determining the individuals or institutions who must accept the obligation of fulfilling that duty can also provoke animated discussion. Whether common law damages or some more confined financial recompense is appropriate are matters the Commissioners are considering as part of our discussions about redress for survivors.

Justice for victims in the criminal context raises multiple and complex issues different from the issues in a civil context. The Royal Commission is addressing many of those issues through external research, round tables and our own policy development. Prof Arie Frieberg, Hugh Donnelly and others have already completed significant work for us.

The issues extend across the appropriate range of criminal offences, the reporting of criminal acts, their investigation and their prosecution. The latter requires us to consider the trial process, the legal rules which control it, in particular joint trials and tendency evidence, directions to juries and appropriate sentencing outcomes.

The Royal Commission is in a privileged position. We are able to both undertake and also commission other professionals to conduct empirical research to inform our decision making. But what of the judge in whose court the criminal trial is conducted? The question I will explore today is how knowledge developed in disciplines outside the law, but relevant to determinations made within it, can be communicated to, and appropriately used by judges.

Although relevant to all judicial decision making it has particular relevance in the child sexual assault context. Today's discussion will not be the last I will have on this topic, but it provides me with an opportunity to raise issues which we will seek to discuss with the community going forward.

The rule of law is the fundamental concept which underpins the social compact by which we order our society. It is important to stress that although the concept necessarily contemplates legal rules it must be distinguished from the notion of rule by law. Rules are necessary to govern a society which accepts the rule of law. The question is always do we have the appropriate rules.

If confidence in the rule of law is to be maintained it is necessary for the legal rules to reflect the contemporary knowledge and expectations of the community. Those expectations are borne of generally accepted values. Some of those values are reflected in our trial processes which are informed by contemporary understandings of human behaviour.

With time and greater knowledge our understandings are modified or redefined. And therein lies the challenge for those who make the rules be they legislators or judges. Early in the development of the common law the task was relatively easy. It is now much more difficult.

In the mid-1700s the English jurist Sir William Blackstone discussed the common law approach to a provoked killing. His words reflect the values of the 18th century but resonate today. He said: "if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor" then the law "pa[id] ... regard to human frailty" and the killer was convicted of manslaughter.

If, however, there was "a sufficient cooling time for passion to subside and reason to interpose" then the defence would fail and the killing would be murder.^[1]

Contrast the contemporary relevance of those words about provocation with Blackstone's understanding of the mind of a victim of sexual assault. He said:

"if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might be heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned."^[2]

The seeds of later and erroneous approaches to issues of sexual assault can be seen in these remarks.

In 1879 an event occurred of fundamental importance in the development of our understanding of human behavior. In Leipzig, the first laboratory solely dedicated to psychological research was founded by Wilhelm Wundt.

In that laboratory Wundt and his students developed the empirical methodologies that allowed psychology to emerge as a discipline distinct from philosophy.^[3] The question was how would the law respond to the birth of the new science whose area of focus – human behaviour – was central to so many aspects of the law itself.

Initially, matters moved relatively quickly. Less than two decades after the formation of Wundt's laboratory, a murder trial in Munich, saw what was probably the first testimony given by a psychological expert.^[4] And in Vienna, in 1906 Freud gave a series of lectures to judges discussing the lessons that psychology might offer the law in the context of fact-finding.^[5]

Despite these promising beginnings, by 1908 it was evident that the law was largely indifferent to the way in which psychology might be applied within its domain. That year Hugo Munsterberg, who had been a student of Wundt's in Leipzig^[6] before moving to the United States to run the psychological lab at Harvard, published a book entitled *On the Witness Stand: Essays on Psychology and Crime*. Munsterberg was a strong advocate of forensic psychology and in particular psychological testimony.

He had himself served as psychological consultant in two murder trials in the US.^[7] In his book Munsterberg described how experimental psychology had sufficiently matured to the point where it could now be deployed to serve "the practical needs of life";^[8] education, medicine, art, economics and the law.^[9] But whilst the other disciplines had embraced psychology, he said of the law:

"The lawyer alone is obdurate. The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made long strides ... They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more."^[10]

As far as the law was concerned human behaviour was directly observable. Our common sense together with a judicial wisdom derived from legal experience was more than adequate. This sentiment is captured in the words of Lawton LJ in *R v Turner*^[11] who said that "[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life."

Despite the advances psychology was making and the insights it was generating, judges continued to rely on their own observations and assumptions about human behaviour. The evidence of children, for example, was to be treated suspiciously because of "the possibility of a young child having a mistaken recollection of what happened."^[12]

Standard legal texts contained quasi-psychological explanations of criminal behavior. Discussing the relevance of post offence behavior to a determination of guilt Kirby J referred to the 1940 writings of Wigmore who hypothesized that just as the commission of a crime leaves “traces of blood, wounds or rent clothing, which point back to the deed done by him” it will also leave “mental traces” which will manifest in subsequent conduct of the criminal.^[13]

Psychology and psychiatry grew rapidly after the Second World War.^[14] Many judges, however, continued to rely on their own assumptions about how people behaved. One area in which this is particularly evident is in assumptions judges make about how jurors reason.

For example it has been held that a judicial direction is required where there is evidence that the accused has lied because “[t]here is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado.”^[15]

Similarly, the rationale for trying multiple counts separately was held to be the “real risk to an accused person [which] may arise from the adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury’s mind in deciding whether he is guilty of another of those offences.”^[16] Judicial assumptions about human behaviour are still, in relatively contemporary times, informing the content of the law.^[17]

Some of these assumptions may be sound. Some accord neatly with a “common sense” view that would be prevalent in the wider community. But how do we know, absent direct consultation of relevant empirical material (if it exists), that these assumptions are correct? It may well be that at the time many of these assumptions were developed there was no objective material of professional learning that could be consulted.

But what is to happen if subsequent knowledge casts doubt on assumptions that have found their way into the content of the law? How should judges keep abreast of wider scientific developments relevant to the judicial task and how then should they make use of them? And what does the law itself have to say about how judges might appropriately undertake this task? In essence the question to be asked is how should we frame the contemporary rules of judicial notice.

Judicial notice allows judges to draw on their own knowledge when deciding the facts in an individual case. It also allows them to deploy their knowledge of the world when developing the law. It sets the limits on the capacity of courts to consult material not tendered in evidence to undertake both these tasks.

Judicial notice is an exception to the rule that information that is to be relied on in the determination of material facts in issue – adjudicative facts – must be proved by admissible evidence; evidence that is tendered and subject to cross-examination.^[18] Rather relevant information need not be tendered and may be acted upon either *simpliciter*, because it is well known and indisputable, or where it has been appropriately verified.^[19]

The search for consistency in the application of the common law doctrine of judicial notice to fact-finding in Australia is destined for failure. The application of the doctrine by the High Court itself has been described as “erratic”^[20] with the criticism made that that “many of the cases appear to have departed from the principle in pursuit of convenience.”^[21]

This reflects the difficulty which the law has encountered in providing rules which allow relevant learning in other disciplines to be utilized by courts when making decisions.

Since the introduction of the uniform evidence legislation in Australia, provisions in the Evidence Acts now govern the principles of judicial notice in the jurisdictions in which this law applies. The key provision is section 144. That section provides that proof is not required about knowledge that is not reasonably open to question.

If that condition is satisfied then the knowledge must also be either common knowledge or knowledge capable of being verified by reference to an authoritative document which cannot be reasonably questioned. Section 144 also provides that judges may acquire this knowledge in any way they see fit.

It responds to procedural fairness concerns by providing that the judge is to give a party an opportunity to make submissions and refer to relevant information relating to the taking into account of knowledge of this kind to ensure that they are not unfairly prejudiced.

It is important, at least in the Australian context that in *Gattellaro v Westpac Banking Corp*^[22] Gleeson CJ, McHugh, Hayne and Heydon JJ stated that “there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment.”

If judicial notice at common law was unsatisfactory, incorporating the doctrine entirely within the parameters of s 144 is also highly problematic. Such an approach presents a serious impediment to any dialogue that might be had between the law and science.

The practice of judges consulting external material to help them decide cases has existed for centuries. In 1761 Lord Mansfield delivered the judgment of the House of Lords in a case involving the obligation of an insurer to indemnify the insured when a cargo of sugar was damaged at sea.^[23]

As was common at the time the trial was conducted with a special jury, the verdict being challenged on appeal. Lord Mansfield did not confine his deliberations to the evidence or submissions before him acknowledging that “[he] had endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustments.”^[24]

In 1955, however, the rules which governed judicial notice were brought directly into focus by attempts in the United States to codify the law of evidence. That year the American legal academic Kenneth Culp Davis published an article titled “Judicial Notice” in the *Columbia Law Review*.

Davis’ purpose in writing this article was to express his concern with judicial notice provisions then being proposed in the US for the Model Code of Evidence and the Uniform Rules of Evidence; provisions Davis regarded as “seriously and fundamentally unsound.”^[25]

Davis recognized that courts use facts not tendered in evidence before them in two ways.^[26] The first is to determine the facts in issue in a case; a fact so used he labelled an adjudicative fact. The second way in which facts are used is in assisting the court to ‘determine the content of the law and policy and to exercise its judgment or discretion in determining what course of action to take’; facts used in this way are legislative facts.

Davis was concerned that the distinction between legislative and adjudicative facts had not been recognized in the proposed legislation. This was problematic because incorporating legislative facts into the judicial notice provisions placed a fetter on the ability to draw on outside knowledge in circumstances where the formulation of law and policy “gains strength to the extent that information replaces guesswork or ignorance or intuition or general impressions. Questions of law and policy often yield to comprehensive factual study.”^[27]

In Australia the distinction between legislative and adjudicative facts and the consequences that follow were discussed by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd*: His Honour said:

In contrast with adjudicative facts, which always relate to the issues between the parties, legislative facts generally relate to the law-making function of the judicial process. As Brennan J pointed out in *Gerhardy v Brown*, a court that is considering the validity or scope of a law “is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties”. Whether the law is a Constitution, a legislative enactment or a principle or rule of the common law or equity the “validity and scope of a law cannot be made to depend on the course of private litigation.”^[28]

Heydon J has described legislative facts as revealing “how existing rules work and how rules which do not exist might work if they were adopted.”^[29] They are sometimes developed from evidence tendered in the trial although that is not necessary in every case.

For Heydon J the distinguishing feature will be the level of technical sophistication in the material relied upon. However, the fact that minds may differ about the material relied upon does not itself require the calling of the author who may be subject to cross examination.^[30] Legislative facts are available to assist the court in determining adjudicative facts.

Section 144, like the proposed provision discussed by Davis, does not expressly recognize the distinction between adjudicative and legislative facts.^[31]

Any discussion of legislative and adjudicative facts raises multiple dilemmas. Reasoning processes which apply when determining a fact in issue may be a result of the application of a legislative fact authoritatively determined and used to inform a rule.

We may also, and often do, instinctively apply our accumulated knowledge to determine a fact in issue. In reality we may be applying our own formulation of legislative facts to aid the resolution of the facts in issue. And when we look at what people instinctively assume we may be in for a surprise.

In a paper published in 2006 I discussed the process by which a person may determine facts in issue, including the behavioural characteristics by which many people believe they can identify and distinguish a truthful witness from someone who is telling lies.^[32]

The research I examined for the purposes of that paper indicated that despite the assumption that observing the demeanour of a witness under examination, in particular under cross-examination, will assist the tribunal of fact in determining whether that witness is truthful, for most people, the likelihood of a person detecting a lie is no better than chance.^[33]

Importantly, it is not just the jury who will struggle with this task. There is evidence to the effect that judges and lawyers fair no better than lay people in their ability to detect deception.^[34]

This inability to accurately identify a falsehood may be explained by what psychology tells us are the behavioural cues that do not indicate dishonesty; cues which run counter to many commonly held assumptions. Shifting posture, smiling, scratching and head, foot or leg movements are not the hallmarks of a liar.^[35]

And whilst most observers rely on a person's face to assess their credibility this is in fact the easiest behavioural 'channel' for a person to control.

I concluded in that paper that acceptance that precepts of common sense applied to decision making will lead to an understanding of the real truth that may be at odds, indeed sometimes markedly at odds, with what science may tell us about the observed behavioural characteristics.

The Royal Commission is of course concerned with sexual offending in relation to children. The history of sexual assault trials and the legislative facts relevant to them are replete with statements by judges which reveal ignorance of the learning available in the relevant field. To take some of these

- “If events such as these occur one expects some complaint to be made and that such a complaint is made within a reasonably early stage of the events themselves. Take for example an allegation that someone was raped and the complaint is made a year later.

That, in the eyes of everybody, would cast some suspicion on the acceptability of the allegation.”^[36]

- “There is, of course nothing wrong with a husband, faced with his wife’s initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. Sometimes it is a fine line between agreeing, then changing of the mind, and consenting ...”^[37]
- “Experience has shown that human recollection and particularly the recollection of events occurring in childhood, is frequently erroneous and liable to distortion.”^[38]
- “it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute.”^[39]
- “A complaint is admissible if made at the earliest reasonable opportunity – if a man runs out of a house and doesn’t tell anyone the house is burning until the night following it is not consistent with him believing that the house was on fire when he ran out of it.”^[40]
- “There is no evidence, apart from the evidence she gave, which corroborates [or] significantly confirms, what she told you. Her evidence is not evidence of the truth.”^[41]

The law in relation to legislative facts in Australia has been rendered uncertain by the decision of the High Court in *Aytugrul v The Queen*.^[42] I must disclose that the appeal was from the NSW Court of Criminal Appeal where I presided and dissented over the appropriate approach to describing the consequence of DNA evidence.

I referred directly to research undertaken into the persuasive power associated with different forms of expression of statistical information. The information was being relied on not to determine a fact in issue. Rather it was relevant to the jury’s consideration of the DNA evidence and, in turn, how the rules relating the exclusion of that evidence might be applied.

The consequence would be how the advocates could explain the evidence in submissions to the jury and how the judge would direct them in relation to that issue. This is of course a legislative as opposed to an adjudicative fact.

The High Court decision has come to be understood, at least that of the joint judgment, as excluding recourse to legislative facts unless determined in accordance with the rules in relation to judicial notice in s 144 of the Uniform Evidence Act.

Heydon J is the only judge who suggests otherwise. If this is the case it represents a significant constraint upon the law’s capacity to utilize the available learning, particularly of psychologists and psychiatrists, in understanding the characteristics of human behaviour relevant to the adjudicative process.

It also represents a significant shift in approach. For example, in *Woods* McHugh J recognized that “[o]n countless occasions, Justices of this Court have used material, extraneous to the record, in determining the validity and scope of legal rule and principles. They have frequently relied on reports, studies, articles and books resulting from their own research after the case has been reserved and parties have made their submissions.”^[43]

His Honour went on to cite as examples the reference to extraneous materials to explain why children may delay in complaining about sexual assault in *Jones v The Queen*^[44] and his Honour’s own reference to psychiatry journals and reports in discussing the sentencing approaches to pedophiles in *Ryan v The Queen*.^[45]

Woods was an appeal from the Full Court of the Supreme Court of Western Australia. Western Australia is not a jurisdiction in which the uniform evidence legislation applies.

In *Doggett v The Queen* Kirby J in the course of discussing why judicial warnings were required in cases involving sexual offences where there had been a long delay stated that “[i]t would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic contests, and other data supporting the reflections about memory, mentioned in *Longman*.

Judges, on the other hand are, or should be, aware of such matters. That is why, in a case of long delay, a warning must be given to the jury.”^[46] *Doggett* was an appeal from the Supreme Court of Queensland Court of Appeal. The uniform evidence legislation does not apply in Queensland.

‘Ordinary human behaviour’ has been recognized as a particular category of facts that may be judicially noticed without inquiry; that is without reference to external material. In *M v The Queen* Gaudron J observed that child victims of sexual assault may be reluctant to resist the offender or to protest, and reluctant also to complain for fear that they may be rejected or punished by the offender.^[47]

It is significant that such an observation could be considered so common place and well-known to fall within the judicial notice exception and yet be contrary to decades long legal practice in respect of absence of complaint which assumed the very opposite. I will say more about this later.

What material falls into and outside of the category of ‘ordinary human behaviour’ will largely be a matter for the individual judge. It is a topic about which reasonable minds may differ. Consider, as an example, differences in the way judges approach their capacity to “know” how teenagers behave.

In *M v The Queen*, an appeal against conviction for of a number of sexual offences committed against a complainant who was 13 years old at the time of the alleged offences, McHugh J expressed doubt as to the capacity for judges to assess teenage behaviour stating:

“Attitudes towards sexual matters and behaviour of young people have changed so much in recent years that in many instances the views of appellate judges about how teenagers behave, derived from their own past conduct with teenagers, may well be out of date.”^[48]

The contrary position was taken by the Full Court of the High Court in *Phillips v The Queen*,^[49] a tendency case, where the Court relied on its own assessment of how teenagers normally behave to determine that the accused’s behaviour on other occasions was not sufficiently unusual, and therefore not sufficiently probative to justify its admission. This decision precluded the jury from making its own assessment of the behaviour of the accused and its possible probative value.

Another judge who has cautioned against judge’s relying on their own assumptions about modern society is Callinan J. He has observed that “[a]n assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it.”^[50]

‘Ordinary human behaviour’ is fundamental in the study of psychology. Although our current rules have been framed by judges drawing upon their own understandings, however misguided they may be, s 144 prevents consultation of authoritative professional material on potentially the same topic unless that information is brought to the attention of the parties and only where it is not reasonably open to question. This has significant implications for the both the civil, and particularly the criminal, trial process.

The history of the legislative facts relating to delayed complaint illustrates some of the problems. Embedded within the common law were special rules for dealing with complaint in the context of sexual assault, in particular in circumstances where there was a delay between the occurrence of the assault and the time at which a complaint was made.

The common law, as laid down in *Kilby v The Queen*, required a judge to warn the jury that delayed complaint was relevant to the jury’s assessment of the credibility of the complainant.^[51]

The rationale for this rule was the “general assumption that the victim of sexual offences will complain at the first reasonable opportunity, and that, if complaint is not then made a subsequent complaint is likely to be false.”^[52] The common law equated delay with falsity because of how judges assumed genuine victims of sexual offences behaved. The assumption was derived from the medieval doctrine of ‘hue and cry’.^[53]

Research has thoroughly discredited this assumption.^[54] Delay in complaint is in fact typical rather than unusual, particularly in the context of child sexual abuse.^[55] Evidence indicates that a majority of children who are sexually abused do not reveal this abuse in childhood.^[56] Research has eroded any factual basis on which a general requirement to direct a jury that delay is relevant to credibility could have been justified.

In response to concerns about the stereotypical assumptions contained in the common law, state parliaments enacted legislation requiring judges to warn juries that delay in complaint was not necessarily indicative that the allegation was false and that there may be good reasons for a complainant to delay making a complaint.

A joint report by the Australian, New South Wales and Victorian Law Reform Commissions stated that the effect of these provisions was undermined by decisions of the High Court, citing specifically the decision in *Crofts*.^[57]

Crofts v The Queen^[58] concerned the content to be given to a direction to a jury on the significance they might attach to delayed complaint in the context of amendments made to the *Crimes Act 1958* (Vic). Section 61(1)(b) stated that if in the course of the trial, evidence was given, or a question asked or statement made which suggested that there was a delay in making a complaint about the alleged offence the judge was required to warn the jury that delay in complaining does not necessarily indicate that the allegation is false and to inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in complaining about it.

The first complaint in *Crofts* had been made by the complainant to her mother six years after the first alleged incident and six months after the last incident. Notably, the Court stated that “[b]y the measure of cases of this kind, [this] was a substantial delay.”^[59] It is now commonly accepted - and this has been confirmed by the survivors who have come to us for a private session - that in the context of child sexual abuse the typical period of delay is more than 20 years.

The Court in *Crofts* held that the legislative amendments had not abrogated the common law requirement to give a direction about delay.^[60] Failure to give a direction that delay in complaint was a relevant matter in assessing the complainant’s credibility meant that the direction given by the trial judge in accordance with the terms of s 61 was “unbalanced”.^[61] Parliament’s intention:

“was simply to correct what had previously been standard practice by which, based on supposed “human experience” and the “experience of the courts”, judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against were specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to “sterilize” complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration.”^[62]

It may well be that parliament intended to preserve the capacity for judges to make critical comment. But any “critical comment” must have a firm factual foundation. What we know about delay in complaint in the context of sexual abuse through empirical research, tells us that there is no legitimate rationale for assuming a nexus between delay and the falsity of complaint.

That *Crofts* itself was a case that required a balancing direction has proved controversial. As the complainant was aged between ten and sixteen at the time of the alleged offences *Crofts* became authority for proposition that a *Kilby* direction should generally be given in the child sexual assault context. This application of *Kilby* attracted criticism from other members of the judiciary, on the basis that there was no valid reason to justify this direction being given in this context.^[63]

Post *Crofts* amendments were made to the *Crimes Act 1958* (Vic) to add a “sufficient evidence” test. A court can no longer warn, or suggest to the jury that the credibility of the complainant is affected by delay unless the judge is satisfied that there is sufficient evidence to suggest that the credibility of the complainant is so affected to justify the giving of a such a warning.^[64] The sufficient evidence test also applies in similar provisions in NSW.^[65]

These provisions confer on the trial judge a discretion to give a warning in certain circumstances. In order to fairly exercise this discretion it is important that judges have an accurate understanding of the relevance of delay to an assessment of the complainant’s credibility. Without this it is difficult to give content to a “sufficient evidence” test.

The law with respect to delayed complaint has been additionally disadvantageous to complainants as a consequence of the decision in *Longman*^[66] and the subsequent decisions that confirmed and extended its application.^[67] In *Longman*, a period of more than twenty years had elapsed between last alleged assault and the first complaint.

The alleged abuse occurred whilst the complainant was aged between six and ten. *Longman* determined that a strongly worded warning should be given in circumstances of delayed complaint as the accused would have inevitably suffered a forensic disadvantage which the jury would not be aware of without the assistance of the judge.^[68] The classic formulation of the *Longman* warning includes the phrase “dangerous to convict.”

The precise content to be given to a *Longman* warning was a matter that judges had some difficulty grappling with. The warning set out in the joint reasons was complicated by observations made by Justices Deane and McHugh in their respective judgments as to why they each felt a warning was necessary in that case.

Deane J referred to “[t]he possibility of child fantasy about sexual matters, particularly in relation to occurrences when the child is half-asleep or between period of sleep, cannot be ignored” and stated that “[t]he long passage of time can harden fantasy or semi-fantasy into the absolute conviction of reality.”^[69]

McHugh J stated that “[t]he fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to ‘remember’ is well documented” and that “[r]ecollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine.”^[70]

For these passages Justices Deane and McHugh cite no judicial authority. More importantly, Deane J cites no scientific or extra-judicial material for these propositions. McHugh J cites a single book, “Memory”, published in 1964. These observations, disadvantageous to complainants, especially complainants who were children at the time in which they were offended against, were subsequently shown by evidence to be of doubtful accuracy.^[71]

The observations made by Deane and McHugh JJ about childhood memory have not been accepted without critical judicial comment. In *JJB v R Spigelman* CJ stated:

“Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background. This has been shown to be so in sexual assault cases.

Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in *Longman* reflect a similar legal tradition that treated children as unreliable witness. ...

There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence. These are complex issues, as reflected in reviews of the research on the ability of young children to distinguish fantasy from reality. The same is true of research about a child’s ability to accurately stressful events.

The complexity of these issues is not reflected in the observations of Deane J and McHugh J in *Longman*, which should, be treated with caution.”^[72]

Although Spigelman CJ footnoted a reference to the psychological research he had in mind it was not tendered and subject to cross examination. Although some may be concerned about his methodology, the professionals would confirm he was correct.

The decisions in *Longman* and *Crofts* had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time at which they were assaulted. Consequences that can be seen to flow directly from what judge’s thought they knew about how genuine complainants behaved and what they thought they knew about how memory worked.

Assumptions that turned out, with the benefit of empirical research, to be erroneous. These assumptions became embedded in the fabric of the common law and proved difficult even for Parliament to completely dislodge.

Where observations are made about human nature, and these observations go on to inform the law and its practical application judges must work to ensure these observations are accurate. Where science progresses and the law lags behind the criminal justice system risks inflicting injustice on either complainants or the accused.

However, it is apparent that the law, at least in Australia, has not yet identified the rules which will allow the scientist to speak effectively to the judge. I have referred to occasions when judges of the High Court, without consideration of the appropriate rules for their reception, have embraced the work of psychologists to assist their understanding of human behaviour.

But the random nature of these references emphasizes the need for some agreed rules about the appropriate approach. A trial within a trial, particularly at the appellate level, is not particularly attractive. But rules which are not informed by science run the risk of undermining community confidence in the law.

In my remarks today I have attempted to provide you with some understanding of the complex problems which the law confronts in utilizing the learning of other professionals, particularly psychologists, in developing the appropriate rules for criminal trials.

These issues are of particular concern for the Royal Commission in relation to the complex issues of joint trials, the related issues of tendency and coincidence reasoning and the assessment of harm and other issues in sentencing. I do not have time to discuss our current thinking on these issues today. All of these will be the subject of detailed consideration in our forthcoming reports.

- [1] Blackstone's Commentaries on the Laws of England, 1st ed, bk 4, c 15 p 191
- [2] Blackstone's Commentaries on the Laws of England, 1st ed, bk 4, c 15 p 213-214
- [3] Stanford Encyclopedia of Philosophy. <http://plato.stanford.edu/entries/wilhelm-wundt/#OrdKno>
- [4] R D Mackay, A M Colman and P Thornton, 'The Admissibility of Expert Psychological and Psychiatric Testimony' in A Heaton-Armstrong, E Shepherd and D Wolchover (eds) *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (1999, Oxford University Press) 322
- [5] A Kapardis, *Psychology and the Law: A Critical Introduction* (2014, 4th ed, Cambridge University Press), 3
- [6] Hugo Munsterberg, *On the Witness Stand: Essays on Psychology and Crime*(1908, The McClure Co), 4
- [7] Mackay, Colman Thornton, above n 4, 322.
- [8] Munsterberg, above n 6, 8.
- [9] *Ibid* 9
- [10] Munsterberg, above n 6, 10-11.
- [11] [1975] QB 834, 841.
- [12] *R v Pitts* (1912) 8 Cr App 126.
- [13] *Zoneff v The Queen* (2000) 200 CLR 234 at 258-9 citing Wigmore on Evidence (3rd ed, 1940).
- [14] Mackay, Colman Thornton, above n 4, 322.
- [15] *Broadhurst v The Queen* [1964] QB 441 at 457.
- [16] *Sutton v The Queen* (1984) 152 CLR 528.
- [17] For example in the provocation context, the High Court of Australia in 1990 determined that the age of the accused should be incorporated into the ordinary person test because "[a]s a broad generalization it is true to say that the powers of self-control of a young adult of eighteen or nineteen years are likely to be less than those of a more mature person.": *Stingel* (1990) 171 CLR 312, 331.
- [18] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 [64] (McHugh J); Ligertwood & Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (2010, 5th ed), [6.59]; Freckelton "Judicial Notice" in Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2013, 5th ed), 163-164.
- [19] One classic statement of the doctrine at common law is that of Isaacs J in *Holland v Jones* (1917) 23 CLR 149, 153: "The only guiding principle – apart from statute – as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed

- to be aware of it, the court “notices” it, either simpliciter if it is once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.”
- [20] Freckelton ‘Judicial Notice’ in Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2013, 5th ed), 167-169.
- [21] *Ibid*, 165.
- [22] (2004) 78 ALJR 394 at [17]. See also, discussion of this issue in Odgers, *Uniform Evidence Law*, (2014, 11th ed) 926-927.
- [23] *Lewis v Rucker*, 2 Burr 1167; 97 ER 769 (1761)
- [24] *Lewis v Rucker*, 2 Burr 1167, 1172; 97 ER 769, 772 (1761)
- [25] Davis, “Judicial Notice” (1955) *Columbia Law Review* 945, 945.
- [26] *Ibid* 952. See also Davis, “An Approach to Problems of Evidence in the Administrative Process” (1942) 55 *Harvard Law Review* 364, 402-410.
- [27] *Ibid* 953.
- [28] (2002) 208 CLR 460, [65].
- [29] *Aytugrul v The Queen* [2012] HCA 15, [71] (Heydon J). Justice Heydon has referred to the different ways in which judges use facts in a number of cases: see, for example, *Thomas v Mowbray* (2007) 233 CLR 307, 512-523; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 382.
- [30] *Aytugrul v The Queen* [2012] HCA 15, [74] (Heydon J).
- [31] The Australian Law Reform Commission intended that s 144 apply to both legislative and adjudicative facts: Odgers, *Uniform Evidence Law*, (2014, 11th ed) at 927.
- [32] McClellan P, “Who is Telling the Truth? Psychology, Common Sense and the Law” (2006) 80 *Australian Law Journal* 655.
- [33] *Ibid* 657-8, citing Ekman P, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, New York, 1985).
- [34] *Ibid* 660, citing Ekman P and O’Sullivan M, ‘Who can Catch a Liar?’ (1991) 46 *American Psychologist* 913.
- [35] *Ibid* 660.
- [36] NSW Department of Women, “Heroines of Fortitude: The experience of women in court as victims of sexual assault” (November 1996), 211. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.
- [37] *R v Johns* (unreported, Supreme Court of South Australia, 26 August 1992) (Bollen J)
- [38] *Longman v The Queen* (1989) 168 CLR 79, 108 (McHugh J).
- [39] *Reg v Henry*; *Reg v Manning* (1968) 53 Cr App R 150, 153 (Lord Salmon) cited with approval by a majority of the High Court in *Kelleher v The Queen* (1974) 131 CLR 534.
- [40] NSW Department of Women, “Heroines of Fortitude” above n 44, 211. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.
- [41] *Ibid* 193. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.
- [42] [2012] HCA 15
- [43] (2002) 208 CLR 460, [68].
- [44] (1997) 191 CLR 439, 463
- [45] (2001) 75 ALJR 815, [42]-[44].
- [46] (2001) 208 CLR 343, [126]
- [47] (1994) 181 CLR 487 at 515. This is cited by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, [66] as an example of ‘Notorious facts judicially noticed without inquiry’ and in Heydon, *Cross on Evidence* (2015, 10th ed), 167.
- [48] (1994) 181 CLR 487, [43]
- [49] (2006) 225 CLR 303
- [50] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [252]
- [51] The rule as stated by Barwick CJ in *Kilby v The Queen* (1973) 129 CLR 460, 465 was that “[i]t would be no doubt proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given.”
- [52] *Graham v The Queen* (1988) 195 CLR 606, [12] (Gaudron, Gummow and Hayne JJ).
- [53] ALRC, *Uniform Evidence Law*, Report No. 102 (2005), [18.72]. This was a joint report of the ALRC, NSWLRC and VLRC.
- [54] *Ibid* [18.155]
- [55] Cossins, “Time Out for Longman: Myths, Science and the Common Law” (2010) 34 *Melbourne University Law Review* 69, 70-83; Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report*, (2014) vol 1, 48.
- [56] Donnelly, “Delay and the Credibility of Complainants in Sexual Assault Proceedings” (April 2007) 19(3) *Judicial Officers Bulletin*.
- [57] ALRC, above n 53, [18.74].
- [58] (1996) 186 CLR 427.
- [59] (1996) 186 CLR 427, 442.
- [60] (1996) 186 CLR 427, 451.
- [61] (1996) 186 CLR 427, 452.
- [62] (1996) 186 CLR 427, 451.
- [63] See *R v LTP* [2004] NSWCCA 109 [123] (Howie J); *R v Markuleski* (2001) 52 NSWLR 82, [244] (Wood CJ at CL)

- [64] Section 61(1)(b)(ii).
[65] Criminal Procedure Act 1986 (NSW) s 294(2)(c).
[66] (1989) 168 CLR 79.
[67] See *Crompton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343.
[68] (1989) 168 CLR 79, 91.
[69] (1989) 168 CLR 79, 101.
[70] (1989) 168 CLR 79, 107-108.
[71] ALRC, above n 53, [18.126].
[72] (2006) 161 A Crim R 187, 188 [3]-[8] (internal references omitted).

Long term outcomes of Forgotten Australians study

Sydney, New South Wales

18 February 2015

Today is an important day for the people who we have come to know as the Forgotten Australians.

With the commencement of the Long Term Outcomes of Forgotten Australians Study comes another step in understanding the needs of a large group of Australians who for various reasons have been disadvantaged and many of whom have endured great suffering.

This research comes at a time when the Australian community has come to engage more than previously with a largely unknown part of our national history.

Although various inquiries and reports have examined issues related to the experiences of children in institutions- including institutional care, foster care, child migration, and the child protection system in some of the states and territories- there has remained a relatively limited public knowledge of the nature of these experiences and the life-long consequences for those who spent some or part of their childhoods in out-of-home care settings.

Early in my time as Chair of the Royal Commission I acknowledged publicly that it was not until I began my work with the Commission that I came to adequately appreciate the devastating and long-lasting impacts which the sexual abuse of children can have. I am sure that my lack of an adequate understanding was shared by many in the community.

By 'bearing witness' to the personal stories of survivors through the Royal Commission's public hearings and reports, we are contributing to a greater community understanding.

The primary research project which I am pleased to launch today will add to the understanding of these issues and help to ensure that the mistakes made in the past are not repeated.

Importantly, it will help to identify the response which the community must make.

The Long Term Outcomes of Forgotten Australians Study is designed to increase our understanding of the experience of the many children who were hidden in institutions and forgotten by society. For many children who have spent time in institutions, their experiences were characterised by neglect, maltreatment, deprivation and loss of identity, making the transition into adulthood especially challenging.

These children were again forgotten when it came time for them to leave the institution. They were left to fend for themselves having had no preparation for life in the 'outside world'. For some the trauma of their experience may never go away.

This study directly addresses the need for the community to gather a store of knowledge that can be drawn upon; knowledge which can be used to shape the care experience in a way that enriches the good outcomes and reduces the negative outcomes.

Unlike the Royal Commission, where we have terms of reference which limit our focus to child sexual abuse, this research will examine the complete experience of children who spent time in care during the period of 1930-1989, both positive and negative. This is a significant opportunity to learn about the experience and life outcome of many of the people we recognise as Forgotten Australians.

Both the Royal Commission and the LOFA study have a common interest in the experiences of children in care institutions and out of home care. Of the around 3000 private sessions the Commissioners have now held, many survivors have reported physical and psychological abuse as well as sexual abuse.

In the 22 public hearings we have held we have examined many residential institutions. These have included Salvation Army boys homes, Christian Brothers residences in Western Australia, Parramatta Girls Home, the Retta Dixon Home in Darwin and Bethcar Children's Home at Brewarrina.

We have examined allegations of abuse which happened some time ago as well as recent abuse.

We believe that it is necessary that the history of children's homes in Australia is fully explored. The community should understand the suffering of many Australian children who went through residential and out of home care.

It is not only necessary for the Royal Commission to look at these issues in order to fulfil our terms of reference but it is a story that needs to be told for the Australian people. As has been the case in Ireland, until recently the community had little idea of the extent of abuse, physical, psychological and sexual, many children experienced in children's homes for much of the 20th century.

Children's homes were one of the significant means of care from the 1920s up until the 1970s. In Australia, half a million children were placed in care during this time, a period when there was relatively little support for families in need.

By the 1960s the notion of child protection re-emerged as a social concern in Australia and in other western countries which triggered responses through the 1970s to the 1990s.

Out-of-home care moved from institutions and was increasingly provided by foster parents and smaller group care.

By the 1990s greater emphasis was placed on the prevention of problems. The definition of child abuse was expanded. Neglect was included in mandatory reporting provisions.

As I understand the LOFA research it will seek to apply its learnings to contemporary settings. The Royal Commission must also look at these issues, in particular out of home care.

In March we will be holding a public hearing that will be focused on preventing and responding to allegations of child sexual abuse in out of home care. This will be the first public hearing of the Royal Commission which has policy issues as the primary focus.

The hearing will look at the incidence of child sexual abuse in contemporary out-of-home care settings. In addition, it will examine how Australian government and NGO service providers recruit and train carers and look at the system and policies in place for reporting and responding to allegations of abuse.

The hearing will be held here in Sydney but we will be examining the work of providers from every State and Territory.

We have already commenced our work in this area. In 2013 we released an issues paper on preventing sexual abuse of children in out of home care. In April 2014 our first roundtable focused on the same issue.

It is the hope of the Commissioners that after these and other consultations, this hearing will help progress the debate about best practice in prevention of abuse and responding effectively to allegations.

The Long Term Outcomes of Forgotten Australians Study will help identify the current un-met needs of care leavers and to determine the best ways to support them.

This research complements the Royal Commission's work in this area and we expect that its findings will help to inform our final recommendations.

Last month the Royal Commission released a consultation paper on redress and civil litigation. The provision of services to meet the needs of survivors, including funding when needed for counselling and psychological care, was identified in the paper as one of the three elements of effective redress. The other two elements are a personal response by the institution to the survivor and a money sum paid in recognition of the wrong done to the individual.

Many institutions have acknowledged that their previous response to survivors has been inadequate. Many survivors continue to have a pressing need for assistance. For these reasons, the Commissioners accepted that we should consider the issue of redress and make final recommendations in relation to it as soon as possible.

It is important to emphasise that although it appears that governments must accept a broader role in providing effective and fair redress, the primary responsibility is with the institution, whether government or otherwise, in which a survivor was abused. That institution must provide an appropriate personal response and be responsible for funding the counselling and money sum for each person abused in that institution.

There are many considerations relevant to the appropriate money sum, including fairness and affordability. The consultation paper considers various options with a cap of \$100,000, \$150,000 or \$200,000. These are used to assist an understanding of the situation. Of course, other options may be appropriate.

Commissioners know from our work in private sessions that some survivors will need lifelong counselling and psychological care, while others will need care from time to time.

There are existing services, including specialist sexual assault services and public funding through Medicare, that help many survivors to obtain at least some of the counselling and psychological care that they need. However, we have learnt that existing services are not adequate and that there are a number of service gaps.

The Commissioners believe that as a general principle, as part of any redress system, counselling should be available throughout a survivor's life and available on an episodic basis or as needed.

We have considered options for the formation and ongoing management of a redress scheme. It is apparent that a scheme should be structured so that the decision making about redress is independent of the institution in which the abuse occurred.

It is clear that survivors want a scheme that will treat them fairly and equally, regardless of the institutions in which they were abused. After all, why should a survivor of a home that no longer exists receive less than someone who was abused at a school or in a church?

In the consultation paper we discuss some possible options which might ensure that survivors' needs for counselling and psychological care are met. One option is to significantly expand the public provision of appropriate counselling services, either through changing Medicare requirements or through a stand-alone government program.

Another option is to establish a trust fund that would operate as part of a redress scheme. It is important that any counselling and psychological care provided through redress should supplement existing public services, and not displace or compete with them.

While counselling and psychological care provided under a redress scheme would provide for survivors of child sexual abuse there would undoubtedly be flow-on benefits for others with significant childhood or adolescent trauma, as a result of their experience as a Forgotten Australian.

I anticipate that with additional funding the pool of competent trauma counsellors will increase which can only be of benefit to all who need help, whether sexually abused or not.

There are already a range of support services that are of benefit to survivors including non-therapeutic services. A particular concern of many people is to have help in accessing personal records and photographs. Many need enhanced life skills and assistance with housing and employment.

The Royal Commission is conducting a separate project to investigate how adequate our present support services are in meeting survivors' needs. It will consider whether recommendations should be made to increase or alter existing support services.

Commissioners have been impressed by the work of many organisations that support survivors. Existing services are highly valued by many survivors. Some elements of a redress scheme may overlap with services provided by existing organisations but the recommendations of the Royal Commission are not intended to reduce or divert vital resources for these organisations. Rather, when necessary, we will encourage those resources to be enhanced.

Much of the discussion after the Commissioners released the consultation paper centered on the figure of \$4.378 billion, which we estimated was the total cost of redress nationally. This was based on modelling that assumes 65,000 eligible survivors receiving average payments of \$65,000.

A couple of weeks ago the group Adults Surviving Child Abuse (ASCA) released a report they commissioned from Pegasus Economics that assessed the cost of not appropriately addressing the needs of adult survivors of childhood trauma and abuse in Australia.

The assumption in the report is that childhood trauma, including child sexual abuse, can have short-term as well as life-long impacts if not addressed. The impacts they describe are the impacts the Commissioners often see in our work; drug and alcohol abuse, mental health issues, social and economic issues.

The economic modelling puts a number on this cost to Federal, State and Territory Governments at \$6.8 billion annually.

The report concludes that if all forms of childhood trauma are taken into account the minimum savings from successfully addressing childhood trauma in adults is \$9.1 billion.

As we assess the cost of any future redress scheme we must not lose sight of the context including the wider economic and societal impact of child abuse.

Thankfully many institutions have now come to recognise the traumatic and destructive impact of child sexual abuse. Although other societal forces are operating the work of the Royal Commission is bringing a variety of changes. Since the Royal Commission's public hearings began, several institutions have taken responsibility for past wrongs, and have publicly apologised for the hurt and suffering they caused children in their care.

Some have responded by reconsidering the response which they may have made to the needs of survivors in the past. For example, the Christian Brothers have reopened 80 previously settled cases of child sexual abuse that occurred at the institutions it operated.

New settlements have been reached in 14 cases and mediation meetings have taken place in 20 cases. The Salvation Army and some Anglican and Catholic diocese have embraced a similar response.

I understand the NSW Government will soon introduce 18 Guiding Principles to guide how NSW agencies respond to civil claims for child sexual abuse. Claims will, in future, be finalised as quickly as possible. Delay in response can be a damaging experience for many who have been traumatised.

At a community level we are seeing evidence of cultural and attitudinal change towards sexual abuse. The work of the Royal Commission has played an important role in this change.

Karen Willis, the chief executive of Rape and Domestic Violence Services Australia, has said that the Royal Commission has helped remove the shame felt by victims of child sexual abuse. We are encouraged by her comment that the Commission has got people talking, and is encouraging people to seek support. She says more people are calling the Rape and Domestic Violence Service as a result.

The director of Bureau of Crime Statistics and Research, Don Weatherburn, attributes the Royal Commission with encouraging more victims to come forward, which has led to an increase in reported indecent assaults in NSW.

The Royal Commission itself has referred nearly 500 matters to authorities, including police.

Calls to the Adults Surviving Child Abuse helpline have quadrupled since the start of the Royal Commission with almost 100 people contacting the helpline each week. The President of ACSA, Dr Cathy Kezelman has said the Royal Commission had encouraged more people to come forward.

There are many other changes we can see occurring in society, including the review by the Australian Olympic Committee of its policies and practices and the response of the YMCA and other child care providers to some of our findings.

The Royal Commission is undertaking a significant volume of original research and will also draw upon the completed work of others.

When our research and policy work commenced we recognised that our task was to develop a research agenda that fully addresses our terms of reference and has a balanced focus on historical, current and future issues.

We have already published a number of research papers including papers that relate to out of home care prepared by Professor Shurlee Swain of Australian Catholic University.

The report 'History of Institutions providing out of home residential care for children,' examines the history of the many different types of institutions providing out-of-home care for children from 1788 to the de-institutional movement of the 1980s. It sheds light on the complex mix of government, church, charitable and community organisations that have provided care.

Another research report examines ways to reduce child-on-child sexual abuse, as well as abuse perpetrated by caregivers.

There are several other projects being scoped or which are underway in the out of home care area, which we will publish in due course.

I welcome and express the Royal Commission's support for the work which is being undertaken in the Long Term Outcomes of Forgotten Australians Study. The need to examine the present needs of adults who went through institutional care is undoubted. The research will prove to be of great value for those who have suffered and those who must respond to their needs.

These people have come to be collectively described as the "Forgotten" Australians. Although described as 'forgotten', voice is increasingly being given to them through the work of survivor groups, public inquiries, academics, redress schemes and the Royal Commission.

I have no doubt that the study which I am pleased to launch today will strengthen that voice.

Redress and civil litigation

Sydney, New South Wales

30 January 2015

It is just over two years ago since the Royal Commission was appointed. In that time the Commissioners have spoken with over 2,850 survivors in private sessions. Each session reveals a unique personal story of betrayal of a child's trust with, for many, life-long consequences.

Many survivors speak of losing their childhood. Others speak of losing the benefits which come from a stable family and the rewards which come from personal and career achievements.

All who have been abused suffer in some way.

A picture is emerging for the Commissioners that although the sexual abuse of children is not confined in time – it is happening today – there has been a time in Australian history when the conjunction of prevailing social attitudes to children and unquestioning respect for the authority of institutions by adults coalesced to create the high risk environment in which thousands of children were abused.

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 which their relationship with the child gave them. When the silence required 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.

When, amongst adults given the power, there are people with an impaired psycho sexual development, a volatile mix is created.

Our Terms of Reference require us to make recommendations in relation to 'ensuring justice for victims through the provision of redress by institutions'. Many institutions have acknowledged that their previous response to survivors has been inadequate. Many survivors have a pressing need for assistance, including effective and just redress. For these reasons, the Commissioners accepted that we should consider the issue of redress and make final recommendations in relation to it as soon as possible.

A reading of our Terms of Reference, which have been adopted by every Australian government, suggests that there is universal agreement amongst governments that 'justice for victims' requires appropriate redress. Our discussions with institutions have confirmed that every major institution also accepts that effective redress is required if victims are to receive justice.

Everyone recognises that redress is not only about money. Furthermore, an effective redress scheme cannot offer common law damages. The fundamental object of redress must be to help those who have suffered to heal and live a productive and fulfilled life.

Conscious of the complexity of the issues involved in redress the Commissioners have undertaken an extensive program of consultation. We published issues papers on: civil litigation; redress schemes; statutory victims of crime compensation schemes; and Towards Healing.

We have also held a coordinated program of roundtables involving governments, institutions, survivors and others. From this consultation program we have developed a major consultation paper which I release today. I regret that it is a lengthy document. However, there are many questions to consider and the complexities cannot be avoided.

The Commissioners now seek submissions in response to the consultation paper from interested parties so that our final report can be published in the middle of this year. The closing date for submissions is Monday 2 March. The Commissioners will receive oral submissions at a public hearing over three days commencing on Wednesday 25 March.

As the need for effective redress has apparently been accepted by all governments and many institutions, we are endeavouring to provide recommendations for redress which meet the criteria of justice, practicality and affordability. We understand that this issue emerges in an economic climate where governments must be particularly careful in committing public monies to areas not presently funded. However the need having been accepted, it is important that governments and institutions respond.

It is necessary for me to stress that the Commissioners do not presently have firm views about any issue in the consultation paper. We are seeking informed comment to assist us in forming our final views.

When considering the requirement for justice through redress, it is inevitable that the opportunity provided by the civil law for a victim to recover compensatory damages must be examined. Although there are many hurdles that a survivor faces in prosecuting a claim for damages, for some this course provides the possibility of recovering a money sum in excess of that which could be provided by any redress scheme.

In recent years there have been considerable developments in the manner in which the law, in some countries, approaches the liability of institutions for the sexual abuse of children entrusted to the care of the institution. In simple terms, the law in England and Canada has developed so that depending on the circumstances, an institution owes a duty of care to children entrusted to it which may be breached by the deliberate and criminal act of a 'member' of the institution, without negligence on the part of the institution itself.

Although Australian law has not taken this step it is not difficult to contemplate a duty which is owed by an institution which is absolute in nature. Where an institution holds itself out as providing for the welfare and development of a child, being an organisation which a parent may entrust with the care of their child and the child is abused, many people would expect the institution to be accountable. A crime committed by a member of the institution becomes the responsibility of the institution itself.

Inherent in the contemporary response of the law in England and Canada to these issues is an acceptance that an institution carries an unqualified obligation to care for any child entrusted to its care.

The apparent acceptance by government and institutions in Australia of the need for effective redress, although not in the amount of common law damages, reflects an acceptance of a similar obligation by governments and institutions. The significant questions are of course what should be the elements of redress, how should it be provided and how can it be adequately funded.

The consultation paper contains a detailed discussion of these issues. It suggests that effective redress must have three elements – personal response by the institution to the survivor, guaranteed funding when needed for counselling and psychological care and a money sum which is paid in recognition of the wrong done to the individual.

We have considered options for the formation and ongoing management of a redress scheme. It is clear that a scheme should be structured so that the decision making about redress is independent of the institution in which the abuse occurred. It is also clear that survivors want a scheme that will treat them fairly and equally, regardless of the institutions in which they were abused.

Many people prefer a single national scheme administered by the Australian Government. Institutions would contribute to the funding of the scheme in accordance with their responsibility to individual survivors and in addition would meet their relative proportion of the costs of the scheme's administration.

An alternative considered in the paper is to provide individual State and Territory based schemes which adopt and are administered in accordance with common national principles. Individual institutions would contribute in the same manner as they would contribute to a national scheme. This option would require the Australian Government to at least contribute to State and Territory schemes in respect of survivors who were abused in Commonwealth run institutions.

Another alternative is for individual institutions, either alone, or combining together to provide and administer their own independent scheme also in accordance with common national principles. This would leave governments to either provide their own schemes, but in accordance with the common national principles, or join in a scheme with institutions.

At this stage of the development of a possible redress scheme various assumptions must be made. They include the number of survivors, their need for counselling and its likely cost, and the amount considered to be adequate as a money sum. To assist us in identifying appropriate assumptions we have engaged a firm of actuaries. The consultation paper draws upon their work. The actuaries' paper is available on the Royal Commission website.

Critical to the modelling of a possible redress scheme is the assumption which is made as to the number of survivors who may be eligible. The actuaries have carefully analysed the Western Australian Government scheme to determine the number of people who were accepted to be entitled to redress for sexual abuse they suffered as a child. From this analysis and using other data, they have estimated the number of survivors who may be entitled to some level of redress nationally to be 65,000.

We know from our private sessions that some survivors will need lifelong counselling and psychological care, while others will need care from time to time. There are existing services, including specialist sexual assault services and public funding through Medicare, that help some survivors to obtain at least some of the counselling and psychological care that they need. However, we have learnt that existing services are not adequate. There are a number of service gaps.

We discuss some possible options in the consultation paper which might ensure that survivors' needs for counselling and psychological care are met. One option is to significantly expand the public provision of appropriate counselling services, either through changing Medicare requirements or through a stand-alone government program.

Another option is to establish a trust fund that would operate as part of a redress scheme. It is important that any counselling and psychological care provided through redress should supplement existing public services, and not displace or compete with them. We seek all interested parties' views in relation to counselling and psychological care. We will endeavour to make recommendations that ensure survivors' needs are appropriately met in a way that does not adversely affect existing services.

There are many considerations relevant to the appropriate money sum, including fairness and affordability. The consultation paper considers various options with a cap of \$100,000, \$150,000 or \$200,000. These are used to assist an understanding of the situation. Of course, other options may be appropriate.

It is important to appreciate that the possible cost of a scheme is not significantly dependant on the cap but rather on the spread of amounts within the cap and the resulting average payment which may be appropriate for individual survivors. The consultation paper considers how those amounts might be determined.

It suggests that relevant criteria could be severity of abuse – 40 per cent, impact of abuse – 40 per cent and distinctive institutional factors – 20 per cent. Other approaches are possible. Average payments of \$50,000, \$65,000 and \$80,000 are modelled.

A significant issue in our discussions has been the provision which should be made for survivors who were abused in institutions which no longer exist and for which there is no successor or overarching organisation. There are also survivors who were abused in institutions which have no money.

If these survivors are to benefit from a redress scheme the funding must come from either government or other institutions. The issue of funder of last resort is important if, as our Terms of Reference contemplate, the community is to ensure justice for victims through the provision of redress.

When designing a redress scheme it is necessary to acknowledge that many institutions and some state governments have already provided redress in different forms. Payments already made by these schemes would have to be offset. This would also be the case where a survivor has received a common law award or settlement. Various possibilities are discussed in the paper for adjusting for past payments.

Our actuarial advisers have conducted detailed modelling of the possible costs of a redress scheme. The two critical assumptions are the number of eligible survivors and the average cost of payments under the scheme. The consultation paper includes the modelling that assumes 65,000 eligible survivors and average payments of \$65,000. Based on these assumptions, the total cost of redress nationally would be in the order of \$4.378 billion. This number will of course vary depending on the assumptions which are made.

The cost of redress would be spread over a number of years. The actuaries have provided an indicative 10 year model. That model indicates that, adopting the same assumptions of 65,000 eligible survivors and average payments of \$65,000, the maximum cost in any one year is likely to be in the order of \$650 million nationally. This would be funded by contributions from both governments and institutions.

If government is the funder of last resort, and continuing with the same assumptions of 65,000 eligible survivors and average payments of \$65,000, a contribution of \$1.971 billion would be required from all governments of which \$582 million reflects the contribution as funder of last resort. \$2.407 billion would be the contribution required from private institutions.

I should again stress that these numbers change if the assumptions change and if a different level of average payment is chosen.

It is important to emphasise that although it appears that governments must accept a broader role in providing effective and fair redress, the primary responsibility is with the institution,

whether government or otherwise, in which a survivor was abused. That institution must provide an appropriate personal response and be responsible for funding the counselling and money sum for each person abused in that institution.

Accepting that effective redress through a redress scheme should be available, it is nevertheless necessary to ensure that survivors have appropriate access to the possibility of common law damages.

Apart from the issue of the duty of care, a number of other issues in relation to civil liability are discussed in the paper.

It must now be clear from the work we have already completed that limitation periods of three, six or even 12 years will be inadequate to allow many victims time to come to the position where they are able to give an account of their abuse and provide information from which the damage which they may have suffered can be assessed.

For some people the betrayal of the trust inherent in abuse by an adult inflicts such profound damage that it may be 20 years or longer before the person is able to talk of their experience. For many it is not until that time or more has passed that they come to understand that they have been damaged and for the first time seek assistance in coping with the psychological trauma.

We know that some people who are abused move on from the experience with minimal impact on their lives. Others will experience trauma which in their later life may require a level of intense care. The consultation paper raises the question of amendments to the statutes of limitations which may be appropriate for survivors.

As I have indicated, it is necessary to consider the elements of the duty of care which should be imposed upon an institution and the occasions for its breach. The paper discusses the English and Canadian position. If change is appropriate legislation would be required by each State or Territory.

Related to the duty of care issue is the question of the appropriate onus of proof. Instead of the victim being required to prove a breach of the duty of care, should the institution be obliged to prove that it took all reasonable steps to care for the child? If made, this would be a significant change but many would support it because of the increased discipline it would impose on institutions.

Each of these questions raises a series of complex sub-issues. They are all considered in the consultation paper.

During the course of last year, and after discussions with the Attorney General, who has been supportive of the Commission's work, we reported to the Australian Government that it was necessary, if we were to appropriately complete our tasks, that we be funded for two years

beyond the original three years provided in the Letters Patent. The Australian Government agreed and we are now funded to provide our final report by – December 2017. The Commissioners are committed to complete our work by that time.

The Commissioners have throughout our work been conscious of the need to engage with people in regional areas. Apart from many people who we have assisted to travel for a private session in a city, the Commissioners have spoken with many people by telephone.

We have now conducted private sessions in the regional centres of Rockhampton, Woorabinda, Launceston, Cairns, the Kimberley, Geelong, Ballarat, Bendigo, and Coffs Harbour. In first half of 2015, we have programmed private sessions, including some return visits, in the regional centres of Lismore, Newcastle, Townsville, Launceston, Cairns, Warrnambool, Shepparton and the Tiwi Islands.

Depending on the number of people wanting a session in particular locations, we will arrange private sessions in other regional centres. We have also held private sessions in a number of metropolitan and regional prisons and we have planned further private sessions at prisons in 2015.

We have now completed 21 public hearings. We have forwarded nine reports of hearings to government of which six have been released. A number of further reports are close to completion. Our future program of public hearings contemplates seventeen hearings this year. The program will end in early 2017. This will allow time for the Commissioners to complete private sessions and develop comprehensive policy recommendations.

It is apparent that our capacity to conduct public hearings could never allow a hearing into every institution in which abuse has occurred. We must be selective. The decisions in relation to which institutions to examine in a public hearing are made to cover a broad range of institutions having regard to geographical location, type of institutions and the character of the provider.

Eventually the choice reflects the concentration of institutional types which feature more predominately in the information we are gathering, including from private sessions.

On Monday we will commence a public hearing in Melbourne which will examine allegations of child abuse against four individuals of Yeshiva Melbourne and Yeshiva Bondi. This will be followed by a hearing in Sydney which will explore allegations in relation to Knox Grammar School. We will then turn our attention in a public hearing to out of home care.

In April the Commission will travel to Rockhampton where the public hearing will focus on the experiences of children at St Joseph's Orphanage, Neerkol, which was managed by the Sisters of Mercy. The case study will also examine the conduct of priests attached to the Diocese of Rockhampton who carried out duties at the Orphanage.

In May we will travel to Ballarat, a regional centre with a deeply disturbing history of institutional sexual abuse. The hearing will commence in May but is likely to require further sittings at a later date. The first part of the hearing will hear of the experience of many survivors and the damaging impacts which the abuse has inflicted on the social fabric of the community and the families within the community.

Our Terms of Reference require the Commissioners to examine systemic failures by institutions in relation to incidents of child sexual abuse to enable best practice to be identified so that it may be followed in the future. Two imperatives are identified.

Firstly to protect against the occurrence of child sexual abuse, and secondly to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims. To assist in defining our work the Letters Patent identify four areas of particular significance to which our inquiries should be directed.

With these areas in mind, the Commissioners have identified the major policy areas which we must investigate with a view to developing appropriate recommendations for change. Our work in this area is supported by a comprehensive program of research. We have already completed and published reports in relation to seven research projects. Three more reports will be published in February. We have also published seven issues papers.

Details are available on the Royal Commission website.

Early in our work we identified a need to provide recommendations in two areas as soon as possible. The first is redress and civil litigation. The other issue is working with children checks, about which I would like to say a few words.

It may come as a surprise to many people that although discussed by governments for years, Australia still does not have a national or otherwise uniform system for checking the pre-employment history of a person who seeks to work in a paid or voluntary capacity with children.

This is a significant failure by government which must be rectified. As we know our federal structure of government is accepted as bringing many benefits, however there are some areas where the complexities which result from differing perspectives and expenditure preferences create difficulties. A uniform system of checks for those who seek to work with children has proved to be one of those areas.

Because, although the need is obvious, the criteria which should be adopted has been controversial, the Commissioners decided that these issues should be addressed early in our work and a report provided to Government. Our primary consultation work in this area is now complete.

Further detailed discussions are presently taking place and I anticipate that we will publish the final report on this issue in May of this year. It is to be hoped that all governments will respond to the issues raised in a constructive and timely manner. A national framework for working with children checks is long overdue. Its absence is a blight upon the communities' efforts to provide effectively for the protection of children.

Finally, this morning I should reflect on the response which is already evident from both governments and institutions to the issues raised by the Royal Commission's work. It has been overwhelmingly positive reflecting a general acceptance of the need for us all to do more to protect our children.

The cooperative goodwill between institutions, governments and survivor groups was evident in our roundtable meetings. These were always productive with every participant expressing a determination to effectively respond to the issues.

We are also aware of significant changes in the general community. Apart from the efforts of major institutions to repair the outcome of previously inadequate redress responses of which each, or at least part, of the Anglican, Salvation Army and some Catholic communities have committed themselves, our work is bringing change to the policy and practices of many institutions involved with children.

We know of the work which the YMCA is doing to respond to its identified problems and we understand many other childcare providers have moved to review their practices and ensure they meet a suitable standard. We are also working with the Australian Olympic movement to develop effective policies and practices across all Olympic sports which involve children.

We have also learnt of the development by appropriately skilled organisations of audit programs to ensure that institutions adopt and achieve best practice in the care of children.

Apart from the 493 matters we have referred to the Police for investigation we know that more people than previously are bringing allegations directly to the Police for investigation.

As I have indicated, we have provided a rigorous timetable for consideration of the consultation paper on redress and civil litigation. We have done this because we know that there are many survivors who are frail or ageing who are entitled to an effective response through redress for their abuse.

By releasing this consultation paper today, we are encouraging anyone with an interest in the issue to provide a submission to us. This may be done by making a written submission or by providing comments in a short online form. I stress that no one should assume the Commissioners have a final view on any issue. We are seeking submissions which will help us to establish our views and provide recommendations which are just, practical and affordable.

Blue Knot Day 2014

Parliament House Canberra, Australian Capital Territory

27 October 2014

I would like to acknowledge and thank Dr Kezelman and ASCA for the work they do every day to help survivors of sexual and other abuse. In particular can I thank Dr Kezelman for her support of the Royal Commission. Dr Kezelman has been working with us, together with many other people, to develop our recommendations for redress – more of that in a moment.

Blue Knot Day is a reminder that there are many Australians who are survivors of childhood trauma and abuse. The strength, courage and resilience of those who have come forward to the Royal Commission to tell us their story shows us that recovery is possible. That possibility is enhanced by the work of Dr Kezelman and ASCA and the other people and organisations who assist survivors.

The Royal Commission held its first public sitting in Melbourne in April last year. On that occasion I remarked on the number of public inquiries which have considered the abuse, including sexual abuse, of children. I said that over time the community has come to acknowledge that fundamental wrongs have been committed in the past which have caused great trauma and lasting damage to many people.

Although a painful process, if a community is to move forward, it must come to understand where wrongs have occurred. The Royal Commission has been tasked by its Letters Patent to develop an understanding of where we have gone wrong in the protection of children and bring forward recommendations which, so far as may be possible, will right those wrongs and make it safer for children in the future.

The Royal Commission has now heard from about 2,500 people in private sessions. Many others have provided us with a written account of their abuse. We have also conducted 19 public hearings.

The people who we talk to in private sessions cover a broad spectrum of Australian society. Each of their individual experiences has left a mark on their lives. For some that mark is evident in a profound sadness because of their betrayal by a trusted adult. Others carry greater scars. For others the life consequences have been catastrophic.

Each person's story is unique with impacts of greater or lesser significance in their life journey and with differing impacts upon their psychological and physical well-being.

Commissioners have also heard the stories of people who, despite traumatic childhood experiences and the indifferent or negligent response of institutions that had the responsibility to protect and care for them, have never lost their capacity to love and care for others.

We have seen humour and ingenuity among survivors. But we have also witnessed profound sorrow, grief and pain that for many may never go away.

The link between childhood sexual abuse and physical and mental health problems later in life is well-established. Some Australian and international studies have found that, amongst other debilitating effects, childhood sexual abuse can result in higher rates of depression, eating disorders and social anxiety. Child sexual abuse has been linked to psychotic disorders, including schizophrenia.

Commissioners have heard many stories from family members who have told the story on behalf of a loved one who has committed suicide. What is perhaps lesser known about the links between child sexual abuse and mental health is that it is not only the impact of the abuse itself that can lead to devastating outcomes for victims.

The impact of the response by the institution, the survivor's family or others in the community to this abuse may be just as critical.

We have taken considerable steps to ensure that as many people as possible are aware of the Royal Commission and the opportunity afforded by a private session to tell their story. The people who we hear from in private sessions come of their own choice. They self-select. We now have another 1,500 in the queue awaiting a session. The rate of inquiry for a session presently shows no signs of diminishing.

Public hearings are markedly different to private sessions. We have gathered information which would justify a public hearing into more than 1,000 institutions. We obviously could not hold anywhere near that number of public inquiries. For that reason we have carefully selected our public inquiries to include different types of institutions in different geographical locations.

We have also considered the response of supervisory bodies and those responsible for investigating and prosecuting people who are alleged to have sexually abused children. Our purpose is to assist the Australian community to understand what has gone wrong through a representative selection of case studies. From those studied and the research and policy work we are doing, recommendations for change are being developed.

This is not the occasion to discuss the Commissioners' present thoughts on many of the issues confronting the Commission. However, I can say that, from the material we have gathered to date, it is apparent that when our task is complete we will have documented a period in Australian society when institutions failed the children in their care. I do not mean to condemn every institution.

It is clear that many were managed and sustained by the efforts of both volunteers and paid workers who understood how to manage an institution that provides for the welfare of children. But even then we can recognise that many well-intentioned people did not understand and did not respond to failures which should have been obvious in the institutions of which they were part.

Although some institutions operated as single entities most have some integrated or overarching management arrangement or doctrinal regime. Failures may have been evident in the actions of one or a number of people but that does not relieve those in responsible positions who failed to provide appropriate policies to guide the institution and practices to inhibit the actions of the offenders.

From the work we have done we have gained an understanding of failures to protect children in residential facilities, schools including boarding schools, Christian churches of every character, Jewish organisations, kindergartens, after school care, sporting organisations, dance classes, music organisations, scouts, hospitals and other institutions.

There is no difference in the nature of the allegations nor in the mechanism for institutional failure between institutions conducted by government and those in the private sector. When the institution provided residential care it is common to find sexual abuse accompanied by high levels of physical abuse and exploitation of the children's labour, often for little if any reward.

A picture is emerging for us that although sexual abuse of children is not confined in time – it is happening today – there has been 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.

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 which 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, be they youth worker, teacher, residential supervisor or cleric, the power imbalance was entrenched to the inevitable detriment of many children. When, amongst adults who are given the power, there are people with an impaired psycho-sexual development, a volatile mix is created.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and mechanisms which were available to regulate and control aberrant behaviour failed.

This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions. It is confirmed by the development, in recent years, of regulatory control by government over many institutions which provide for children, and the development of education programs and mechanisms by which problems can more readily be brought to attention.

The most obvious is Working With Children regulation, but there are many others. No doubt we all hope that from the tragic personal stories and institutional failures revealed in our public hearings the community will be reminded that both individual institutions and governments failed in their responsibility to children.

Where once silence was demanded, a child's complaint, however tentative in its communication, must be heard and given an appropriate response. Whatever the nature of the institution and however its members are respected by the community we must all accept that there may be members of trusted institutions who fail in their duty towards children. The power of the institution must never again be allowed to silence a child or diminish the preparedness or capacity of adults to act to protect children.

As you all know, the Royal Commission has been tasked with considering many issues, including "ensuring justice for victims through the provision of redress by institutions." Our research and consultation in relation to redress is now well advanced and we anticipate publishing a paper in January which will invite public responses to this complex issue.

Our discussions with a broad range of institutions, survivor groups and Government confirm that everyone accepts that there should be an effective response available to all survivors. That response should include three fundamental elements. First, for those who wish it, there should be an opportunity to engage with the institution where they were abused, receive a meaningful apology and be otherwise supported in a spiritually and culturally appropriate manner.

The second need is for any survivor to have access to counselling or psychiatric care as they may need it during their lifetime. Currently both the limited availability of trained professionals with appropriate experience and the problems faced by many individuals in paying for their treatment mean that there is an obvious gap.

The answer can only be found in a secure source of funds. By some means, funding must be found which ensures that professionals are available to keep people alive and otherwise provide them with the capacity to function effectively.

The third need of survivors is a lump sum payment which marks the abuse and recognises the failure of the institution to keep the person safe as a child.

One of the difficulties faced in providing effective redress is that some of the institutions in which children were abused have ceased to exist. Others have no money. Leaving survivors of some institutions without effective redress, but making it available to others, falls short of the goal identified in our Letters Patent of ensuring justice for victims.

The inevitable consequence is that the community must look both to government and the institutions with the necessary resources to come together to provide a response which provides appropriate redress for all who have suffered sexual abuse as children in an institutional context.

I wanted to talk to you briefly this morning about another important area of our work- the criminal justice system as it relates to the prosecution of offenders who have sexually abused children. Some of the relevant issues are the subject of present controversy amongst the judges of different states.

However, what has emerged very clearly in private sessions is the disconnect between the expectations of people who are not lawyers and the requirements of the criminal justice system. It arises when decisions are being made as to how an accused person should be appropriately tried when there are multiple charges of sexual abuse. I have no present view about the issue but the community does need to reflect upon it and help us to develop recommendations.

It seems that depending upon the particular Australian state where a case is tried, different tests are being applied for the admissibility of tendency evidence. The concern of the judges has been that a jury may be misled into what lawyers call propensity reasoning. If they have knowledge of criminal behaviour by an accused on another occasion, they may be more ready to convict the accused, perhaps erroneously, of the conduct with which he or she has been charged.

One consequence is that when there are multiple charges of sexual assault by the same accused but of different people, judges may rule that rather than risk the jury using impermissible reasoning, each charge should be considered in a separate trial.

It is of concern to learn, as we have in private sessions, of multiple cases where the separation of trials has resulted in the acquittal of all the charges. One man told us of seven charges against the same accused who allegedly abused seven different boys in a boarding school dormitory. Six trials resulted in an acquittal, two in a hung jury.

The Commissioner who conducted the private session had no doubt that the person was telling the truth with respect to his own abuse. The survivor wonders what the jury in his trial would have thought if they had known of the seven other charges founded upon evidence of boys from the same dormitory.

Although these issues have previously been discussed, on many occasions, the evidence of our public hearings has provided an important practical perspective on the controversy. It reveals

how institutional decision-makers generally approach these issues. It is generally at odds with the approach of the lawyers.

Institutions have given evidence of the redress schemes they have developed for survivors. Some institutions have also been sued at common law for damages. In each case the institution must decide whether it accepts the survivor's account of the alleged events.

We have heard, on more than one occasion, of institutions that are reluctant to accept that the abuse happened, when only one person has complained about the alleged offender. However, when others come forward, the institution in most cases readily accepts the allegations and negotiates redress payments or damages.

These institutions are of course reasoning as most lay people will. Ordinary human experience tells us that if a person acts in a particular manner on one occasion, given similar circumstances or opportunity, they are likely to act in the same manner again.

This assumption lies behind Chief Justice de Jersey's discussion last year of the possibility of evidence being tendered in a criminal trial of the prior convictions of an accused. Judges in England can now admit this evidence. Chief Justice de Jersey, when commenting on this reform, asked whether a jury should be denied knowledge that an alleged rapist committed another rape six months earlier or that an accused charged with fraud has a string of similar convictions for dishonesty?

This is but one of the issues we must consider in the criminal justice component of our work. There are many others and the Commissioners look forward to engaging with the legal community, survivors and others with an interest in the criminal law to enable us to develop recommendations for government.

The Royal Commission which was created by the previous Government and fully supported by the present Government provides an opportunity for us all to reflect and come together and where appropriate, to ask the various parliaments to consider legislative changes.

A Royal Commission which is tasked by all of the Commonwealth, State and Territory Governments to look at these issues is rare. The Commissioners are determined to ensure that the opportunity is not lost and that effective change will bring a safer future for the nation's children.

May I again thank Dr Kezelman for the invitation to speak to you today. I look forward to continuing our dialogue as the Royal Commission undertakes its tasks.

14th International Criminal Law Congress 2014

Melbourne, Victoria

9 October 2014

In 1984, John (not his real name), an 11 year old boy, started as a Year 7 boarder at a prestigious Sydney school. He was, as you would expect, distressed from being away from his family for the first time. About two months into the school year, he was in bed asleep, when he was awakened to find his dormitory master sexually abusing him.

The abuse was repeated with escalating severity on several occasions while John was in Year 7. After Year 7, John moved to the Year 8 dormitory. The abuse stopped.

John did not feel able to tell anyone what had happened to him until some years later when he was treated for injuries suffered in an armed robbery.

John then told both his doctors and his parents. In 2001, he went to the police. Following an extensive police investigation, John told us that charges were laid against the dormitory master in respect of offences against seven boys, each of whom had at the time of the abuse been a Year 7 boarder.

A dormitory master or person in a similar role abusing multiple children in his care is a regular feature of the personal stories received by the Royal Commission.

The master denied the charges. What John said upset him the most was that the court ordered that each charge be tried separately.

There were eight separate trials. John's was the last. When giving evidence, John of course could not refer to any factual matters relevant to the other allegations.

Parts of his statement could not be discussed. John has since wondered what the members of the jury might have thought if, the day after they acquitted the dormitory master, they discovered through the media that this was the last of eight trials in which the accused was alleged to have offended against boarders.

There were two hung juries and six acquittals. None of the juries knew that the accused was alleged to have engaged in the repeated abuse of multiple boys within his care.

We cannot know whether the outcome would have been different if any of the allegations had been tried together. What we do know is that John felt let down by the criminal justice system. His concerns would, I suggest, be shared by many in the community. John believes the jury did not hear the true story.

Alan (again not his real name) was abused by a scout leader. As it happened, the leader also abused other boys. The abuse occurred on multiple occasions and extended to penetrative sex.

Alan went to the police but only some years after the events. Frustrated by the slowness of their response, he took matters into his own hands and went to the abuser's house and, in his words, "smashed him up" and smashed his house.

For his offending Alan received three months' imprisonment. The offender received an eight months suspended sentence and was required to pay a victims of crime compensation levy of \$450 to the Crown. "Work that out and stay sober? That's the justice system" was Alan's parting comment to the Commissioner he spoke with in the private session.

When the previous Government announced the establishment of the Royal Commission, the then Prime Minister made plain that the decision reflected a growing awareness in Government and the general community of the widespread and at times systematic sexual abuse of children within institutions.

Over the past three decades there have been many inquiries in Australia which have touched upon or been concerned with the sexual abuse of children.

I am advised that there have been more than 300 inquiries, of which at least 80 have looked at issues directly relevant to the Commission's work. That number speaks to the difficulty the community has found in confronting and dealing with these issues. And, of course, there are many more inquiries into these issues which have been conducted overseas.

Both the Government and Opposition of the day realised that many people had been impacted by sexual abuse within institutions.

It was a challenge to the wellbeing of so many in the community that it needed to be openly discussed, possible causes identified and effective responses developed.

The pain endured by so many for so long, which had been understood by relatively few, required a community response. Although a Royal Commission can be confronting to those investigated and whose behaviour is publicly discussed, the impact from the confrontation can be the occasion for a major shift in community understanding.

This may bring change in the behaviour of individuals and institutions and an effective legislative response.

I have spoken on other occasions of the changes we can already see happening across many of the significant institutions in the country in response to the work the Royal Commission is doing. This is not the occasion to discuss them but it is clear that many if not all institutions responsible for children will be changed by the work we are doing.

To facilitate the work of the Royal Commission the Government decided, and the Parliament accepted, that the *Royal Commissions Act 1902* (Cth) should be amended. Before its amendment, the Act operated through the conventional processes of a Royal Commission including the gathering of evidence at public and private hearings.

The Act did not provide a mechanism for Commissioners to meet with survivors of abuse in a manner which would allow them to speak privately in a setting in which they could understand that someone in authority had listened to and accepted their account. With the support of all parties, the Commonwealth Act was amended to provide a process known as private sessions.

A private session allows a person who may have suffered abuse, or someone who was aware of the abuse of another (commonly a family member) to come to the Commission, talk to one or two Commissioners, tell their story, have it recorded, and have its acceptance acknowledged.

I have previously referred to this as the obligation, which all of the Commissioners accept, to bear witness on behalf of the nation to the sexual abuse of individuals in institutions.

As of last Friday the Commissioners have held 2,452 private sessions. We have also received 2,601 written accounts from survivors or their family and friends. There are presently 1,448 people in the queue awaiting a session. We continue to receive about 41 requests for a private session each week.

We have recently received a two year extension to enable us to complete our work. The continued demand for private sessions was a very significant factor in the Commissioners seeking that extension.

Private sessions are one of the three “pillars” underpinning our work. The others are hearings, both public and private, and our work in policy and research. We will draw upon the work in each area when making our final recommendations for change.

Although the Commissioners understand the need for an early response to many issues, it is important that the recommendations we make, if they are to bring lasting benefits, have been adequately considered and that appropriate people and institutions have been consulted.

The need to conduct sufficient public hearings was a further important factor in the Commissioners seeking an extension of time for our work. Public hearings allow us to examine an institution in detail. They provide both background information and the detail of individual or managerial failure.

We know that our public hearings are having an impact on individuals and institutions. It could hardly be otherwise. When failure is publicly recognised in part of an institution which has a national reach, it would be surprising if other parts of the institution were not examined by the institution itself.

With effective understanding can come an appreciation of the need for change. The extension, provided by the Government, will also allow us to go back and look again at some institutions and discuss how they have responded to identified problems and the effectiveness of their responses.

We must be selective about the institutions we examine in public hearings. Our resources are finite. We have developed criteria to assist us in deciding which allegations and institutions should be the subject of a hearing.

We must conduct sufficient public hearings to ensure that a range of institutional types in different geographical locations throughout Australia are examined. We must also ensure that all important systemic issues are effectively considered in public hearings.

The Letters Patent provide comprehensive terms of reference to the Royal Commission. In addition to bearing witness to the abuse and trauma inflicted on children who suffered sexual abuse in an institutional context, they require us to identify and focus our inquiry and recommendations on systemic issues.

Drawing upon the experience of individuals and institutions and our research work, we are required to make recommendations that will provide a just response for people who have been sexually abused and ensure institutions achieve best practice in protecting children in the future.

We do not have any power to provide compensation or initiate prosecutions. However, we do refer individual cases to police with a view to their further investigation and prosecution. So far I have referred 334 cases.

At the end of our inquiry, our final report must recommend the laws, policies, practices and systems that may prevent or, where it occurs, respond to the sexual abuse of children in institutions.

Our Terms of Reference require the Royal Commission to inquire into what institutions and governments should do to ensure justice for victims through the provision of redress by institutions, and processes for referral for investigation and prosecution and support services.

We will consider justice in the context of civil litigation, redress schemes and support services – our criminal justice work will look at the investigation and prosecution functions.

Our work in these areas may have wider implications beyond the institutional context and our Terms of Reference recognise that any recommendations we make are likely to improve the response to all forms of child sexual abuse in all contexts.

Because of the need for an early response, the Commissioners have given a high priority to issues of civil litigation reform and redress schemes. The Commissioners have agreed to make final recommendations on these matters by the middle of next year.

The issues are complex and the institutional and personal interests diverse. We are looking at statutory limitation periods and the duty that should apply to institutions responsible for the care of children entrusted to them.

Apart from civil litigation, we are considering redress schemes, the criteria for eligibility, who should provide, fund and manage them and the benefits which they should provide. There are many complex questions. We have initiated an extensive consultation process, which will culminate with public consultation in the early part of 2015 and a report by the middle of next year.

Although civil issues required priority we have already commenced our work in relation to criminal justice. Some matters have been considered in public hearings.

They were raised in our inquiries relating to Scouts Australia NSW, outside school hours care at YMCA in Sydney, St Ann's Special School in Adelaide, the Christian Brothers' residential institutions in Western Australia, Swimming Australia in Queensland and New South Wales and the Aboriginal children's home, Retta Dixon, in the Northern Territory.

We know from private sessions that, at least for some survivors, criminal justice is far more important than any compensation or redress. They tell us that they want to see the offender punished for what he (and it is almost always "he") did.

They want the community to know that the offender is not the upstanding person he has perhaps appeared to be, and they want the offender to be forced to acknowledge the very great harm he has done. John and Alan are not unique in their response.

The demand for retribution and denunciation is not surprising. Many of our public hearings have heard individual survivors' accounts of the impact of abuse, in some cases over many decades. Collectively, their accounts, and the thousands of further accounts we have received in private sessions, confirm the lifelong difficulties survivors face in many aspects of their lives.

It is over a year since I acknowledged publicly that it was not until I began my work with the Commission that I came adequately to appreciate the devastating and long-lasting effect which abuse can have on some people. I have also learned that many others in the community have a similarly limited knowledge.

The public hearings and private sessions have provided insight for myself and many other people. Events which lawyers and many others may have thought of as comparatively minor, or at the less serious end of the scale, can have a devastating impact on some victims.

The “get over it” and “get on with your life” response reflects a lack of understanding both of the mechanisms by which damage occurs and the potentially lifelong impact of that damage. As with any significant traumatic event the memory may never be lost.

We will at some point hold a public hearing which focuses on the nature of the impact of sexual abuse as a child and the process by which it occurs. The academic literature has reported for some time on the impact of child sexual abuse. However, the personal accounts through public hearings and private sessions will bring an understanding of the issues to a wider audience.

The criminal justice issues which the Royal Commission must consider extend from reporting to police and police investigations, through all aspects of the trial process and to sentencing, appeals and post-sentencing measures.

In New South Wales, at least since the paedophile reference to the Wood Royal Commission into the New South Wales Police Service conducted from 1995 to 1997, and some other jurisdictions, there have been significant reforms to police practices and procedures in relation to investigating allegations of child sexual abuse, and to cross-agency cooperation in child protection activities.

Since the 1970s and 1980s, all Australian jurisdictions have made significant amendments to sexual offences and child sexual abuse legislation. Some of these amendments have explicitly focused on child protection concerns, such as mandatory reporting laws. Others amendments, such as the introduction of offences where the accused is in a position of authority or trust in relation to the victim, have particular relevance for offending in an institutional context.

Most jurisdictions have also modified the process by which complainants who are children or other vulnerable witnesses can give evidence.

Because the issues that confront the criminal justice system in relation to child sexual abuse are not new, we are being careful to target our research program so that it does not duplicate existing work.

To assist us in identifying the issues we should consider we have established a Criminal Justice Working Group. It comprises a group of practitioners and academics who specialise in relevant fields.

It is important to recognise that we are not one Royal Commission. We have letters Patent from the Commonwealth and States and are also charged with examining these issues in the Territories. Because the criminal justice issues we are concerned with are the responsibility of the States we must make findings and develop recommendations for each jurisdiction. History teaches us that this can be a difficult task. Our research work reflects these complexities.

The reports of our first four research projects are available on the Royal Commission website. These reports identify child sexual abuse offences across Australian jurisdictions, review the history and present state of Australian mandatory reporting laws, examine the relevance of child exploitation material to child sexual abuse and provide an historical review of these offences. They were carried out by the Australian Institute of Criminology and other academics.

With the advice of the Criminal Justice Working Group, we have a further three external research projects currently underway, including research on the impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases, an extensive sentencing research study, and research on the use of alternative mechanisms for taking a complainant's evidence.

With respect to police, there are a number of issues we need to examine. We are looking at the use of specialist child sexual abuse units within police and the use of cross-agency specialist child protection units. We will consider issues of information sharing and communication, and how police intelligence is used in child protection when charges are not laid or a prosecution does not proceed.

In relation to prosecutions, we are looking at public prosecutors, including the adequacy of current prosecution guidelines, decision-making processes around decisions not to prosecute and whether there should be specialist child sexual abuse prosecution units.

We are looking at a number of issues in trial processes, including whether there should be specialist child sexual abuse courts, whether the current processes for receiving complainants' evidence are appropriate and are being used, and whether the limits on cross-examination of complainants are appropriate and are being used. We are looking at directions and warnings to juries that are often given in child sexual abuse proceedings.

Critically in this area, we are also looking at the admissibility of tendency and coincidence and relationship evidence. We are looking at John's problem, the issue of multiple charges, including from more than one complainant. I will say a little more about this later.

With respect to sentencing, we are seeking to get a better understanding of the sentences which have been given for child sexual abuse offences committed in an institutional context and the factors that influence those sentences. We are looking at whether the range and present structure of sentencing options are appropriate.

We are also looking at appeals in child sexual abuse cases, and particularly some of the issues that arise where jury verdicts are challenged because of their asserted inconsistency.

Our work on sentencing and appeals will also help in considering whether current offences for child sexual abuse are adequate and appropriate. Following the Victorian Parliamentary Inquiry, the Victorian Parliament recently enacted a new offence, s 49C of the *Crimes Act 1958* (Vic). This offence targets failures by persons in authority in an organisation that exercises care,

supervision or authority over children, to protect a child under 16 years of age from a sexual offence committed by an adult who is associated with the organisation.

The person in authority will commit the offence if he or she knows that there is a substantial risk that an adult associated with the organisation will commit a sexual offence against a child who is or may come under the care, supervision or authority of the organisation, and negligently fails to reduce or remove that risk. The offence can be prosecuted without proof that a sexual offence has been committed. The maximum penalty is five years' imprisonment.

Emeritus Professor Arie Freiberg, who is well known to this audience, has been engaged to help us with our work in sentencing. He has suggested that, apart from the Victorian legislation, we consider whether there should be an offence that applies to the institution, as well as individuals within it.

He raises the question whether, if there are significant failures in an institution's response to child sexual abuse, or if there is an institutional culture that encourages or tolerates abuse, should the institution be criminally liable, in addition to the individual abuser? If it is thought that an institution should be criminally liable, apart from the complexities of the drafting, thought needs to be given to the sanctions that might best bring about changes within the institution to better protect children.

I should of course emphasise that the Commissioners have no views on any of these matters at this stage.

As I have mentioned, any process which recommends change across all Australian jurisdictions presents practical challenges. In some respects, these challenges bring an advantage. Some States have already identified new approaches to some of the issues and we will be able to identify what may be working best. We will also consider relevant developments in overseas jurisdictions.

It will be apparent to you that some of the issues we must examine are not new. Those of us who have been involved in criminal law, whether at the police investigation stage or at the trial or appellate level, know well the consideration that sexual abuse issues, and child sexual abuse issues in particular, have received in bringing reforms across police and prosecution practices and trial processes over the past few decades.

In spite of the issues being well known, and in spite of decades of reform, the preliminary results from some of our research suggest that the opportunity to secure justice for victims of child sexual abuse through the criminal justice system may in fact be decreasing, rather than increasing.

We have engaged Associate Professors Judith Cashmore and Rita Shackel and Professor Patrick Parkinson of the University of Sydney to conduct research into the impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases.

While the project is continuing, their preliminary analysis of police and court data from New South Wales suggests that there has been a fairly steady increase in the number of incidents of child sexual assault offences reported to Police from 1995 to 2013, with a short, above-trend increase following the Wood Royal Commission. These are reports of child sexual assault, being the most serious offences involving penetration, separated out from reports of indecent assault, acts of indecency, and other sexual offences.

For the same period, the preliminary analysis of the data shows that the proportion of child sexual assaults reported to police in respect of which the person of interest proceeds to court – that is, where there are charges laid – has declined quite dramatically, from around 60 per cent in 1995, to around 15 per cent in 2013. This decline in the proportion of child sexual assault reports leading to charges or prosecutions has occurred in relation to both child sexual assaults reported when the complainant was still a child, and to child sexual assaults reported when the complainant was an adult.

The researchers are also considering South Australian data in this study. It is not clear from the South Australian data that there has been the same reduction in reported child sexual assaults proceeding to court in South Australia as appears to have occurred in New South Wales.

The South Australian data suggests that there has been a decline in reporting of child sexual assault and indecent assault in South Australia, following a peak around the Layton and Mullighan Inquiries but there has been an increase in the numbers of defendants at court charged with child sexual assault offences since 2005.

The indication from the preliminary analysis of New South Wales data that reports of child sexual assault are up but prosecutions are down, both as a proportion of reports and in absolute terms, is not at all what we would have expected to see. The rate of attrition in sexual abuse cases, and in child sexual abuse cases in particular, has long been notoriously high. But if it is increasing this is troubling. In light of the decades of reform, we would be entitled to expect it to be getting considerably better.

The issue has greater significance than might first appear. Relevant criminal convictions, and in most Australian jurisdictions charges, are essential information in the assessment of a person's suitability under the working with children check regime. Working with children checks are one important procedure for keeping known offenders, or those assessed as particularly at risk of offending, from working with children.

If alleged offenders are not being charged, or the charges are dropped without trial, we must consider the impact upon the effectiveness of regulatory measures that primarily rely on convictions and charges for their operation.

Without buying into debates about how effective gaol terms are in achieving general or specific deterrence, the literature suggests that in areas of concern to us the risks of detection and the speed of punishment are significant deterrents to offending. If, in spite of increased reports to police, there are fewer prosecutions for child sexual assault, then what impact might this have on deterrence? If there is an impact, and there may not be, it is unlikely that it could be positive.

If it is the case that there is a decline in prosecutions in New South Wales which is replicated across all Australian jurisdictions we must ask why is it occurring.

Are there fewer prosecutions because complainants, or their parents, are deciding that they do not want to proceed through the criminal justice system?

If this is the reason, we need to understand whether this is because the criminal justice system is too damaging or traumatic for complainants, despite reforms over the past 20 years, or whether it is because some complainants do not place importance on pursuing criminal justice. It may be that their needs are met through other mechanisms.

If the system is too damaging or traumatic for complainants, then we must consider how the system could be improved for the complainant, while still delivering a fair trial for the accused. If some complainants are not interested in pursuing criminal justice, we will need to consider how the child protection system can still be appropriately informed by intelligence from reports to police that do not become the subject of charges, so that the regulatory measures that draw on both charges and convictions are not compromised.

Of course it is also possible that if there are fewer prosecutions, this may be because of a change in police or prosecution practices.

Resourcing issues for police and prosecutors are perennial. It is possible that they are impacting on the prosecution of sexual offences, particularly if resources have been reallocated in accordance with changing priorities. We will try and find the answers.

It may also be that prosecutors are becoming more conservative in the child sexual abuse cases they will prosecute. If this is the explanation, it is reasonable to ask whether a more conservative approach is appropriate. If it is occurring, is it because of perceived difficulties in successfully prosecuting child sexual assault offences? Is this because tests for admissibility of tendency and coincidence evidence, and for joint trials, are too onerous? Are the jury directions and warnings appropriate? Do they reflect what we now know about how child sexual abuse occurs and is reported? Do they have an inappropriate impact on jury decision-making? Is a complainant's evidence readily undermined, not because it is essentially unreliable, but because of the manner in which trials are conducted?

These are questions that have an added importance if they are contributing inappropriately to a reduction in the number and rate of prosecutions for child sexual assaults.

Our research, that suggests decreasing rates of prosecuting reported child sexual assaults in New South Wales, was commissioned for quite a different purpose. The original purpose was to examine the prosecution process for allegations of child sexual abuse that are reported to the police following a delay in disclosure or reporting, compared to the prosecution process for allegations of child sexual abuse that are reported more contemporaneously with the abuse.

The preliminary results of the first step of analysing recent crime reporting and courts data have revealed the quite separate and surprising indication of decreasing prosecutions for child sexual assault. We will consider with the researchers how best to further this investigation.

One of the difficulties for complainants in both sexual assault and other areas of crime is that they have very limited means, if any, of questioning the decisions made by Directors of Public Prosecution. Some feel this acutely, both when charges are reduced but more so if charges are dropped altogether.

Many of the Prosecution Guidelines adopted in Australian jurisdictions encourage or require consultation between the prosecutor, the complainant and the police. Many of the Guidelines also encourage or require the giving of reasons for discretionary decisions, including decisions not to prosecute, to people who have a legitimate interest.

In the public hearing into Swimming Australia in July this year, we heard evidence from the New South Wales and Queensland Directors of Public Prosecutions with respect to their Guidelines and decision-making processes. We heard similar evidence in the Retta Dixon hearing in Darwin. In each case representatives of survivors suggested there were significant flaws in the decision-making process and at least in Retta Dixon a failure to follow Prosecution Guidelines. What became clear in these hearings is that there is no external oversight or accountability of offices of the DPPs in Australia.

In Victoria, there is a Director's Committee, an internal body. That Committee, among other tasks, advises the Director on "special decisions", including decisions to discontinue proceedings or to issue a no-bill. Where a meeting is held to consider a "special decision", the Committee comprises the Director of Public Prosecutions and the Chief Crown Prosecutor, and for some special decisions, the most senior prosecutor or other lawyer concerned in the matter. The Director may make a decision contrary to the Committee's advice, but must provide reasons to the Attorney General, which are required to be tabled in Parliament.

Of course, the establishment of independent DPPs is well understood as arising from the need for prosecutorial decisions to be made independently of the political pressures of the day. But DPPs in Australia today are one of the very few administrative decision-makers whose decisions are not subject to judicial, parliamentary or executive oversight, or any other form of oversight or review. It is relevant to ask whether this is appropriate.

In the United Kingdom, prosecutorial decisions made by the DPP are amenable to judicial review, although the courts acknowledge that their powers in this respect are to be exercised sparingly. There are constitutional impediments to allowing judicial review of prosecutorial decisions in Australia because of the separation of judicial power doctrine. (See *Likiardopoulos v The Queen* (2012) 247 CLR 265). I am not sure the logic of that position would resonate with some complainants.

The United Kingdom also has a Crown Prosecution Service Inspectorate, with an independent statutory office of Chief Inspector. The Inspectorate may conduct inspections of the operations of the Crown Prosecution Service in particular geographic areas or in relation to particular themes or types of prosecution nationally. The Attorney-General may also refer specific cases that have caused public controversy to the Inspectorate for review.

Further, the United Kingdom has recently established an Independent Assessor for Complaints. The Independent Assessor handles and investigates complaints from members of the public about the Crown Prosecution Service and may conduct audits of complaints.

There have been suggestions for some form of oversight of DPPs in Australia. In 2001, two options for oversight of the New South Wales Office of the DPP were considered. Both were rejected.

The proposed Public Prosecutions Management Board would have had oversight of management, administrative and financial decisions, but not prosecutorial decisions. The proposal was criticised by both the then DPP and the then Senior Public Defender on the basis that oversight of administrative matters by the head of the Attorney-General's Department, as a member of the Board, could permit indirect interference with prosecutorial decision-making. I can understand this criticism but a different structure which assures independence from government may have been worth considering.

The second proposal was to establish a Parliamentary Joint Committee to set the Office of the DPP's budget, to monitor and review the exercise by the DPP of his functions, and to recommend changes to the Office of the DPP's functions, structures and procedures.

The Joint Committee would also have had the power to require the DPP or a Deputy DPP to furnish the Committee with reasons why he or she chose not to proceed with, or appeal, a particular case. The proposal for a Joint Committee did not proceed. It was criticised because of the suggested possibility of political interference with the DPP.

Whether Australian DPPs should be subject to some form of oversight or external accountability is an issue that we must consider. What is plain is that independence brings with it an increased obligation to ensure that the decision-making process is of the highest integrity and administrative practice is beyond any legitimate criticism. A lack of any external oversight, including of administrative process, brings the risk of failure in the decisions which are made.

I must emphasise again that the Commissioners have no concluded views on any of these matters, whether as to causes of a decrease in the prosecution of child sexual abuse or as to possible reforms. These issues do, however, highlight the scope and importance of the work that we are undertaking and some of the matters on which we will be seeking the profession's input and assistance, as well as that of the broader community.

I want to say something further about John's issue. Many people have raised it. Complainants feel a great frustration when allegations of child sexual abuse in an institutional context are made by multiple complainants against the one accused, and they are ordered to be dealt with in separate trials.

Many people have told us in private sessions of the unfairness they see, when an accused faces separate trials and is acquitted, without the jury having heard anything of the other allegations. Survivors have told us how distressing and unfair they feel it is when they are required, in their evidence, to omit what to them are important parts of their accounts of what occurred, and to limit themselves – in their view, artificially – to a partial account of the events.

We must consider the rules relating to the admissibility of tendency and coincidence, or at common law propensity and similar fact evidence, and the circumstances in which joint or separate trials are ordered.

It is not an easy task even to establish how the relevant law is currently applied in practice in each Australian jurisdiction. Only Queensland retains the common law as set out by the High Court in *Pfennig v The Queen* (1995) 182 CLR 461. Queensland has, however, modified the common law to abrogate the High Court's decision in *Hoch v The Queen* (1988) 165 CLR 292, by legislating that similar fact evidence must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion.

Western Australia and South Australia have adopted different statutory tests for the admissibility of this sort of evidence, termed "propensity evidence" in Western Australia and "discreditable conduct evidence" in South Australia. The South Australian provisions, which commenced on 1 June 2012, have been held in that State to have ousted the common law.

The remaining jurisdictions, being the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory, have each enacted the Uniform Evidence Act provisions, replacing the terminology of propensity and similar fact evidence with tendency and coincidence evidence.

Even with uniform provisions, however, it is not clear that the legislation is applied in the same manner in each jurisdiction. In particular, in *Velkoski v The Queen* [2014] VSCA 121, the Court of Appeal of Victoria recently set out its analysis of what it has identified as a divergence between the appellate courts in New South Wales and Victoria on the admission of tendency evidence under the Uniform Evidence Act provisions. In *Saoud v The Queen* [2014] NSWCCA 136, the

New South Wales Court of Criminal Appeal expressed some doubt as to whether there is a real difference of approach between New South Wales and Victoria such that comparable cases would be decided differently in each State. This is a matter we will consider.

There are at least five possible grounds of divergence. First, the Uniform Evidence Act requires the “probative value” of tendency or coincidence evidence to be assessed. In New South Wales, Tasmania and the Australian Capital Territory, this assessment requires the court to look at what it is open for a tribunal of fact to conclude should the evidence be accepted. Only in limited circumstances would credibility or reliability be considered.

However, in the Victorian Court of Appeal decision of *Dupas v The Queen* (2012) 218 A Crim R 507, a five judge bench unanimously said that probative value always requires consideration of the reliability and weight of evidence, and that authorities to the contrary were “manifestly wrong”.

Second, the Uniform Evidence Act requires tendency or coincidence evidence to have “significant probative value” before it can be admitted. Although in New South Wales, Tasmania and the Australian Capital Territory, the word “significant” has been read as meaning “important” or “of consequence”, in *Semaan v The Queen* [2013] VSCA 134, the Victorian Court of Appeal said that the word is better read as meaning “substantial”. This is said to import a more onerous threshold of admissibility.

Third, in New South Wales, Victoria and the Australian Capital Territory, it is accepted that the possibility that tendency or coincidence evidence has been concocted or is contaminated can affect its probative value. However, whereas Victorian and earlier New South Wales decisions said that the “real chance” of contamination or concoction will always prevent the evidence from having significant probative value, in *BJS v The Queen* [2011] NSWCCA 239; [2013] NSWCCA 123, the Court of Criminal Appeal of New South Wales denied that this will always be the case.

Furthermore, in the Tasmanian decision of *Tasmania v W* [2012] TASSC 47, Blow J expressed the view that concoction or contamination is simply not relevant to the question of significant probative value.

Fourth, a question that has recently received public attention is whether the incidents described in tendency evidence must be similar before the evidence can have “significant probative value.” In particular, in *Velkoski v The Queen* [2014] VSCA 121, the Victorian Court of Appeal said that “evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct.” The Court said that recent New South Wales decisions had departed from that principle and therefore gone “too far in lowering the threshold to admissibility.”

Last week, an ABC news report colourfully suggested that the ruling of the Victorian Court was “a clamp down on the way child abuse cases are handled” and “could thwart convictions” by “making it harder for groups of victims to band together” in joint trials. The report also quoted a Victorian Police Assistant Commissioner and the Victorian Attorney-General, both of whom said that the different approaches to tendency evidence in different jurisdictions need to be examined on a national level.

Fifth, when an appeal is made from a trial judge’s ruling on the admissibility of tendency or coincidence evidence, there is some uncertainty about what level of appellate restraint the court should apply when reviewing the trial judge’s decision. While early New South Wales and Victorian authorities were inconsistent whether the high level of restraint described in *House v The King* (1936) 55 CLR 499 did not apply to tendency or coincidence rulings, it has now been settled in those jurisdictions that it does. However, in *L v Tasmania* (2006) 15 Tas R 381, a majority of the Court of Appeal of Tasmania followed the earlier New South Wales authorities that held the contrary.

Understanding the different approaches across Australian jurisdictions is important, as is determining what the approach should be. It is common for persons who commit child sexual abuse in an institutional context to offend against more than one victim and sometimes over extended periods of time.

Our second public hearing examined the response of YMCA NSW to Jonathan Lord’s sexual abuse of 12 children during 2010 and 2011. Multiple offending against multiple victims in institutional contexts is, regrettably, not just an occurrence in the distant past.

No doubt we all expect and certainly hope that the opportunity for perpetrators to offend over extended periods of time will be significantly reduced, if not eliminated, by improved institutional responses, both as a result of increased attention to the issue arising from the Royal Commission’s ongoing work and as a result of the recommendations we will make.

In the recent public hearing into Swimming Australia, evidence was given by Lloyd Babb SC, the current Director of Public Prosecutions in New South Wales. Mr Babb told the Commission that his impression is that joint trials do “impact on the rate of acquittal”, because “put in their proper context, offending against multiple complainants is powerful evidence”. Mr Babb suggested that “presumptions (in favour of) joint trials where there are multiple complainants is worth considering”.

Such a presumption has been legislated for in Victoria and in the Northern Territory, although in *R v Popamitrou* (2004) 7 VR 375 the Victorian Court of Appeal said that where evidence for offences against different complainants is not admissible against each other, the common law skepticism against joint trials will remain “influential”.

Mr Babb also expressed concern that, with respect to the admissibility of tendency evidence under the Uniform Evidence Act, “the idea of striking similarity pervades the mind of decision-makers sometimes” despite in his view the legislation having superseded this common law idea. He advocated clarification to the legislation to make plain that striking similarity is not required.

There are many other suggestions for change in this area – some are not new. One of course is the previously mooted suggestion for specialist child sexual abuse courts. This may exclude juries but provide for a judge sitting with expert assessors. It has been suggested that judges would not face the same difficulties as juries in avoiding impermissible propensity reasoning. Failures would be revealed in their reasons for decision and could be dealt with on appeal.

The need for potentially complex jury directions to lay jurors in joint trials which may not be understood would be removed, as would the need to restrict a witness’ evidence in separate trials. On the other hand, we have traditionally placed great importance on the availability of a jury’s fact-finding in criminal trials including sexual assault.

Eliminating juries may be at the fairly extreme end of reform options in this area. There may be other suggestions that could be considered to increase the availability of joint trials for child sexual abuse matters.

The focus of the Royal Commission must be on child sexual abuse in an institutional context. However, any changes we recommend to criminal law and procedure will affect the criminal justice process for all sexual offenders and their victims. As we turn our public focus to the criminal law, we will be seeking the assistance of the judiciary, the profession and the broader community in identifying and evaluating any proposed reforms.

We have also instituted a sentencing research project which is focusing on child sexual abuse in an institutional context, including the factors that influence sentencing for that offending.

Because the criminal law presently makes little distinction between institutional and non-institutional child sexual abuse sentencing data on child sexual abuse offences, regardless of whether there is an institutional aspect, will help us to assess whether the range of offences for child sexual abuse and the current sentencing responses are adequate and appropriate.

If I have managed to excite or alarm you by this brief discussion of the Royal Commission’s interest in criminal justice, it has been a good morning’s work for me.

I hope you follow our work and will be ready to help us when we ask for input on these issues.

We are planning a consultation program to include the judiciary and the legal profession in each Australian jurisdiction.

You do have some time to get ready for this process. Our first step is to be sure that we have up-to-date data and robust research, not just to inform our own work but also to help inform those who engage with us. We probably all have a bit to learn about each other's jurisdictional differences and different ways of doing things. We certainly need to know as much as we can about what is happening to child sexual abuse cases in the criminal justice system now, or at least as recently as the data will allow.

We will continue to publish reports of the criminal justice research we have commissioned as they are finalised. I encourage you to keep an eye on our website for relevant publications. We also expect that our public hearings will continue to raise criminal justice issues, which may be dealt with in more or less detail in that hearing, depending on the focus of the particular hearing.

We will publish issues papers seeking public submissions on some issues in criminal justice, including issues relating to police.

We all know that many of the issues the Royal Commission must consider are not new. But nothing we have seen in our work to date suggests that the criminal justice system's current response to victims of child sexual abuse is without controversy. Even when the issues have been considered before, the contemporary understanding of the current system may have changed. The most up-to-date prosecution data to which I have referred earlier suggests that there are issues in relation to child sexual assault prosecutions that we may not have appreciated, and that we do not yet understand.

I look forward to discussing all these matters with you as we develop our ideas.

Care Leavers Australia Network 2014

Care Leavers Australia Network (CLAN) 14th Australasian Conference - Sydney, New South Wales

5 July 2014

Thank you for inviting me to join with you to celebrate the 14th anniversary of the Care Leavers Australia Network.

When we first started our work the Commissioners decided that it was essential that we meet with representatives of the various organisations which support survivors. This proved to be a wise decision. CLAN and the others who work to help survivors of sexual abuse have provided us with assistance in a variety of ways.

They have been important in building trust in our processes and encouraging people to come forward to tell their story to the Commission.

As all of you who have come together today appreciate, when a person suffers sexual abuse as a child the impact can be devastating. For some those impacts last for the whole of their lives.

Many suffer from an inability to form effective personal relationships. In some cases their education is compromised, often catastrophically. They can find themselves isolated, impoverished and seriously disabled.

The initially bright, achieving, energetic ten year old may be befriended and made to feel special by a person with teaching or pastoral responsibility who then abuses them. A life full of promise and expectation may be fundamentally compromised. The innate qualities of a happy child can make them the target for the evil deeds of an abuser.

As you know many people who have suffered abuse have great difficulty in talking of their experience until well into their adult lives. Some will exhibit the adverse consequences of the abuse at an early age. For others those consequences may not be apparent, at least to others, until later in their lives.

All who have been abused need the support and advocacy of organisations like CLAN. I appreciate that not everyone who is a member of CLAN has experienced sexual abuse. But for many of them their childhood experiences have brought disadvantage and suffering.

The Royal Commission was created after some years of public discussion and increasing controversy surrounding the sexual abuse of children. Why it was that the pressure for the inquiry finally proved irresistible in this century rather than previously is not clear.

A senior member of the Roman Catholic Church recently acknowledged when giving evidence to the Commission that, although our direct knowledge of abuse and the institutions in which it has occurred must be limited to the lifetimes of those who are still alive, there is no reason to assume that abuse is a phenomenon confined to the period after World War II.

Indeed, from what we are learning such a view would properly be described as naïve.

We have been told in evidence on more than one occasion that there was a view in the Roman Catholic Church, at least in the 20th century, that the sexual assault of children by touching and other inappropriate physical acts, short of penetration, was a “moral failure” but not a crime.

This raises questions of contemporary significance. Apart from the problem of defining moral failure, why did such a view, which is out of step with the community values reflected in the criminal law, emerge?

Furthermore, if, as appears likely, that view was common in the Roman Catholic Church, was it a view held more generally in the community? If it was, why was it not challenged in previous generations? Providing answers to these questions requires consideration of the value structure in our society in earlier generations. The answers may provide valuable lessons for contemporary institutions.

It is not uncommon to hear people talk of the events which the Royal Commission has been asked to consider as confined to the past. They are often described as “historical”, the implication being that they are not of contemporary relevance. It is true that many of the allegations that have been brought to us relate to events which occurred more than 20 years ago.

Many are more recent. However, it is important to understand that when a person is abused as a child it is most likely that they will not be able to talk about it for at least a period of 20 years, in some cases significantly longer. Only this week a man aged 84 came to a private session and related a story of very significant abuse which he suffered as a child.

He told the Commissioner who talked with him that he had never previously told anyone that he had been abused. Many others have given a similar account.

This week we learned of the verdict of the jury in relation to Rolf Harris. Newspaper reports suggest that as a consequence of the publicity and the jury’s verdict more victims have come forward. This is not surprising. It is becoming apparent as we do our work that as the issue of abuse is raised and talked about survivors increasingly feel able to bring their own story to the authorities.

That which may have been kept secret for years may now be told. The burden of guilt and shame which many have felt is lifted by knowing that others who have suffered have overcome their reticence. It becomes legitimate to talk openly of their childhood experience.

Rolf Harris is 84 years of age. The trial judge is reported to have said that his crimes require a custodial sentence. Although many of his victims were abused decades ago, the appropriate contemporary response of the criminal justice system, which must acknowledge his age, is not diminished by the fact that it has taken many years for the victims to report.

Our experience in speaking with survivors tells us that those who have suffered from Harris' criminal acts will believe that, notwithstanding his age, Harris must be punished for his actions. They have suffered and, in their minds, so must he.

We must never assume that although an allegation relates to events said to have occurred many years ago, the bringing of that allegation to the appropriate authorities will not make a significant contribution to the victim's life.

There are many other lessons to be learned from looking at past instances of abuse. Apart from exposing the actions of an individual abuser, public understanding of the institutional context in which abuse has occurred is of fundamental importance to the community. Although painful, it is also important to the institution.

The exposure of failures enables the institution to confront its problems and both recognise and accept the need to implement change. It allows those who participate in the activities of or otherwise engage with the institution to understand how it failed, giving them knowledge which will assist the institution to avoid problems in the future.

It has been reported to us that many of the institutions we have publicly examined have responded by examining the cause of their problems and how they may be overcome. We also know that other institutions, who have not yet been examined in public, are conducting similar reviews.

The Royal Commission has provided the incentive for those who have the responsibility for children in institutions to acknowledge the potential for failure and make changes which will minimise the risk of those failures being repeated in the future.

As you know, although many people believed it would take longer, the Royal Commission was originally required to complete its work by the end of 2015. Now that we understand the nature and scope of the problems the Commissioners have been able to define the "project" which we believe must be completed if the issues are to be adequately addressed.

That project requires two further years of work beyond the end of 2015. As we state in the Interim Report, that time is required to complete the essential private sessions and public hearings and develop the authoritative policy initiatives.

Even then we will only be able to publicly investigate a small fraction of the institutions where we have received allegations. We know of more than 1,000 we could look at.

Even with another two years we can only look at about 60. With the knowledge we now have the Commissioners have defined a “project” which we believe will enable Government, relevant institutions and the community to understand what has happened and make changes to ensure that institutions are a safer place for our children.

However, we are firm in our view that the Royal Commission must complete the project by the end of 2017.

Although we have asked Government for two more years we are conscious of the pressing need which many institutions have for recommendations across a range of issues of particular concern.

I have said on more than one occasion that notwithstanding any final reporting date, the Commissioners will report to Government in relation to particular issues as soon as our work in relation to an issue is complete.

However, it is also important to recognise that recommendations for change either by statute, regulation or institutional practice must be properly considered and consultation across all of the jurisdictions must occur. We are not just a Commonwealth Commission but have Letters Patent or similar authority from each of the States and Territories.

Most Royal Commissions are given objectives which confine the issues which must be examined. Consideration of the Terms of Reference of the other two Royal Commissions presently underway in relation to home insulation and trade unions makes this plain.

When our Royal Commission was set up nobody knew how many people would come to talk to us, nobody knew how many institutions might have to be looked at and nobody had assessed the complexity of the policy issues which required resolution.

Our Letters Patent require the Commissioners to fully explore claims of systemic failures in institutions and look for those from which best practice can be identified. We have now held 14 public hearings in which a variety of systemic failures have been examined.

Two of those hearings are the subject of a public report. More reports will soon follow. We have also been able to identify and have discussed areas where institutions have responded appropriately to the issues which have confronted them. Although we will separately report on each of the public hearings, we will draw from those hearings particular issues which will be carried forward, and through a structured process develop recommendations for change.

The task we have defined contemplates a total of 70 public hearings, assuming we complete our work at the end of 2017. We will be able to look at only about 60 institutions. You will understand why today I do not give you a list of the institutions which we will seek to examine.

However, there is a detailed list which we have determined having regard to the type of institution, its geographical location, the nature and number of allegations we hold in respect of that institution and the systemic issues which may be revealed by a public inquiry.

The Letters Patent emphasise the importance of allowing survivors to share their experiences to both assist with the healing of survivors and assist in developing strategies and reforms.

We have now conducted almost 1,900 private sessions. Although for many survivors a private session is a difficult and stressful experience, the overwhelming response we have from people is that they have found it beneficial and healing to be able to tell their story, often for the first time, to a member of the Royal Commission.

Apart from those who have come to us in private sessions we have approximately the same number of people who have provided us a written account of their experience. This means that we have now received well over 3,000 stories of the abuse suffered by people when they were children.

Many people in private sessions have told us that they have come to tell their story in the hope that by doing so the abuse which they suffered will never be suffered by another child. Many have reflected upon the failures of their particular institutions and come with suggestions for change.

Not surprisingly they emphasise the need for children to have the ability to be able to report what has been happening to them. Empowering children to be able to speak to parents or other adults in a supervisory role and, most importantly, be believed, is a fundamental need recognised by many.

Another issue commonly identified by survivors is the lack of understanding by a child of the fact that the conduct of the abusive adult is something which should not have occurred.

Many survivors report that, being a small child, they did not understand the nature of the abusive act and the purpose of the adult in inflicting it upon them. It is critical to our endeavour to provide child safe environments that the Commissioners explore these issues with the assistance of people who have devoted their professional lives to research in the area.

There has been some discussion recently about the manner in which the Royal Commission is undertaking its task. There are clearly some misconceptions. The Commissioners welcome public discussion of our work. But we do ask that those who engage in that discussion first read the speeches I have made and consider the reports we have released. It is only informed discussion that will help us in our work.

Firstly, as I have already said, but it bears repeating, it is not correct that any institution will have to wait until the end of the Commission to be told of our findings and recommendations. Two reports, dealing with Scouts and out-of-home care and the YMCA have already been published.

The YMCA have already responded by making significant changes in personnel and reviewing their practices. We will provide separate reports in relation to policy issues as soon as the detailed work to bring forward authoritative conclusions and recommendations has been completed.

Secondly, we have not only heard from church leaders: Government agency heads have given and will continue to give evidence where this is relevant.

Thirdly, roundtables and other public consultations are an important tool in the Commission's work. For those who are interested podcasts will be made available of each roundtable and a summary will be published on our website.

We do this to ensure that the next stage in our consideration of any issue benefits from informed discussion with people, institutions or governments who know what others have said and may as a consequence assist with a focused and mature consideration of the issue.

Fourthly, one of the many imperatives in the Letters Patent obliges us to enquire and make recommendations which ensure justice for victims of sexual abuse through redress, support services and referral of allegations for investigation and prosecution. I know that these are difficult issues. We have no choice but to consider them.

Many survivors have told us of their experiences when they complained of their abuse to the institution in which it occurred. Some institutions have developed a formalised process for their response. Others address these issues in an ad hoc fashion. In some States redress schemes, which include modest monetary payments, have also been developed. However, they are not universal.

Providing an appropriate response and redress to a person who has been abused raises many complex questions. A number of institutions have recognised the need to review the response which they have made to people in the past. However, they are hesitant to move forward without understanding the recommendations which the Royal Commission may make in this area.

Notwithstanding the complexities of the task we recognise the need to address these problems at the earliest possible date. We have developed a program which will allow us to identify the issues, collect relevant information and provide recommendations. We are seeking to publish our conclusions in a separate report by the middle of next year.

Some of you will be aware of the complexities involved. It is common for institutions to recognise the need to separate their pastoral or restorative response to a survivor from any process which provides monetary redress or compensation. Institutions which have responded by offering money have generally also been the decision-maker as to the amount which should be provided. Such a process is burdened by a fundamental conflict.

That conflict is evident in some schemes where a cap is placed on the maximum payment which can be made. Although a redress scheme may need a cap, if it is imposed arbitrarily by the institution responsible for the payment it can be difficult for a survivor to accept the process as other than token and insincere. The problems are made worse if the person seeking redress is not aware that the institution has imposed a cap.

Survivors generally identify three fundamental elements of an effective redress scheme. Many people seek an apology from the institution, and sometimes from the abuser, which acknowledges and accepts responsibility for the harm done to them. They need the institution to accept that a member of that institution inflicted great harm and has caused great suffering.

Many survivors have a need for effective and ongoing counselling provided by appropriately qualified professionals. This comes at a cost, particularly where in some cases counselling is necessary for years or decades. Survivors understandably look to the institutions to meet that cost.

Apart from suffering personal health issues many survivor's lives have been seriously compromised in other ways. In some cases the damage is so great that they have never been able to complete an education, establish satisfactory personal relationships and provide the security of a home and other basics of life.

The process by which the sexual abuse of a child can seriously damage the personal development of the individual may not be fully understood. However, it is clear beyond argument that for some people this will occur. To help with these difficulties many survivors seek a money payment. For some it brings an acknowledgment of the failure of the institution. But for others it reflects a need for financial assistance to sustain their lives.

I appreciate that people from various organisations, including your own, Leonie Sheedy, have called for a nationally funded redress scheme. This is one response which the Royal Commission must consider. However, defining the essential elements of such a scheme and the source of its funds is complex. It is not difficult to recognise that an appropriate redress scheme should provide a consistent response to anyone who may have been abused by any institution wherever located within Australia. Abuse and its consequences cannot be distinguished by State, region, diocese or parish. Both the factual threshold which must be crossed to be eligible for redress and the financial response should be consistent if the process is to be fair.

There are other complexities. The obligation which is contained in the Letters Patent to consider justice for victims requires us to look at the "rules" of civil liability as well as any redress scheme. We cannot avoid the issues. The two must be considered together. I know there is a view that rules of civil liability should be left to the High Court. I do not understand the intellectual foundation for that view. Having regard to the High Court's previous approach to issues of vicarious liability and the difficulties presented by the "Ellis defence" and statutes of limitation, the High Court would almost certainly say this is not an issue for it but for the Parliament. As Brennan J said in *Dietrich v The Queen* "changes in the common law are not made whenever a judge thinks a change desirable." (*Dietrich v The Queen* (1992) 177 CLR 292 at 320).

On issues of such general importance and complexity Parliaments look for guidance from Law Reform Commissions or other properly constituted inquiries. These issues were discussed by Mason J in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633.

In our case the Royal Commission has been asked to assist by making recommendations to government. We cannot avoid this task. But it is complex and requires consultation with many groups and individuals. Although that process has begun it requires time if our recommendations are to have any prospect of being accepted.

It is already apparent that the work which the Commission is doing is bringing significant understanding and provoking change across a number of institutions. I understand that in NSW the Department of Family and Community Services has responded to the case study of the Parramatta Girls Home.

Its staff are being trained to understand and more effectively manage the institution having regard to the issues which emerged during the study. The NSW Children's Guardian has also signalled changes to policies and procedures.

Following the YMCA study that organisation is reviewing its employment and management practices. All local councils in NSW which provide after school care have responded by initiating a review of their own facilities and practices.

In Queensland the Brisbane Archdiocese of the Catholic Church has responded to our work by engaging professionals to deliver programs for school children and training staff on the prevention of child sexual abuse. A child safety audit has also been initiated in five parishes.

At a national level the Catholic Church is taking steps which indicate a recognition of the need for greater transparency. The Truth Justice and Healing Council has been established with a promise of "commitment to justice for victims and survivors". The Commission's engagement with the Council has been wholly positive, which is reflected in the public statements of its Chief Executive, Mr Sullivan.

During the course of the public hearing in Sydney, Cardinal Pell accepted the need for the Church to review its reliance upon the Ellis Defence. He acknowledged that there must be an effective institutional response to the damage done to an individual who is abused within that institution. A similar position has been accepted in public hearings by the Salvation Army (Eastern Territory) and the Christian Brothers.

Earlier this week Mr Sullivan, speaking on behalf of the Truth Justice and Healing Council, said:

"In cases of child sexual abuse, all Church authorities should have a legal entity that can be sued and that legal entity should be backed by insurance or the Church's assets."

He also said that:

“It’s up to all Church authorities to advise their lawyers that is the policy and those lawyers should get with the program.”

Many institutions have undertaken a review of their response to the needs of victims who have previously come forward. This is marked by the Salvation Army’s undertaking to review every claim it has previously considered. A similar approach has been initiated by the Sydney and Melbourne Catholic Archdioceses and the Christian Brothers.

We have heard of other organisations which have recognised the need to reconsider these matters.

I have mentioned in previous speeches that I have written to the Holy See asking for copies of documents relating to complaints of abuse in respect of Australian priests or religious. The Royal Commission has now received two sets of documents, relating to individual Catholic priests.

The Holy See has indicated that where documents relating to any person are not available from an Australian source, copies held in Rome may be provided. However, the letter further states:

“... this Secretariat respectfully suggests that requests for all information regarding every case – which include requests for documents reflecting internal ‘deliberations’ – are not appropriate. As is the case with all other sovereign subjects of international law, the Holy See maintains the confidentiality of internal deliberations related to its judicial and administrative proceedings, and indeed depends upon deliberative confidentiality to ensure the integrity and efficacy of its judicial and administrative processes.”

Apart from the response of institutions it is plain that the work of the Commission has significantly impacted on the national conversation about the abuse of children. An increase in matters coming to the police has been reported. I expect that as we continue our work many more people will feel able to bring their allegations, either to the Commission, or directly to the police.

I am conscious of the fact that the work we are doing may be having an adverse impact upon the institutions which we are examining in public case studies.

This is an inevitable product of past failures within those institutions. I recognise that in their various ways each of the institutions we must look at otherwise makes a significant contribution to the wellbeing of many in the community.

It is now apparent from the evidence and public statements of some of the major institutions that they recognise that, unless they acknowledge the failures and accept responsibility for them, their capacity to re-establish their public standing will be limited.

A genuine acknowledgement of failure brings the opportunity for survivors to heal and enhances the capacity for an institution to effectively continue its work in the community.

International Men's Health Symposium 2014

Brisbane, Queensland

12 June 2014

Thank you for inviting me to address your symposium today.

This is an important gathering which brings together many people with significant understandings of the issues under consideration by the Royal Commission. Unfortunately my commitments preclude me from remaining with you today.

When the then Prime Minister Julia Gillard announced in November 2012 that she intended to recommend the appointment of a Royal Commission to investigate the response of institutions to the sexual abuse of children no one had any realistic idea of the size of the task and the time that would be necessary to complete it.

There was an understanding that the problem was significant but the number of people who may wish to give an account of their personal circumstances and the number of institutions which may be involved was unknown.

The Letters Patent for the Royal Commission were issued on 11 January 2013. They recognise the difficulties in defining the task and for that reason they require the Commission to provide an interim report to government by 30 June this year. In that report we must recommend the date which should be fixed for the submission of a final report.

Although the terms of reference contemplate that the final report should be delivered not later than 31 December 2015 this was always recognised to be unlikely to be achieved.

When the Prime Minister announced the appointment of the Commissioners of the Royal Commission she said that “the terms of reference do set an end date for the Royal Commission of 31 December 2015 but that end date can be extended if necessary.”

By 31 May 2014, we had issued 643 notices or summonses to produce, and received around 400,000 documents in response. We also issued 246 notices or summonses to witnesses to appear before the Royal Commission.

We have received more than 13,500 phone calls at our call centre, and more than 5,500 pieces of correspondence.

I have referred over 160 matters to the police for investigation.

As the government originally contemplated it is now possible for us to identify the tasks which we must complete to effectively respond to the Letters Patent. When developing our plan we have been careful to reflect the essential obligations in the Letters Patent.

They stress that it is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse be fully explored, and that best practice is identified. Further they state that it is important that those affected by child sexual abuse can share their experiences to assist with healing and to inform the development of strategies and reforms.

The Letters Patent require us to make recommendations about policy, legislative, administrative or structural reforms.

Since we began our work we have received allegations of abuse from people in more than 1,000 institutions. It has been suggested by some people that the problems we are looking at are all “historical”, happened in the past and are unlikely to occur today.

An analysis of the institutions reported to us in private sessions confirms that, although it is possible that the level of abuse has diminished, the reality is that the potential remains.

Because private sessions are conducted with people who self-report, care should be taken before using this analysis for statistical purposes. However, it is informative and provides a contemporary context for sexual abuse allegations.

Thirty two percent of the institutions reported to us can be described as an industrial school, training school, reformatory, orphanage or children’s home. Some of the children in these facilities would have been part of the child migration program in the third quarter of the last century.

Others would have been born out of wedlock, and because of the cultural norm of that time, surrendered to institutional care. It can be assumed that with the cessation of those programs and the widespread use of contraception and more accepting social attitudes the risk to children in those circumstances has been removed.

However, with the closure of orphanages and similar residential institutions for children, the problems which children previously faced when living in dysfunctional families or without effective care from a parent or guardian have not disappeared.

Many of those children will today find their way into out-of-home care. Others of them who have encountered difficulties with the justice system will end up in some form of detention. They remain vulnerable to abuse, although in a different institutional setting.

Apart from this group there are three other types of institutions which are subject to high levels of complaint in the reports we have received in private sessions.

Thirty percent of our private sessions have been conducted with people who were abused in a school or other educational

setting. Sixteen percent have told us they were abused in a place of worship, in a church youth group or seminary. About eight percent report abuse in out-of-home care.

The balance of those coming to us in private sessions report abuse in a variety of circumstances including child care, sporting groups, health care and juvenile justice. We can assume that the number of children in child care- both day care and after school care- will have increased.

It is obvious that in any institution which has responsibility for children there is a risk of sexual abuse. As I have said it is only the child migrant children and children born out of wedlock who are no longer in institutions. All of the other institutions and accordingly opportunities for abuse remain.

Some types of institutions, in particular out-of-home care, and child day care and after school care have increased in number over recent years. Because it takes, on average, more than 20 years for people to report abuse, in some cases significantly longer, it is wrong to assume that abuse of children in an institutional context is a problem of the past.

The task of the Royal Commission is to identify appropriate recommendations to respond to a problem which, although of necessity described by past events, must respond to future risks.

I have described on previous occasions the care with which the Royal Commission selects institutions to be considered in a public hearing. Although some must be hearings in relation to institutions which have ceased to exist many are not. We have conducted public hearings into the Scouts, YMCA, three schools, two diocesan churches and the Salvation Army.

All of these institutions continue to exist. The risk of abuse accordingly remains. We will continue to select public hearings where we can develop issues of present relevance and develop contemporary responses.

Faith-based institutions, whether residential facilities, schools or diocesan constitute a significant proportion of the institutions reported to us by survivors. Many of these are Catholic institutions. Although we will look at a representative sample of all institutions in public hearings it is inevitable that there will be multiple Catholic institutions which must be considered.

You will be aware of the recent statements by Vatican spokesmen and the Pope in relation to the sexual abuse of children. To further our inquiries into the response of the Catholic Church to offending priests and religious in Australia I have written to Cardinal Tarusio Bertone the Secretary of State of the Vatican City seeking a copy of all documents held in Rome relating to complaints of sexual abuse by priests or religious.

We have asked for copies of documents which reveal the nature and extent of communications between Catholic congregations in Australia and the Holy See.

We have to date received some documents which are relevant to the public inquiry which will occur shortly in respect of the diocese of Wollongong. I am awaiting a reply in relation to our general request. From these documents we should be able to determine how church authorities in Australia, under the guidance or direction of the Vatican, have responded to individual allegations of abuse.

One of the difficult questions which the Royal Commission is considering is why does abuse occur or more directly why does a person become an abuser. A variety of views have been expressed. It is unclear to me whether we will ever be able to satisfactorily answer the question.

However, we will identify and consider the theories which involve the structure of institutions and the profile of individuals who have authority within them in an endeavour to provide an answer to the question.

The issue is compounded by the fact that we know that the majority of abuse happens in a familial or other domestic context. That may be merely a product of numbers (most children live with a family) but it suggests that matters other than the fact of the institution are important. There are people who suggest that the obligation of celibacy increases the risk that a person will be an abuser.

Some senior clerics have acknowledged in evidence to the Royal Commission that the issue should be considered. It may also be that familial abuse is predominantly a male assaulting a female which is occasioned by different factors to a male assaulting a boy in an entirely male environment. These are all complex issues which the Commissioners must consider.

It is already clear that the work we are doing is having a significant impact upon the way institutions operate and respond to the sexual abuse of children. Some of our understanding comes from evidence in public hearings and others from information obtained elsewhere.

The public hearing into the YMCA Caringbah has brought a response from both the YMCA and other child care groups. We understand YMCA is reviewing its employment and management procedures, both in NSW and elsewhere.

We also understand that after hearing of the YMCA's problems many other child care providers are reviewing their own practices, learning from the difficulties exposed at the YMCA and the failures which enabled abuse to occur.

As you know we have conducted public hearings into segments of the Catholic and Anglican churches. In those public hearings church leaders have both acknowledged past failures and promised to reconsider the institution's response, including the monetary payments, made to individual survivors.

The Salvation Army has responded in a similar way. I shall return to these issues in a moment.

We have now examined three schools in public hearings. In each of these significant problems of abuse have been identified. It has been reported to us that, as a consequence, many schools are reviewing their own employment and management practices and, where weaknesses are identified, appropriate changes are being made.

There are many other issues which we are considering through investigation, research and consultation. The Criminal and Civil Justice systems, Working with Children procedures, what makes an institution safe for children, and problems in out-of-home care are but some of those issues.

By the end of 2015 we estimate that having regard to the other work which we must complete we will have been able to conduct only 40 public hearings. From the information we have collected we have concluded that there are at least 30 more institutions which must be examined in a public hearing if we are to fulfil the requirements of the Letters Patent.

Beyond the investigation of particular institutions we believe we should also conduct public hearings to review the response of institutions which have already been subject to a hearing to identify whether an effective response is being made to the problems which have been revealed. We will also conduct hearings in which we discuss with a number of institutions their individual responses to common problems.

Many survivors have told us of their experience when they complained of their abuse to the institution in which it occurred. Some institutions have developed a formalised process for their response. Others address these issues in an ad hoc fashion. In some states redress schemes, which include modest monetary payments, have also been developed. However, they are not universal.

Providing an appropriate response and redress to a person who has been abused raises many complex issues. A number of institutions have recognised the need to review the response which they have made to people in the past. However, they are hesitant to move forward without understanding the recommendations which the Royal Commission may make in this area.

Notwithstanding the complexities of the task we recognise the need to address these problems at the earliest possible date. We have developed a program which will allow us to identify the issues, collect relevant information and provide recommendations. We are seeking to publish our conclusions and recommendations by the middle of next year.

Some of you will be aware of the complexities involved. It is common for institutions to recognise the need to separate any pastoral response to a survivor from any process which provides monetary redress or compensation. Institutions which have responded by offering money have generally also been the decision maker as to the amount which should be provided. Such a process is burdened by a fundamental conflict.

That conflict is evident in some schemes where a cap is placed on the maximum payment which can be made. Although a redress scheme may need a cap, if it is imposed arbitrarily by the institution responsible for the payment it can be difficult for a survivor to accept the process is other than token and insincere.

Survivors generally identify three fundamental elements of an effective redress scheme. Many people seek apology from the institution and sometimes from the abuser which acknowledges and accepts responsibility for the harm done to them. They need the institution to accept that a member of that institution inflicted great harm and has caused great suffering.

Many survivors have a need for effective and ongoing counselling provided by appropriately qualified professionals. This comes at a cost, particularly where in some cases counselling is necessary for years or decades. Survivors understandably look to the institutions to meet that cost.

Apart from suffering personal health issues many survivor's lives have been seriously compromised in other ways. In some cases the damage is so great that they have never been able to complete an education, establish satisfactory personal relationships and provide the security of a home and other basics of life.

The process by which the sexual abuse of a child can seriously damage the personal development of the individual may not be fully understood.

However, it is clear beyond argument that in some people this will occur. To help with these difficulties many survivors seek a money payment. For some it brings an acknowledgement of the failure of the institution. But for others it reflects a need for financial assistance to sustain their lives.

There are many other issues which the Royal Commission must address. They are discussed in the Interim Report which will be provided to governments on 30 June. The Commissioners look forward to engaging with both individuals and institutions throughout the country to develop recommendations which will achieve the objective of making our institutions safer places for children.

This is an opportunity for all of us to bring fundamental and lasting change to the wellbeing of children in an institutional context.

2014 Families Australia Oration

2014 Families Australia Oration at the Child Aware Approaches Conference

30 March 2014

On 10 April 1874, the New York Times carried an account of the evidence given by a nine year old girl in the Supreme Court of New York on the previous day.

It was the chilling story of the mistreatment of an orphan who had been placed into the care of people by the name of Connolly. Mrs Connolly, who the child was required to call Mamma, was later convicted of her felonious assault.

The nine year old was Mary Ellen Wilson. She was giving evidence in a case brought by Henry Bergh, who happened to be the president of the “Society for the Prevention of Cruelty to Animals”. Bergh had been approached for help by a concerned Methodist mission worker who became aware of Mary Ellen’s circumstances.

One suspects that Mary Ellen’s circumstances were not unique although perhaps unusually harsh. In 19th century America and indeed in many societies children were afforded no rights. They were treated as the property of their parents and guardians. Many suffered great deprivation.

When the New York Times reported the proceedings, there was significant “excitement and indignation in the community”. Mary Ellen was placed into the care of the mission worker.

The year after the proceedings, Bergh founded, with John D Wright, the New York Society for the Prevention of Cruelty to Children, the world’s first child protective agency, which successfully advocated for laws requiring the more humane treatment of children by their guardians. The Society still operates today.

We know that society constantly changes. Although most of us prefer stability in social values and community expectations, our experience is otherwise. Even those of us who hold to fundamental conservative values accept that change is inevitable, if not in our generation in future generations.

Although we may find it uncomfortable to question the values and expectations we hold, history teaches us that hindsight will inevitably reveal the failure of at least some of our present certainties.

Sometimes changes occur without any obvious catalyst: there develops a general community acceptance that something is wrong. At other times an event occurs which sends a shock through the community and demands a response from institutions and governments.

In many areas of our lives, community values and the limits of acceptable conduct, which had been primarily the province of the various churches, have become absorbed into statutory rules under which the conduct of individuals and corporations is regulated and, where necessary, disciplined.

Charity, once the haphazard contribution of voluntary associations, has come in many areas to be accepted as the role of government which raises income and other taxes, many of which are ideas of the 20th century, which subsidise or provide aged pensions, medical facilities, unemployment benefits, child care and myriad other benefits which are seen to be essential in a civilised society.

Looking back, we can see that the shock to many in America when they heard of the plight of Mary Ellen was the catalyst for the first step in major changes in the way our societies perceive children and respond to their welfare.

The actions of a dedicated mission worker and bold animal rights activist, and the desperate circumstances of one child, brought the issue to public attention, prompting a change in general community attitudes to the welfare of children.

Community attitudes to the protection of children in the United Kingdom changed later than in America but were no doubt influenced by the story of Mary Ellen. In 1884 the London Society for the Prevention of Cruelty to Children was established.

The Society changed its name to become the British National Society and in 1889 contributed to the pressure on the Parliament to pass the *Prevention of Cruelty to Children Act*, known as the Children's Charter.

The path to change was similar in Australia. During the 1890's colonial Parliaments, influenced by the British National Society, passed legislation with provisions relating to the neglect of children. Various state societies for the protection of children were created.

They undertook the investigation and reporting of child abuse. However, Dorothy Scott and Shurlee Swain have concluded that, although societies were aware of evidence of child sexual abuse, they chose to ignore it. They comment that "[t]he idealised version of childhood which [the societies] were seeking to construct was an innocent one which had no space for a sexualised child".

We all have an understanding of the social changes which emerged in western society during the 1960's. We look back on that period as a time when the community was prepared to openly question previously accepted values and leaders acknowledged an obligation to initiate change.

The organised protection of children was part of this change. Child protection became a political issue. No government could avoid responding.

The protection of children was reframed from primarily a charitable endeavour to a demand from greater society for an organised government response.

The catalyst for this change in America was the publication by Dr Henry Kempe and his colleagues of a paper identifying “the battered child syndrome”. The doctors took up the issue, arguing that there must be significant child abuse within the community.

A similar story is found in Australia. The Australian media played a significant role in increasing public awareness which brought a political response to child protection matters. Pressure built for governments to take greater responsibility, and develop government-based child protection measures

There was a change from a passive response to active identification of children suffering abuse and neglect. The first mandatory reporting laws in Australia passed through the South Australian Parliament in 1969.

The work of the Royal Commission is bringing an understanding that many children under the supervision of adults within an institutional context or taken into residential care have suffered both sexual assault and gross physical abuse.

The criminal law describes “sexual assault” by various offences which reflect the Parliament’s view of the levels of severity of the offence when the legislation was enacted.

There is a question which the Royal Commission is addressing as to whether the manner in which sexual assault is defined in various statutes remains appropriate.

This is not the occasion to discuss how the pressure for the Royal Commission developed. It is sufficient to recognise that, at least where institutions are concerned, both the government and opposition of the day came to realise that abuse had impacted upon many people.

It was a challenge to the wellbeing of so many in the community that it needed to be openly discussed, the causes identified and effective responses developed.

The pain endured by so many for so long, which had been understood by relatively few, required a community response. Although a Royal Commission can be confronting to those investigated and whose behaviour is publicly discussed, the impact from the confrontation can be the occasion for a major shift in community understanding.

This may bring change in the behaviour of individuals and institutions and an effective legislative response.

I have spoken previously about the three “pillars” which underpin our work. Private sessions, public hearings, including round tables, and research, which is assisted by issues papers. Each process brings its own outcome and they will ultimately come together to inform our final recommendations for change.

Although I recognise a need for an early response to many issues it is important that the recommendations we make have been adequately considered and appropriate people and institutions consulted if our recommendations are to bring lasting benefits.

As of last Friday the Commissioners have held 1,426 private sessions. We have also received 1,328 written accounts from survivors or their family and friends. I have referred information in relation to 141 matters to police in different states. There are presently 1,065 people in the queue awaiting a session. We continue to receive about 40 requests for a private session each week.

Many people find it difficult to talk of their experience and are hesitant about the possibility of reactivating their trauma. The Commissioners are constantly told by people who come to private sessions of others who they know and who are on the cusp of coming to talk with us.

I still cannot identify how many will ultimately come and talk to us. We have only just begun to engage with people in prisons, people with disabilities and people in remote communities.

The overwhelming response from people who come to a private session is positive. We have been careful to employ appropriately trained people to answer the telephone when the initial contact is made and we have in place professional counsellors to assist people who come to a session.

Recognising that many people will experience a decline in mood following their session we are careful to follow people up to ensure they have adequate support available.

Some comments which are typical of people's responses when asked by counsellors about their experience in a private session include "I felt immense relief" and "I felt empowered and glad that I attended". One attendee described the process as "fantastic" and that she felt "important" and "heard".

Another said the process was "surprisingly worthwhile", and was "ecstatic" to be finally heard. A common response has been that if this process "would prevent this happening to one child then it would all be worth it". Another person said "I was relieved, empowered, pleased". One person said: "It was the best stressful experience I've ever had".

Many people speak of the significance of the fact that, in the private session, their story has been heard and accepted for the first time. For many there is a sense of relief, giving them a more positive view about their future.

There can be little doubt that Parliament's foresight in amending the Royal Commissions Act to provide for private sessions has and will bring great benefit for many people.

The nature of private sessions does not allow rigorous analysis of the information we gain. However, the following may be of interest:

At the time they attended a private session, 90 percent of the people who have come to us were 40 years of age or older; 70 percent were 50 years or older;

Nearly 62 percent of the people we have spoken with were sexually abused in a faith-based institution – 25 percent in religious residential and day schools; 20 percent in faith-based welfare institutions and 17 percent in other religious institutions.

Nearly 35 percent were abused as children in a school setting – 26 percent in day schools, the majority of which were religious schools, and nearly 9 percent in a residential school; and

Thirty percent of people coming to us were abused in welfare institutions, including orphanages, children’s homes and residential facilities. The majority of these welfare institutions were faith-based institutions.

Just over 41 percent of the institutions mentioned in private sessions were run either by a Catholic order or diocese;

Government-run institutions accounted for 21 percent – these included juvenile detention and a range of welfare institutions.

You will all have some understanding of the work the Royal Commission is doing in public hearings. Because of the intensive investigative and analytical work required to prepare and conduct a public hearing, which is both instructive and fair, we must be selective in the institutions which we examine in public.

We must also be careful to avoid interfering with any ongoing criminal investigation or prosecution. It is clear we must look at a representative range of institutions, religious and non-religious, across each of the states and territories.

One important indicator is the number of cases of abuse of which we are aware coming from any particular institution. Many different institutions have come to our notice.

In addition to the significant number of reports of abuse in foster care, we have received allegations of abuse in more than 1,950 institutions. For this purpose we define an institution as a separate body which may be part of a large organisation. For example, an individual parish or school may be part of a larger denominational structure.

In 168 of these institutions, we have received allegations from five or more victims. There are also 13 institutions where we have received allegations from 30 or more victims. Although the Royal Commission has been given significant resources, they could never be sufficient to allow the examination of more than a relatively small selection of the institutions in which we are aware there have been problems.

I am sorry that many people will be disappointed that their particular institution and their own story will not be publicly examined.

We have now held public hearings into around 20 institutions. In order to maximise our capacity the Commission will generally sit in panels of three Commissioners when conducting public hearings. On occasions a single Commissioner will sit. However, this is only likely to occur when the issues to be discussed are generally historical.

It is important that more than one Commissioner hear the evidence when contemporary issues of policy are likely to come into focus.

Primary research is often difficult to fund in Australia. Unless directed towards some identifiable economic efficiency or medical advance, it can be difficult to attract either public or private funding for an in depth consideration of issues.

This is particularly true of research into social issues. With the identified need for the Royal Commission and the significant commitment by government to our task has come a budget that enables the Commission, either from our own people or by commissioning the help of others, to develop a significant research program.

When developing our research agenda, we have been careful to ensure that we are devoting resources to achieve the maximum benefit for the community both now and into the future.

We engaged Associate Professor Leah Bromfield, a respected academic in the field, to consult with other leading academics and experts to assist us to determine the issues that our research should examine.

Our Terms of Reference are broad, and predictably there are issues which raise more questions than we have the time or resources to explore. To assist our decision-making we organised the potential research projects into three categories. We have taken the same approach when identifying the institutions which should be the subject of a public hearing.

The categories are broadly “must”, “should” and “could”: that which must be done to fulfil the Terms of Reference and can be completed within the current timeframe and available resources; that which should be done to fulfil the Terms of Reference if additional resources of time and money were available; and that which would be of assistance, but which was not central in fulfilling the Terms of Reference. Given our present time frame and budget, only research in the first category has been committed to.

Wherever possible, the Commission will draw upon existing research and information. However, in some areas critical to our Terms of Reference this research does not exist. Our research is designed to “fill research gaps” from which authoritative conclusions may emerge.

The research projects to which we are committed fall into one of the following categories:

- Identifying child sexual abuse;
- The responses of institutions in which child sexual abuse has occurred;
- The response of government and its statutory authorities to child sexual abuse;
- How best to respond to the need for treatment and support needs of victim/survivors and their families;
- Why does child sexual abuse occur in institutions?
- Preventing child sexual abuse in institutions, which includes the sub themes: primary prevention and preventing recidivism;
- What we can learn from past inquiries and research to ensure this Royal Commission has a positive impact; and
- The history and characteristics of specific institutions of interest.

In most of our research, private sessions and public hearings, we hear from adults. Only very infrequently do children have the opportunity to provide input into the systems and means for their protection.

We have commissioned researchers, skilled in research with children, to undertake a project in which they will gather the views of children and examine with them the factors that make them feel both safe and unsafe in institutions. It may prove one of our most valuable pieces of research.

One of the questions that emerged early in our work was the need to attempt to understand the prevalence of child sexual abuse within institutional contexts. The existing evidence was dated and each study only related to one type of institution.

There are a number of potentially significant confounders in their research, including very considerable delay in reporting, 20 years or more on average for children, and the high level of under-reporting.

The study looked at child sexual abuse reported by child survivors over the last five years using records held by police, child protection agencies, education departments and working with children check administering bodies. The report is not yet ready for publication but some of the available results may be of interest.

The best available indicators, nationally produced, estimate that depending on the particular state or territory, between 3.3 percent and 6.6 percent of all reports of child sexual abuse made to police within the last five years occurred within an institutional context.

The researchers concluded that this approximated to five percent of all cases of recently reported allegations of child sexual abuse and would equate to an annual total of between 400 to 600 allegations. The researchers emphasised that this was a conservative and maybe a very conservative estimate.

However, it does suggest a significant continuing problem of sexual abuse in an institutional context. It confirms the view that a great deal of abuse occurs in families. It is of course likely that the existence of the Royal Commission will increase the rate of reporting.

Police data indicated that the sexual abuse of children in an institutional context was very much a school based event. Depending upon the state or territory the percentage of the abuse in schools ranged from 68 percent to 95 percent. Safety in care data suggests that children in out of home care have a heightened level of vulnerability.

The most common age of victims when their abuse commenced was between 10 to 14 years; again, depending on the state or territory, this ranged from 45 percent to 60 percent. Ten to 14 year olds were over represented in institutional locations compared to other locations.

The findings in relation to gender are complex. Females are more likely to be sexually abused than males: rates for females abused in an institutional location, depending on the state or territory, ranged from 64 percent to 79 percent. However, for males who were abused, a higher proportion of cases were in an institutional location compared to other locations than for females.

Proportions for males ranged between 1.4 to 2 times greater than proportions for females. Males were also likely to take more than five years longer than females to report abuse.

Consistent with all other research into child sexual abuse, perpetrators in an institutional context were overwhelmingly male. Surprisingly, more than two thirds of abusers in an institutional context were children and young people.

Historical data suggests that males were more likely to be sexually abused in institutions than females. Past inquiries and research into institutional child sexual abuse have led us to focus on adult perpetrators. The changes evident in the data may reflect changes in residential, educational and religious institutions over time.

However, they may also be confounded by factors such as different patterns in reporting for males compared to females or different patterns in police recording of complaints for adults compared to juvenile perpetrators. Further research is needed before we can be confident that the results of this study truly reflect changing patterns in the sexual abuse of children in institutions.

The Royal Commission has now been in effective operation for about 12 months. Many issues have emerged, some of which will be taken forward and discussed in round tables and public hearings. One major issue is the manner in which there should be a financial response, if any, from institutions, including government, to the sexual assault of people when they were children. Should there be a redress or compensation scheme?

No one should assume that I have any view, much less any concluded view, about the issue, but matters of financial assistance, access to counselling, apologies and memorials are of great significance to many of the survivors from whom the Royal Commission has already heard.

They are matters which many institutions are continuing to deal with as complaints of child sexual abuse come forward. Some religious leaders have already publicly acknowledged that their approach to these issues in the past may have been inadequate or inappropriate.

In public hearings and private sessions, the Commissioners have heard evidence and received information from survivors about their experience when seeking compensation or redress, both through formal legal mechanisms and through current or past redress schemes. Some survivors have been satisfied with the outcomes.

Others have been dissatisfied. Some survivors have not pursued existing opportunities, in some cases accepting legal advice that the process would be difficult or doomed to failure.

The existing approaches from institutions bring quite different experiences for survivors and may bring markedly different outcomes, sometimes when there is no apparent reason for the differences, at least having regard to the nature of the abuse and its consequences.

We have now conducted two public hearings in relation to the Catholic Church's Towards Healing scheme, and we are presently holding a public hearing in relation to the Salvation Army's policies, in respect of support for survivors, including their approach to redress.

When the Commission heard evidence in Sydney touching this issue, the Commissioner of the Eastern Territory volunteered that the Salvation Army would review all payments which have been made to ensure they have been fair.

This is a significant step. The Anglican Diocese of Grafton is doing the same. Cardinal Pell was of the same opinion in relation to people abused within the Sydney Archdiocese. I suspect, and the Commissioners are hopeful, that as a result of the Royal Commission's focus on this issue other institutions will respond in a similar manner.

It is apparent from the work we have already undertaken that designing a fair redress scheme, assuming that one should be created, raises significant and difficult questions.

These questions become more difficult when endeavouring to define a scheme which may extend across more than one institution or group of institutions. The questions are many and varied. Some of the issues have ramifications beyond issues of sexual abuse including the legal liability, if any, of unincorporated associations.

In what circumstances, if any, should institutions be responsible for the sexual assault of a child by a member of that institution? If there should be responsibility, is it moral or legal?

If moral, what are the appropriate elements of that moral obligation? Do they differ from the elements of the obligation which the law might impose? Should institutions provide financial compensation on the same basis as would be ordered by a court in civil litigation? If a survivor is unable to work because of the abuse they suffered in the institution, should redress extend to compensation for lost earnings?

Some institutions have more assets than others. If because it is either a legal duty or moral obligation, should survivors injured by the wealthier institutions receive higher compensation payments than those injured by poorer institutions? How should fairness and consistency between survivors be achieved in these circumstances? What should be the position if the institution has ceased to operate and has no clear successor institution?

If there is a national scheme, as many propose, how should the financial contributions of institutions be determined? Should participation in a scheme be voluntary or compulsory? Can the scheme be made compatible with an institution's insurance cover?

There are many other questions.

The sexual abuse of children mostly occurs where there are no witnesses. What level of verification or proof should be required to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation? Should the courts be removed from the process and claims resolved in accordance with an administrative decision-making model?

What sort of support should be available for claimants when seeking compensation? Should counselling and legal advice be provided by any compensation scheme and, if so, should there be any limits on such services?

If a survivor has already received some financial compensation for the abuse through one or more existing schemes or other processes, should the financial compensation already received be taken into account in any new scheme?

If some form of national redress scheme is to be recommended, all of these questions will need to be answered. If a scheme is thought to be appropriate in principle, whether or not to recommend it may depend upon whether it is possible to devise a scheme that is fair to both claimants and institutions. It must be timely and supportive in its processes while maintaining consistent procedures in handling claims in all Australian institutions.

If it is accepted that, whether or not there is a national scheme, the common law should continue to respond to claims, the Commissioners must consider the present legal rules with respect to liability of an institution for the unauthorised and criminal acts of its employee or other persons carrying out its functions.

Both the legal structure of institutions, an issue relevant to claims against churches but, also, against other unincorporated bodies, and the liability for the criminal acts of another must be considered.

These are difficult issues. They have been addressed in the Ellis case and by the High Court in *New South Wales v Lepore* (2003) 212 CLR 511. The trend in common law countries may be towards accepting liability as did Lord Phillips in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1.

The issue has been raised by the Royal Commission with representatives of the Catholic Church, including Cardinal Pell. Before reaching any conclusion in relation to matters of redress, we will consult widely and may hold round tables to ensure we understand the community's views about these issues.

When the Commission started its work, we had a limited understanding of the nature and extent of the problems we would discover. We commenced by conducting private sessions. From those sessions and by drawing upon knowledge that was already available we gradually came to understand the issues we faced.

Recognising that one of our fundamental obligations was to listen to people in private sessions, we have structured our work to give private sessions priority. As I have indicated, the demand for private sessions continues at a high rate and shows no significant sign of abating.

During our first week of private sessions we became aware of the problems at the YMCA when two parents of children attending the after school care centre at Caringbah told us of their experiences.

The response of the YMCA NSW to an employee's conduct raised issues of concern in relation to management at various levels, and how a child safe organisation should operate. The YMCA is one of the largest providers of outside of school hours care in Australia.

The employee who assaulted the children was Jonathan Lord. During his employment with YMCA NSW, he groomed and sexually abused a number of boys between the ages of six and 10, both at YMCA and elsewhere. Lord met many of the boys he abused through his employment with YMCA. A number of the offences committed by Lord were committed on YMCA premises and during YMCA excursions.

The case study explored how children can be groomed by offenders and provided important lessons on how parents and work colleagues can be manipulated to give an offender access to children who they intend to assault.

The case study highlighted the need for institutions to have plans and policies which make plain how the institution will respond to serious allegations made against staff, including dealing with police investigations and court processes, whilst supporting and keeping staff and families appropriately informed.

The case study also considered the role, responsibility and attitude of YMCA NSW's senior management. Issues in the evidence included whether YMCA failed to adequately acknowledge its own systemic failures in relation to Lord and shifted the blame onto junior staff.

YMCA NSW management's understanding of the problem of child sexual abuse was also the subject of evidence. The Commissioners' report on these issues and many others will be made available to government in the near future.

Early this year we had achieved sufficient understanding of the issues we must look at to be able to develop a concept plan. That plan sets out the work which we believe we can complete within the current time frame of our Terms of Reference – the end of 2015.

However, having regard to the demand for private sessions and the public hearings, if the Commission concludes at the end of next year there would be many tasks left uncompleted. Our current estimates suggest that at the end of 2015 there may be 2,000 people who will have asked for but not received a private session.

I have spoken with the Attorney General, Senator Brandis, about these issues and as you may be aware he has told a Senate Estimates Committee of our discussions. The interim report, which will be provided to government at the end of June, will endeavour to identify the tasks which we understand we should complete and our estimate of the appropriate time frame in which to complete them.

I am often asked how the Commissioners are coping with the responsibilities we have. I could not suggest that the many hours we spend listening to people whose lives have been destroyed because of sexual assault when they were children are not difficult.

They are.

Many men of my own age break down and weep when telling their stories. They are stories of personalities damaged, education thwarted, legitimate expectations dashed, marriages lost and children alienated.

We are listening to people whose lives have been damaged and in some cases destroyed by the perverted actions of adults, people who both they and their parents had a right to trust. It is no exaggeration to say that, apart from individual lives damaged, whole communities have been divided and their fabric destroyed by the sexual abuse of children within the institutions of that community

It is too early in our work to form authoritative conclusions as to the nature of an institution and its management which provide the opportunity for adults to abuse children. However, there are some common characteristics which have emerged.

In many institutions where we have been told of abuse at any significant level there is a structure where children are required to respect and unquestionably obey the dictates of the adults in charge. Importantly, the parents of those children generally have an unquestioning acceptance of the authority and good intentions of the members of that institution.

The parents have trusted their children to the care of a residential institution, school or church, expecting that, by reason of the promise made by the institution, the child's physical and spiritual welfare will be protected and developed.

As we are now coming to learn the trust placed in those who have authority in these institutions has many times been misplaced. The respect paid to and the unquestioning acceptance of the authority of those in charge allows offenders to exploit their position of trust and abuse children. The child is defenceless to the advances made to them and unable to report it.

They believe that if they report they will not be believed. In some cases we are learning that following a report the offender has been moved to another location where he can continue to offend.

The work the Royal Commission is doing should lead all institutions where abuse has occurred to acknowledge their past, accept the obligation they owe to survivors and resolve to do whatever may be necessary to ensure that, so far as possible, it never happens again.

Nearly all of the leaders of the different religious bodies and other institutions we have looked at in public hearings have sat in the body of the hearing room throughout the evidence of the victims.

While this must have been distressing, I have no doubt that their presence has helped them to gain an understanding of the survivors' experience. For many who have suffered, it offers continuing affirmation of any apology they have been given.

We have received a number of reports of organisations which have already responded to the work we are doing. I have already mentioned the organisations of which we are aware which are reviewing their past response to survivors. I understand that the YMCA has responded to the public hearing by reviewing employment and management practices. I have been told that all of the NSW local councils, which provide after school care, have responded to the public hearing into the YMCA by initiating a review of their own facilities.

The New South Wales Department of Family and Community Services has responded to the case study of the Parramatta Girls Home. It is conducting seminars for its staff, with the assistance of experts in child sexual abuse, as well as taking steps to ensure that young people leave care with an education.

The work that the Royal Commission is doing is revealing profound failures in the management of issues of the sexual abuse of children in various institutions. There have been fundamental breaches of the trust placed in them for the care of children. Just as the story of Mary Ellen shocked the communities of the 19th century, the emerging evidence of failure in our own community has shocked many people. The work we are doing is changing the Australian community's conversation about the care of children.

The Commissioners' hope is that, through our work, a process of healing will be initiated for many survivors and permanent change made to the way institutions are managed and respond to sexual abuse of children. The necessary changes must be reinforced by appropriate regulation and supervision.

The shock we are all experiencing will hopefully, as similar shocks have done in the past, bring real change for the children of future generations.

13th Australasian Conference on Child Abuse and Neglect Melbourne 2013

Child abuse and neglect - Melbourne, Victoria

12 November 2013

Frank was born in Southern Europe. His parents were poor. They were devout members of the Catholic Church. When Frank was about 8 years old his parents were approached by the local Catholic priest who encouraged them to send Frank to Australia to be educated.

The promise was of secondary education in a Catholic institution followed by an opportunity to study at University.

Frank's parents were told that, if they gave him this opportunity, he would have a much more satisfying life in Australia than he could hope for in Southern Europe. Frank's parents were reluctant to see him go and Frank himself resisted the suggestion.

Ultimately, Frank's mother decided that the opportunity should not be allowed to pass and it was decided that Frank would come to Australia.

Before Frank left Southern Europe his parents were required to provide him with a new wardrobe. Basic clothing was acquired and put in a new suitcase. Frank was then sent off with his new clothes to board the ship for the journey. Frank never saw the suitcase or his clothes again.

As you can imagine, when Frank arrived in Australia he was frightened and traumatised by the separation from his parents. He was sent to live in an institution on a rural property in Western Australia. After a few days, when Frank realised he had not attended school, he asked the Brothers when he would join a classroom.

He was told that the classrooms were full and that, instead of going to school, Frank would be put to work on the property. Frank never went to school. The life skills that he acquired were acquired by working in the dairy and in and about the property.

Frank – not his real name – came to the Royal Commission in Perth. He told two Commissioners of the sexual abuse he suffered at the hands of the Catholic Brothers who ran the institution. He says that sexual abuse was accompanied by constant and quite extraordinary levels of physical abuse.

The children were belted with straps with metal objects in them. They were punished for minor transgressions by isolation and deprivation of basic sustenance. Their lives were completely miserable.

After Frank had been on the property for a few years there was a visit from a government official from his home country who came to check on the welfare of the boys who had come to Australia. Frank reports that the children were gathered together in the dining hall and speeches were made.

A glowing picture was given by the Brothers of the opportunities which the boys had been given. They were, as you would expect, required to agree. Sadly, as Frank tells the story, the truth was otherwise.

After the meeting with all the children the government official asked to see Frank alone. They met and Frank was told that his father had recently died. The official also told Frank that his mother was very concerned about his wellbeing. She had not heard from him. Frank was mystified.

He had been writing a letter to his mother every week but none had been received. Frank was also distressed because he had only received one letter from his mother in all the time he had been in Australia. He reported his distress.

The official was surprised because he had understood that Frank's mother had also been writing to him every week. The official asked Frank what the conditions in the home were like.

Frank told him the truth, disclosing the sexual and physical abuse and suffering which all of the children were experiencing. The official returned to Southern Europe and, after a time, the child migration program came to an end.

Frank continued living on the property and when he was old enough was hired out to local property owners. He received a tiny portion of the remuneration appropriate for his labour. As soon as he was old enough, he left the home and went to work in the mines where he saved up enough money to visit his home country.

When he arrived back home he found that his mother had suffered a stroke. As a result, she was not able to give him a hug. Believing that Frank had received an education and was on a path to academic success in his new country, his mother was curious about Frank's life.

He had no choice but to lie. He did not want his mother to know that the decision she had made to send Frank to Australia had gone so horribly wrong. Because he was not able to sustain the lie, Frank returned to Australia where he has lived the rest of his life. Without even a basic education Frank's life has been confined to working as a labourer and driving machinery in the mines.

Although his experience occurred 50 years ago, until he decided to talk to the Royal Commission, Frank had not been able to tell any of his family what had happened to him. He disclosed to his children only 2 weeks before coming to the Commission. He was only able to tell his wife of his childhood experiences the night before he came to talk with us.

The former Prime Minister Julia Gillard announced that she would recommend the establishment of a Royal Commission into Institutional Responses “to instances and allegations of child sexual abuse in Australia” on 12 November 2012 – exactly one year ago.

At the time she said that “the allegations that have come to light recently about child sexual abuse have been heartbreaking. These are insidious, evil acts to which no child should be subject.”

Shortly before the former Prime Minister made that announcement, the then leader of the opposition and now of course the Prime Minister, Tony Abbott – anticipating that the Government might be about to announce a Royal Commission – said that for “a long period there was insufficient awareness and insufficient vigilance when it came to predatory behaviour by people in positions of authority over children.

A lot of terrible things have been done, and a lot of people have suffered deeply.” Mr Abbot went on to indicate that “if the Government were to propose a Royal Commission to investigate the sexual abuse of children, it is something the Coalition would be prepared to support.”

Both the Government and the Opposition of the day acknowledged that the issue of the sexual abuse of children in institutions required a Royal Commission which would not be limited to the examination of any one institution “but must look at all organisations where there is evidence of sexual abuse.”

As Ms Gillard made plain, the decision to appoint a Royal Commission reflected a growing awareness in government and the general community of the widespread and at times systematic sexual abuse of children within institutions. Over the past three decades there have been many inquiries in Australia which have touched upon or been concerned with the sexual abuse of children.

Various inquiries have looked at diverse issues including institutional care, foster care, child migration, the child protection system in some of the states and territories as well as issues in Indigenous communities. I am advised that there have been more than 300 inquiries, of which at least 80 have looked at issues directly relevant to the Commission’s work.

That number may not surprise many in this audience but it speaks to the size of the problem and the difficulty the community has found in confronting and dealing with these issues. And, of course, there are many more reports from inquiries into these issues which have been conducted overseas.

As part of the Royal Commission’s research work we have set about gathering all of the previous Australian reports. We will endeavour to identify the good and bad amongst the recommendations they made, and – with the assistance of the bodies charged with implementing them – to evaluate their effectiveness.

When Prime Minister Gillard announced the appointment of myself and the other Commissioners in January this year she said that “for too many the trauma of (their) abuse has been compounded by the sense that they have had that their nation doesn’t understand or doesn’t care about what they suffered.”

The former Prime Minister, speaking to the survivors of sexual abuse and on behalf of the Australian people, said “we are able to say we want your voices to be heard. Even if you felt for all of your life that no-one’s listened to you, that no-one has taken you seriously, that no one has really cared, the Royal Commission is an opportunity for your voice to be heard.”

To facilitate the work of the Royal Commission the Government decided and the parliament accepted that the Royal Commissions Act should be amended. Before its amendment, the Act provided for the conventional processes of a Royal Commission including the gathering of evidence at public and private hearings.

These procedures are formal with the expectation that a Royal Commission will do most of its work in public. However, the Act did not provide any mechanism for receiving people’s accounts of their individual experience in a manner which met the Prime Minister’s expectations. For those reasons, with the support of all parties, the Royal Commissions Act was amended to provide a process to be known as private sessions.

A private session allows a person who may have suffered abuse, or someone who was aware of the abuse of another (commonly a family member) to come to the Commission and talk to one or two Commissioners, to tell their story, have it recorded, and its acceptance acknowledged.

I have previously referred to this as the obligation, which all of the Commissioners accept, to bear witness on behalf of the nation to the sexual abuse of individuals in institutions. The information which the Commission receives in a private session may be published provided it is relevantly de-identified.

When the Commission began its work we were careful to take advice about the procedure we should follow for private sessions. It was clear that we would have to ensure that there was adequate support for victims who came to tell us their story. But it was also necessary to take steps to protect the health of the Commissioners and staff.

The processes which we have followed have been refined as our work has progressed. I am satisfied that they are effective and, in so far as we are able, will operate to protect the health of all who are involved.

From the time that the Royal Commission was first able to receive telephone calls in April this year until 7 November we have received 6,362 phone calls and 2,775 written and email enquiries. We have now received 627 written personal stories. As at the end of last week we have conducted 742 private sessions. From the enquiries we have received, we have 524 people waiting to be allocated a private session.

There are a further 1,300 people who have called or written to the Royal Commission, of whom we anticipate fifty percent will attend a private session. We continue to receive phone calls at a rate which generates about 10 private sessions each day.

As I have moved around the country speaking to various organisations I have learned that there are still many people who will wish to engage with the Commission but for various reasons have not yet made contact. I have no idea how many people ultimately will want to come to a private session and tell us their story.

Private sessions have now been conducted on many occasions in each of the capital cities. Commissioners are continuously moving around the country. Each of the stories is recorded and analysed for the information which it provides. Many of them will be reported in a de-identified way.

From some we will gather information which will enable further in-depth inquiry leading to the examination of an institution at a public hearing.

Each week I also refer matters raised in a private session to the relevant police force. Some of that information will result in investigation and prosecution of perpetrators. Other information will be added to the intelligence which the police constantly gather about various criminal activities.

Frank told us his story in a private session. Many others are contributing to our understanding of the nature of the problems and tell us where institutions have failed and how they can do better.

Robert, not his real name, is a man who left school less than 20 years ago. I have not met him but I have met his parents who are both professional people. They provided a loving and caring environment for their children.

Determined that all of their children should have the greatest opportunity in life they enrolled Robert in one of Australia's prestigious Christian private schools. They sought out such a school where scholastic achievement would be expected, Christian principles would be embraced, and a strong moral foundation would be provided for the children.

Robert was an engaging and talented child who was good at almost every activity. Learning tasks came easily. He excelled in sport, and stood out in music and drama.

He was quickly recognised as an exceptional child. His talents developed as he made his way into high school where he won academic prizes and was destined for recognition as a leader for the school in his final year.

His results in Year 11 did not quite match the apparent promise. Despite continuing to engage in many school activities, his behaviour at home was changing. At first his parents thought that he was merely experiencing the retreat into himself which often occurs in teenage boys.

The deterioration in his academic work continued in Year 12 and his behaviour at home caused increasing concern. He was often late home and stayed at school until well into the evening.

He told his parents that he and other boys would commonly visit the homes of staff members after school for afternoon tea and, on more than one occasion, Robert asked whether he could stay the night at a particular teacher's house. That request was declined but his parents became increasingly concerned.

Shortly after he left school Robert, under intense questioning from his parents, disclosed the sexual contact which he had with that male teacher.

The consequences for Robert have been profound. Notwithstanding all of his natural abilities Robert's life spiralled out of control. He became an alcoholic and an abuser of analgesics.

With a confused sexual identity he was unable to establish any stable or long term relationships. He has been unable to work, now has no friends and wants little contact with family. His mother describes the experience as a living bereavement. The suffering for all involved is beyond adequate description.

The primary task of the Royal Commission is to listen to the personal stories of sexual abuse and, with the help of the knowledge from people such as yourselves at this conference and many others, draw from those stories the lessons which we can report to the Australian community in an endeavour to ensure so far as possible the abuse of children in institutions never happens again.

There are obvious lessons to be learned both by parents and schools from Robert's story. Parents need to be aware of the signs that something more significant than a child "growing up" is occurring.

They need to be aware that if they have concerns about the behaviour of their child or the routine of the school they can take them to the school and openly discuss them. Just as important are the lessons which schools may learn. There must be rules for teachers' interactions with children. We must provide a school environment which can prevent tragedies such as has occurred with Robert and his family.

I mentioned earlier that there have been a number of inquiries in relation to similar issues in other parts of the world. Taking various forms, the abuse of children has been examined in Ireland, Belgium, South Africa, Germany and the United States of America. Some inquiries have been conducted using the telephone to receive people's stories and others have used standardised interviews.

The Royal Commission's experience confirms that the parliament was correct to follow the private session path. Although a traumatic experience for many, I have no doubt from the follow up work which is being done by the Commission that a private session allows a person to tell their story in a secure environment and in a way which allows them to talk to a person with some authority about the deeply traumatic, and for many, life defining, experience which they suffered as a child.

It is not uncommon for men of my age to break down and weep when describing the trauma of their childhood. For some it is the first time they have been able to tell anyone of their personal story.

Apart from suffering sexual abuse, for those who lived in residential care – often referred to as an orphanage or home, whether run by a church organisation or by a government agency – it is common for them to report not only sexual abuse but extraordinary levels of physical violence and psychological trauma.

Recounting memories of their childhood often 30 or 40 years ago brings forward a variety of traumatic memories.

Private sessions are one of the processes which the Commission is following to carry out the work required of us under the Terms of Reference. We will also conduct public hearings generally involving an in-depth examination of a particular institution.

We also have a significant research program and will engage in extensive community consultation. A number of Issues Papers have been and will continue to be published.

It will be apparent to this audience, and it is confirmed by the range of institutions reported to us in private sessions as being implicated in incidents of abuse, that it would be impossible for the Commission to hold public hearings to investigate activities in every institution where allegations of sexual abuse are made.

The reach of those allegations, both in time and in the range of institutions, is so great that to afford procedural fairness to parties and make responsible findings in respect of them would be impossible. For that reason the Commissioners have determined that we must be selective.

Although there are some institutions which by reason of well-known problems we must examine there will be others where abuse is reported, but having regard to our resources, both of people and time, we will be unable to look at.

When selecting particular institutions to be examined in public hearings we will endeavour to identify those where there may have been the most significant problems and ensure that an appropriate range of institutions are represented.

By reporting in a de-identified manner many of the personal stories from private sessions together with the various matters discussed in public hearings I hope we can give effective voice to those who were abused and provide guidance as to how institutions should be managed in the future.

As you may be aware we have now completed the evidence in 2 public hearings. We have looked at part of the Scouts; at an organisation with responsibility for the foster care of Indigenous children; and at the after school care operations of the YMCA. Next week we will commence a hearing into the children's home at Grafton which involves the Anglican Church.

In December we will commence a hearing in which we look at the Towards Healing program of the Catholic Church. There is a list which is constantly being considered and revised which contains many other possible public hearings which we will conduct as we move forward in our work.

Some comparisons with the work of other inquiries may give you an idea of the size of the task of this Royal Commission. Now that the Commission is fully operational, when there are no public hearings we are able generally to conduct about 70 private sessions in a week.

The Ryan Inquiry in Ireland (which suffered delays because of litigation brought by the Catholic Church) extended over 9 years and 1,090 victims were interviewed. The inquiry in Belgium spoke to 124 victims. The German inquiry, which confined its interviews to telephone calls, spoke to 4,570 victims. The German inquiry also looked at familial abuse which is outside our terms of reference.

The Royal Commission has been asked to provide an authoritative account of the problems of sexual abuse of children in institutions wherever it has occurred. To this end we have developed strategies which will enable us to speak to people in remote locations.

The Commission has officers charged with ensuring that Aboriginal and Torres Strait Islander people are aware of and take advantage of the opportunity to come and tell us their stories.

We are also developing programs by which people in custody and those with mental health issues or disabilities can talk to us.

Apart from these special groups, along with the other Commissioners I have spoken to many groups and organisations about the work of the Commission and explained how we are going about our work. Many people who have been sexually abused as children have suffered such significant trauma that they may never be able to come and talk to us.

However, we are doing whatever we can to facilitate their engagement with the Commission.

We are aware of the significant interest in the Commission's work including the public hearings. For that reason we have made arrangements to provide access to the hearing room through a webcast on the Royal Commission's website.

Although from time to time we may have to interrupt the proceedings to protect a person's identity, so far as possible the public hearings will be accessible to everyone who has access to the internet.

The third major component of the Commission's work is our research program. To assist us in carrying out that program we have engaged Associate Professor Leah Bromfield from the University of South Australia. Various projects have been identified and will be developed. For most projects we will engage outside researchers to carry out the work.

Our Terms of Reference require us to identify findings and recommendations which may lead to changes in laws, policies, practices and systems to better protect against and respond to the sexual abuse of children in an institutional context. Our research will be directed towards these ends.

Apart from the formalised research program we will publish Issues Papers from to time which will be directed towards particular topics and invite submissions from anyone whether a professional or lay person with an interest in that issue. Our learning in relation to various of these matters will be developed through public forums, discussions and consultations with people with experience and knowledge in the various fields.

As I have previously indicated we are aware of the large body of work that has already been undertaken in this field. This conference is testimony to the efforts which have already been made by many people to address these problems.

However, in providing the Royal Commission, the government has acknowledged the need to address these problems in a comprehensive and authoritative way. The Commissioners accept this challenge.

The Terms of Reference also require us to look at the provision of justice for victims of sexual abuse. This will require us to look at the civil and criminal processes relevant to the abuse of children.

There are many issues to consider, not the least of which is the practical impact of the statute of limitations on a person's right to sue and the identity of the appropriate defendant in a civil action. It is common that a person abused as a child will not report until they are an adult.

The conventional limitation period is believed by many to work a significant injustice. Identifying the proper defendant is at the centre of the issues in the Ellis case when he sued the Catholic Church.

An issue which we must address, but which I accept is complex and difficult, is whether there should be some form of general redress or compensation scheme. Some states have looked at this question, at least in relation to state institutions, and a national scheme has been provided in Ireland.

In the criminal area we will look at the structure of offences relating to the sexual abuse of children in the states and territories, the evidence gathering and trial processes, and the sentencing regime and patterns of sentencing for these offences around Australia. These are each significant topics which, if we are to meet the expectation in the Terms of Reference, will require research and consultation across broad sections of the Australian community including government, institutions and individuals with knowledge in these areas.

We have now released 4 Issues Papers: Working With Children Checks; the Catholic Church Towards Healing Process; Child Safe Institutions; and Preventing the Sexual Abuse of Children in out of home care.

Eighty submissions have been received in response to the first Issues Paper on Working With Children Checks. These have come from community organisations, government, business, academic and research institutions, and many individuals. Some common views expressed in the submissions include:

1. The need for national consistency in the operation of the Working With Children Check;
2. The need for more research to determine what elements of existing schemes are most effective; and
3. The need to consider the Working With Children Check as only one element in a broader framework for protecting children.

These topics will be further explored in public forums.

The second Issues Paper on Towards Healing has attracted 48 submissions so far which include 30 submissions relating to personal experiences and 18 institutional or academic submissions. A submission was provided by the Catholic Church's Truth, Justice and Healing Council.

The third Issues Paper on Child Safe Institutions has attracted more than 50 submission. They have come from organisations which provide advocacy and support for survivors of child sexual abuse, religious institutions, government agencies and individuals. A recurring theme in these submissions is the need for nationwide accountability, monitoring and oversight of organisations with responsibility for children.

The submissions also strongly support the establishment of a clear statement of the requirements for a child safe institution. Many submissions identified the need to consult with children to properly understand what would make them feel safe and comfortable in reporting abuse.

The fourth Issues Paper on prevention of abuse in out-of-home care has just closed and I do not presently have information about the submissions.

Likely future Issues Papers may include:

- Reportable conduct schemes for employees;
- Obligations to report to police and to child welfare authorities allegations of child sexual abuse;
- Aspects of civil claims procedures relevant to survivors of child sexual abuse;
- Support needs for survivors and their families; and
- Offender programs.

There will be others.

Submissions in relation to Issues Papers are placed on our website unless confidentiality is required or the Commission believes that its publication would be unfair to some person or institution. The Commission welcomes all submissions to Issues Papers. Furthermore I encourage anyone of you who may believe that a particular topic should be examined to write to the Commission and share your thoughts.

It is a difficult task to establish a Royal Commission. It requires those responsible for it, before they have a proper understanding of all of the issues, to try and identify the likely need for staff and premises and at the same time devise and plan the methodology to be adopted.

The Commission now has 160 staff. This was initially believed to be sufficient. However, as we have refined our processes and come to a better understanding of the issues involved I believe that in order to carry out our work in a reasonable time frame the Commission's staff needs to grow by up to another 100.

Many of these people are required to enhance our public hearing capacity. Although an initial public hearing was conducted with all 6 Commissioners I anticipate that going forward no more than 3 will sit for most public hearings. This will maximise Commissioner capacity for hearings.

However, each of those hearings requires a great deal of intense preparation by lawyers and other staff involved in investigation and analysis.

Apart from the staff required it is necessary for a Royal Commission to provide premises with technology to enable the Commission to do its work.

The technology must meet significant challenges. For example, the Commission served one notice to provide relevant documents on one Catholic diocese. The response was 100,000 documents which require recording and analysis. The technical and analytical skills to allow this to occur cannot be underestimated.

In the course of developing the Commission's capacity we have created a call centre and triage process to receive and manage the large volume of telephone calls we receive from people who wish to tell us their story. We have also developed effective processes to manage and analyse the information we receive.

Our investigation procedures are complex. In many cases the information we receive relates to allegations of events which occurred many years ago.

Institutions have changed and some have ceased to exist. Where it exists documentary material is almost always in paper form and may not be properly catalogued or easily retrieved. Our experience is that institutions are keen to cooperate with us but the practical difficulties mean that the production of documents can often be delayed.

The Royal Commission is required to provide an interim report to government by 30 June next year. This report will discuss the work of the Commission to that date and endeavour to map out the future course of our work. At that time we have been asked to identify the likely time frame to complete our task.

Although an interim report is required next year the Commissioners propose that, as we complete various case studies and reach conclusions, make findings and where possible recommendations, we will provide a report to government as soon as it is finalised.

In this way we do what we can to be fair to those who have an interest in these issues and in particular people who may be criticised in a report, and allow institutions to respond at an early date to problems which we identify. It is possible that problems in one type of institution may also be present in other similar institutions.

As all of you are aware, tragically children continue to experience sexual abuse during their growing years. Apart from the abuse which occurs in a domestic setting the potential for problems occurs across all of the institutions where children are placed in the care of adults.

When in residential care children appear to be particularly vulnerable, but abuse is not limited or confined to those settings. It is plain that many in the community do not understand the potential for abuse to occur, the frequency with which it does occur, and the consequences for the victim and their families.

It is the task of the Royal Commission to provide that understanding and with the assistance of those with knowledge in the various fields to provide findings and recommendations which will make our institutions safe for our children.

Bravehearts White Balloon Day Brisbane 2013

Brisbane, Queensland

6 September 2013

Thank you.

I am pleased to be here with you today to help bring public attention to White Balloon Day and mark its significance in National Child Protection Week.

Bravehearts and the many other organisations concerned with the welfare of children have played a significant role in raising public awareness of the prevalence and consequences of both the sexual and physical abuse of children in the community.

Along with others their efforts resulted in the Australian Government, supported by the Opposition and the governments of each of the States coming together to set up a national Royal Commission to look at the response of institutions to the sexual abuse of children in an institutional context, with the purpose of exposing what has happened in the past and bringing forward recommendations directed to ensuring it does not happen in the future.

It is now well known that the sexual abuse of children has been widespread in the Australian community. However, the full range of institutions in which it has occurred is not generally understood. Furthermore the character and effectiveness of the response to allegations of abuse by institutions in which it has occurred has not generally been exposed.

The prosecution of a perpetrator who has abused a child within an institution brings the existence of the abuse to public knowledge but does not, in most cases, tell the community anything about the response of the institution in which the abuse occurred.

Furthermore, although many recommendations have been made as to how institutions should be managed to minimise the sexual abuse of children and effectively respond to it when it has occurred, it is readily apparent that many of those issues require a coordinated national response.

I have previously talked about the size of the task facing the Royal Commission. In order to assist its work the Australian Parliament amended the Royal Commissions Act to allow the Commission to hear from victims in private sessions. This followed a similar provision to facilitate the gathering of information in private as part of the Ryan Commission into similar problems in Ireland.

It means that the Commission can receive the personal stories of people in private and in circumstances where they feel secure and not threatened by having to confront their alleged abuser. Although the Act provides that information obtained by the Royal Commission in private sessions is not evidence, it may be included in a report if it is “de-identified”, that is, the anonymity of the person is preserved.

Each private session requires one or two Commissioners to be present. We also need two Commission staff to carry out the necessary organisational tasks, including making a recording of the session.

We must also have a trained counsellor present to provide support for anyone in need and ensure that, if required, they are referred to another service capable of providing the person with ongoing support.

When we first started planning for private sessions we took advice from a psychiatrist. We were told that it would be likely that an individual would require 1 to 1½ hours to tell their story and because of the need to safeguard the health of Commissioners and staff, it would only be possible for a Commissioner to hear four stories in one day.

We were also advised that it would not be appropriate, bearing in mind the risk to a Commissioner’s health that a Commissioner sit for five continuous days in any week.

Experience has shown that this advice was sound. Although some people are able to give an account of their abuse in a logical and calm manner many are not. Many people who have come to the Commission have suffered greatly both at the time the abuse occurred and subsequently.

Many have received counselling at various stages of their lives, many have thought of suicide and some have attempted it.

Many people, including those who suffered abuse thirty or forty years ago, break down in the course of telling their story and require the assistance of support persons to be able to continue. The recounting of those stories is often traumatic for the persons telling the story.

The Commission has at 23 August received 4,301 phone calls relevant to allegations of abuse. Not all of these people require a private session and some callers fall outside our Terms of Reference. For example we have not been asked to look at familial abuse.

The Commission has now been able to conduct private sessions in Sydney, Brisbane, Adelaide, Perth, Canberra and Melbourne. At 6 September 326 persons have told a Commissioner their story. At that date 423 were waiting in the queue to tell us their story.

We also have approximately 1000 further persons waiting to be assessed for a private session. We receive an average of 23 new callers per day and we expect that at least 10 of them will require a private session.

I expect that rate to increase once public hearings start and survivors learn more about what we are doing. Many people will be hesitant about coming forward until they are satisfied that they can trust the Commission's processes.

Because the Commission is permanently located in Sydney private sessions can take place at our Sydney premises whenever a Commissioner is available and it is convenient for a person to come and tell their story. In other cities forward arrangements have to be made.

The logistical difficulties have meant that until recently it has not been possible to organise private sessions out of Sydney in more than one place at any one time.

However, now that the Commission has reached near to its full complement of staff and the process of private sessions has, with experience, been refined I am now able to authorise Commissioners to sit in different places at the same time. This will continue throughout the life of the Commission.

The availability of Commissioners for private sessions will also depend upon the demand for Commissioners to sit in public hearings.

Although I anticipate that a great many more private sessions will occur before the Commission's work is complete, probably in the thousands, some preliminary themes are emerging.

It is apparent that where an organisation lacks an appropriate culture and there are not appropriate practices and training of staff within the organisation, there is a risk that sexual abuse will occur. In some institutions there may be only one perpetrator.

In others there will be multiple abusers and many children may be abused. In residential institutions sexual abuse is almost always reported to be accompanied by almost unbelievable levels of physical violence inflicted on the children by the adults who had responsibility for their welfare. Many of the stories we hear will shock people.

It is also clear that the damage to an individual, be it a boy or girl, who is abused at a time when, because of their age, they are unable to resist an abuser or report the abuse to others, may be life changing.

It is common that a person who has been abused in a school setting, but this may occur elsewhere, will experience significant difficulties in being able to concentrate on school work compromising the development of the skills necessary to obtain employment and establish appropriate familial and broader social relationships.

They lose faith in their teachers and in the school and may come to feel alienated from their friends and family. What many may consider to be low levels of abuse of boys and girls can have catastrophic consequences for them leading to a life which is seriously compromised from what it might otherwise have been.

Both boys and girls are left with a distrust of adults and difficulties with intimacy. Inappropriate touching of boys may leave them with confusion as to their sexual identity.

This can manifest in lifelong difficulty in relationships which can cause difficulties in other aspects of their lives. Although the impact on the lives of abused persons has been reported within the academic literature I have no doubt that it is not well understood by the general community.

In my role as a judge I have been called upon to review many of the sentences imposed upon people convicted of the sexual abuse of children but I readily acknowledge that, until I began my work with the Commission, I did not adequately appreciate the devastating and long lasting effect which abuse can have on an individual's life.

It is apparent from the work we have undertaken to date that it will not be possible within any reasonable time frame for the Commission to be able to investigate, hold public hearings and make findings in relation to every institution where there are allegations that children have been sexually abused. We will have to be selective.

To make the best use of our resources we have determined to generally devote the public hearings to systemic issues and policy matters. However, we will also, where we find evidence of a significant cluster of abused individuals, conduct a public hearing.

It may also be that some individual institutions form part of a group of institutions which are themselves part of larger organisational structures which will raise systemic issues which we will examine.

In order to enable Australians to understand what has been occurring and its potentially devastating consequences for abused persons we will, where the person agrees, also publicly tell the story of some individuals. Public hearings will commence in Sydney on 16 September.

I greatly appreciate the opportunity to be able to talk to you today about some of the work the Royal Commission is undertaking. The success of the work that we do is of course dependent upon people coming to us to share their story.

Bravehearts and the other groups who have a role in assisting survivors have an important part to play in helping their members understand the Commission's process and in encouraging and supporting them to come and talk to us.

On behalf of the Royal Commission I express our appreciation for the effective relationship which has been established between us and look forward to their continuing assistance as our work progresses.

First Sitting

April 2013, Sydney

This is the first public sitting of the Royal Commission and it is appropriate that we acknowledge the custodians of the land on which we are meeting. Unfortunately, due to personal circumstances we are unable to proceed with the traditional welcome this morning. However, it is important that we acknowledge the Wurundjeri people of the Kulin nation and pay our respects to their Elders, past and present.

Australians of recent generations have lived through a period of rapid change across many aspects of society. Many changes can be identified. One which is important for the work of this Royal Commission is our preparedness to challenge authority and the actions of those in power in areas where this would not previously have been contemplated. We have seen significant changes in the manner in which power is distributed throughout the community. The women's movement and the fact that women now hold positions of responsibility in government and business are markers of many of the changes which have occurred.

These changes have brought with them a need and capacity to reflect on the functioning of institutions and the behaviour of individuals within those institutions. We have seen both Royal Commissions and Inquiries directed to that end. Many Inquiries have been conducted by Senate Committees. Inquiries have looked at diverse issues including institutional and out of home care, foster care, child migration, the various child protection systems in the States and Territories, the stolen generations, Aboriginal deaths in custody, child sexual abuse in indigenous communities and forced adoptions. There have been many other Inquiries.

Many Inquiries have touched upon the issues raised by the Royal Commission's Terms of Reference. They number more than 40. In addition, there have been a very large number of Inquiries into these issues overseas. As the Royal Commissions and Inquiries that have been held in the last 30 years make plain, the community has come to acknowledge that fundamental wrongs have been committed in the past which have caused great trauma and lasting damage to many people. Although a painful process, if a community is to move forward, it must come to understand where wrongs have occurred and so far as possible, right those wrongs.

It must develop principles which, when implemented through legislation and changes in the culture and management practices of institutions and the behaviour of individuals, will ensure a better future for subsequent generations.

In 1989 world leaders decided that children needed a convention specifically for them. It was recognised that people under 18 years of age may need special care and attention where adults may not. The leaders also wanted to emphasise that children have human rights. As a consequence, states negotiated and ratified the Convention on the Rights of the Child. We can now see that the adoption of the Convention has had both symbolic significance and practical consequences in Australia. It has been a critical step in our society being prepared to look at the manner in which the obligations owed to our children have been met, acknowledge wrongdoing and provide practical means to redress those wrongs and assist in the healing of those who have suffered.

It is already apparent from the work done by other Inquiries and the cases which have been prosecuted in the courts that children have been sexually abused in a variety of institutions over many decades. The extent of the abuse and the institutional response to it are among the important issues raised by the Terms of Reference of this Royal Commission. When this Royal Commission was announced, the government indicated that it would amend the Royal Commissions Act to enable the Commission to receive accounts of alleged abuse from individuals in what have now been called private sessions. That legislation has now passed through the Parliament and become law. It allows the Royal Commission to appoint one or two Commissioners sitting in private to receive a person's account.

I understand that a similar procedure was followed in Ireland which proved of great benefit to many people who were suffering the consequences of the abuses to which they were subjected as children. The Terms of Reference of our Inquiry provide, amongst many other matters, that it is important that those affected by child sexual abuse can share their experiences to assist with healing and to inform the development of strategies and reforms. The Terms of Reference direct the Commissioners to inquire into the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts and the provision of opportunities for them to share their experiences in appropriate ways, while recognising that many of them will be severely traumatised or will have special support needs.

The Commissioners accept that part of the task given to us by the Terms of Reference is to bear witness on behalf of the nation to the abuse and consequential trauma inflicted upon many people who have suffered sexual abuse as children. The bearing of witness is the process of making known what has happened. It involves the telling of personal accounts by those who have experienced child sexual abuse as well as listening to the accounts of others who may have observed these crimes.

There are many examples through history of the importance of this process, especially when an event has provoked great moral outrage. The bearing of witness informs the public consciousness and prepares the community to take steps to prevent abuses from being repeated in the future. Other outcomes may follow. The public record will be informed by the process. The memorialisation and archiving of documents for posterity is an important legacy of bearing witness.

For the individuals who have been traumatised, giving an account of their experiences and telling their story can be an important part of their own recovery process. The bearing of witness by another can break the silence over the abuse that a person experienced, in many cases years ago. It allows the person to be heard, understood and have his or her experiences recorded. The information gained can be used to develop better responses for the future.

The Commission has decided to sit in Melbourne today to report on the work which has been undertaken in setting up the Commission. Senior counsel, Ms Furness, will later address the Commission and indicate the processes she will follow in gathering evidence. Although the Commissioners were formally appointed in January of this year, the government was aware at the time we were appointed that because of various prior commitments it was not possible for all of us to commence work full time until sometime in February.

However, the Commissioners have now been able to meet as a group on a number of occasions. At each meeting, papers have been presented dealing with many issues which must be resolved before the Royal Commission can effectively begin the process of gathering detailed evidence.

The Chief Executive Officer was appointed in January and she began, in consultation with myself and senior counsel assisting the Commission, the planning necessary to establish the Commission. This has included the securing of premises, the development of a plan to provide suitable IT capacity for the Commission and a process for the recruitment of staff to undertake the many tasks which must be completed by the Commission. The Chief Executive Officer has also been responsible for developing a plan so that the Commission can provide an effective telephone response to callers and refer those in need to appropriate counselling services.

The Commission has now engaged trained personnel to answer telephone calls from persons who wish to give an account of their experience to the Commission. As these resources are now in place the Royal Commission is able to receive telephone calls from survivors. Ms Furness will explain more about this in due course and will also tell you of the telephone number that can be rung in order to contact the Commission.

It is important to appreciate that the initial response that we receive may be so great that it may not immediately be possible to interview some people or have arrangements made for their account to be heard immediately in a private session or a hearing. Any person who contacts the Commission will have his or her details taken and sufficient information recorded to enable us to maintain contact and discuss the nature of the allegation and the institution in which it is said to have occurred. In this way we can plan the Royal Commission's work in the most effective and efficient manner.

Many of the preliminary tasks have now been completed but there are many more which must be undertaken before the Commission is fully operational. The Commission anticipates that the recruitment process will bring the full complement of personnel to approximately 110 people. To find the people with appropriate skills and experiences takes time and significant effort from

those involved in doing that work. The Royal Commission is conscious of the need to ensure the absolute security of some of the information it receives and of the need to protect the identity of some persons who come and tell us of their experience within an institution. After considering the options, the Royal Commission is in the process of establishing an IT capacity separate from government and with the highest level of security.

The Commission has been told that many people who will wish to give an account of being sexually abused as a child will have difficulty recounting that experience. For some the opportunity, although of significant benefit to them, may also trigger trauma. It is for this reason that the Commission has delayed the taking of individual accounts until trained persons have been engaged to answer telephone calls. For the Commission not to ensure that it could respond in an appropriate way to any person who makes contact with us would not have been responsible.

I wish to emphasise that the Commission has made arrangements to receive accounts from individuals in suitable premises which we have been told are most likely to be meeting rooms in private hotels. These premises will provide the degree of neutrality and confidence that many people will require. Private sessions will be structured to provide assistance to people in giving their account and arrangements will be made to refer those who may be in need to appropriate counselling services. Ms Furness will say more about these matters when she addresses the Commission.

A number of people have raised concerns that by giving the Royal Commission an account of their experience a person may be in breach of a confidentiality clause entered into with the relevant institution. It is important to stress that we expect that many institutions will cooperate with the Royal Commission and waive reliance on such a clause. However, if anyone wishes to tell us his or her story and has a concern about a confidentiality clause in an agreement, the Commission has powers which will overcome the clause. Anyone who has those concerns should, when they contact the Commission, tell a Commission officer of their concerns before telling their story to us and appropriate steps can then be taken.

The Royal Commission's Terms of Reference are broad-ranging. They are not confined as to the time at which a person says he or she was abused and the definition of institution is broad. It extends from the organised churches through schools, childcare centres and recreational bodies. It also includes any state run institution providing residential care for children and each of the state departments and non-government organisations responsible for organising and supervising foster care arrangements.

In recent weeks the Commission has consulted with many peak organisations representing both survivors and relevant institutions. There are other organisations yet to be consulted. It has been made clear to us that it is likely that there are thousands of people throughout Australia who want to give an account of their experience to the Commission. It seems likely that at least 5,000 people will want to talk to the Commission. The leaders of some of the groups representing survivors of abuse suggest that the number could, in fact, be much higher.

In preparing to receive the accounts of an individual's experience, the Commission is anticipating that each person may need at least an hour in which to tell us of his or her experience. We have been told that many of the accounts we receive will contain serious and often shocking allegations. The advice we have received from psychiatrists is that however robust the listener, persons exposed continuously to the account of these traumatic events are themselves at risk of harm. We understand that there are limits upon how many personal accounts a commissioner and the Commission's staff can safely listen to in any one day.

In the course of a week it will not be possible to listen continuously. It is important that the Commission focus its private sessions and private and public hearings in a manner which enables us to identify institutions in which there may have been problems and organise the obtaining of information and evidence so as to facilitate a detailed examination of those institutions.

The Commission is required to provide an interim report to government by 30 June next year. The Terms of Reference require the Commission to advise on the time which may be necessary to complete its tasks. It is difficult at this stage to estimate how long it will take the Commission to look at any particular institution but some guidance is available from similar Inquiries conducted in Australia and overseas.

The Inquiry conducted by Justice Mullighan into Allegations of Abuse Relating to State Institutions in South Australia took three years. That Inquiry did not look at any private institutions and did not look at institutions which were run by religious bodies. It took evidence from approximately 800 witnesses. The Ryan Inquiry in Ireland which had broad terms of reference, including the physical mistreatment of children in institutions, took approximately nine years to complete its work. Judge Murphy, who conducted a Royal Commission into the Catholic Archdiocese of Dublin, which was separate from the Ryan Commission, took three years to complete that task. An Inquiry into the smaller Diocese of Cloyne took her one year.

From the information which the Commission has been able to gather, I believe that it may be difficult for us to complete a proper investigation and report on more than 6 institutions between now and the time of the interim report. Our enquiries indicate that most institutions are not immediately able to provide the Commission with documents which record their internal management practices and the manner in which they may have dealt with complaints of child sexual abuse.

There will also be difficulties in locating people who held positions of responsibility in the institutions at the relevant time. If the allegations concern events which occurred many years ago, people who were important at the time may now have passed away.

It will be apparent that the task defined by the Terms of Reference is so large, both as to the number of people who may wish to give their account and the number of institutions who may be affected by allegations, that it is unlikely that the Commission can complete its work within the timeframe currently fixed for delivery of the final report. However, I and the Commissioners

propose to use the time between now and the delivery of the interim report to complete as much of our task as we can and when that report is delivered, Government will be able to make a judgment as to the future course which the Commission should take.

I do not want any person to be under any illusion as to the cost of the Commission. It will be expensive. We have to date in setting up the Commission, fitting out premises, purchasing an IT system and acquiring other resources committed to the expenditure of \$22 million. The running costs, including the costs of travel and resourcing Commissioner hearings throughout Australia will have the consequence that the work of the Commission will continue to require the commitment of very significant sums of public money.

The Commission will, through its website, provide regular updates on the progress which is being made to the extent consistent with the effective investigation of particular issues. I mean by that, there may be occasions when what the Commission is doing should not be known to anyone other than the Commissioners, but, so far as we are able, we will inform everyone of what we are doing through the website.

The website will also provide information as to the ongoing costs of the Commission so that both government and the community can be informed of the expenditure which is required to complete our tasks. The Commission has now received approximately 1,200 telephone calls, none of which were solicited. They reflect the level of interest and concern within the community. However, we expect that from today, a great many more calls will be received. Many of the people who want to speak to the Commission will, for a variety of reasons, seek to give an account of their experience in private session.

Many of those people may not want their account reported in public. The Commission will respect their wishes. To facilitate receiving their account, Commissioners will travel to different parts of Australia to listen to the individual stories. However, it is important for me to emphasise that the Commission will, so far as is appropriate, conduct its hearings in public. However, given the nature of the issues with which we are concerned, some information and evidence must remain confidential to the Commission.

It is wrong though to think that the Commission is a secret body. Our findings and recommendations will be made public but we must try to ensure that no person who has suffered from abuse is further damaged by the Commission's process. There will be other people who wish to give their evidence in public. At this stage in the first part of our inquiry and before the interim report, I anticipate that most public hearings will be directed to the Commission gaining an understanding of the response of particular institutions to allegations which the Commission has received in private sessions or in public hearings. I do not presently expect that there will be any public hearings where evidence is taken until at least the last quarter of this year.

You will be aware that the Commission will not entertain applications for leave to appear today. We have, however, announced on our website that we invite institutions or individuals to indicate to the Commission that they believe they have an interest in its work. As the Commission identifies particular institutions or individuals which it proposes to investigate through the public hearing process, those institutions, or individuals and any other institutions or individuals who have expressed an interest and which interest could be affected during the particular hearing, will be notified and given an opportunity to seek leave to be represented.

There will also be public notice of any hearing so that any institution or individual who has not previously contacted the Commission may have an opportunity to make an application for leave to appear. However, the Commission will not entertain applications for leave to appear generally but will confine them to leave to appear in relation to relevant segments of our inquiries.

The Commission recognises the significant potential which the public airing of allegations may have to damage the reputation of individuals or institutions. This is an inevitable consequence of the appointment of a Royal Commission to inquire into matters of public concern. However, mindful of this possibility, the Commission will confine the allegations which it places into the public domain to circumstances where it believes that the airing of these allegations is justified, notwithstanding the risk of damage to a person or to an institution's reputation.

Where there is a risk of damage to a person or to an institution's reputation or the possibility of adverse findings being made with respect to a person or an institution, the Commission will grant leave for a legal representative for that person or institution to appear before it.

The Commission welcomes the response from the Catholic Church, which has repeated on a number of occasions, that it will fully cooperate with the Commission. We have had discussions with the Chief Executive of the Truth, Justice and Healing Council and we understand that the work of collecting and organising the documents held by the Catholic Church in its various manifestations has commenced. It is an enormous task.

Until the Commission is able to identify institutions of particular interest to it, having regard to the allegations which are made, it will not be possible to identify all of the documents which the Commission will require. However, as a result of our initial enquiries, I can indicate that the Commission has already served notices on particular bodies within the Catholic Church in Australia and its insurer, the Salvation Army and the New South Wales Director of Public Prosecutions, seeking the production of relevant documents. More notices are being prepared.

An important element of our Terms of Reference requires that recommendations be developed as to changes which might be made to laws, policies, practices and systems to better protect against and respond to child sexual abuse in an institutional context. To aid in this process, the Commission has formed a research arm which will look at previous reports in relation to child sexual abuse and undertake work to identify the most effective manner of responding to these problems.

The Commission will seek to draw upon the expertise of other people with the relevant experience and may commission research to ensure that our recommendations are both soundly based and practical so that they may be taken up by governments and institutions throughout Australia.

When I spoke in January I stressed that it was necessary for the community to understand that the Commission is not a prosecutorial body. Our investigative processes will be used to receive and consider what we expect will be accounts by individuals of their experience when living within or when they were associated with an institution.

The Commission will be concerned to examine these individual accounts to determine how the circumstances arose, the relevant management practices of the institution in which they occurred and the response which the institution has made to any complaint of sexual abuse by an individual. Because the Commission is not a prosecutorial body we have established links with the appropriate authorities in each State and Territory to which a matter may be referred with the expectation that, where appropriate, prosecutorial proceedings may commence. It is also important to understand that the Commission is not tasked with determining whether any person may be entitled to compensation for any injury which they may have suffered.

Although we recognise that our tasks are complex and will at times be difficult, the Commissioners and our staff are committed to ensuring, so far as we are able, that our obligations to receive individual accounts and report the history of relevant institutions are satisfied. We expect that the work we undertake will allow the community to move forward with a determination that any wrongdoing which has occurred in the past will not be repeated.

It remains for me to emphasise again that it is important for those who are involved in the Commission, and others who discuss its work, to recognise and do what they can to minimise the risk that negative consequences, including retraumatisation and distress may follow from a person coming to the Commission to give his or her account. The Commissioners accept that on behalf of the nation they have been asked to bear witness to the past experiences of those who have suffered child sexual abuse in institutions. We have a responsibility to use those accounts to make further inquiry and, ultimately, to provide an authoritative account of the events and make recommendations about the way forward.

The task we have been given requires significant resources which must be efficiently managed. I appreciate that there will be many people who may be stressed by the fact that the Commission cannot immediately hear their account of their personal circumstances. To those people I offer the assurance that we will receive your account as soon as we are able. I ask those who may be advising those people, and those who report on the work of the Commission, to understand the practical difficulties we face and through their advice and reports, assist others to understand the issues facing the Royal Commission.

Case Study 01: Scouts and Hunter Aboriginal Children's Service

September 2013, Sydney

The Royal Commission held its first public sitting in Melbourne on 3 April this year. On that occasion I spoke of the work which had been undertaken to organise the essential facilities for the Commission. At that time we were still working from temporary premises and had limited staff. However, by then we were able to take survivors' telephone calls and begin the investigative processes of the Commission.

The Commission has now established permanent facilities in Governor Macquarie Tower, this room having been constructed as the main room for our public hearings. When not being used for a public hearing this room will be used for a number of other purposes. We have also employed staff in all areas of the Commission's operations but we believe that to effectively carry out the tasks assigned to us under the Terms of Reference our staff numbers will have to further increase, probably significantly.

The Letters Patent give the Commission broad Terms of Reference. They are not constrained as to time. Although the Letters Patent provide a catalogue of matters that the Royal Commission is to enquire into the fundamental obligation is "to enquire into institutional responses to allegations and incidents of child sexual abuse and related matters." However, the Terms of Reference do place limits on our task. In particular we are not authorised to investigate the sexual abuse of children unless it occurred in an institutional setting. It is apparent that this may not be understood by everyone who has an interest in the Royal Commission's work. I urge anyone who wants to understand our Terms of Reference to access the Royal Commission's website.

The Letters Patent provide a broad definition of institution. It is defined to mean any public or private body, agency, association, club, institution organisation or other entity. The definition is informed by the example in the Letters Patent which speaks of any institution which provides the means through which adults have contact with children. The family is excluded from the definition of institution.

I shall return to the scope of our inquiries in a moment.

When I spoke at the Commission's Melbourne hearing in April I referred to the many inquiries in Australia which have previously dealt with the sexual abuse of children and related issues. By appointing the Royal Commission all Australian governments joined together in responding to continuing anxiety in the community about these issues.

It is now well known that the sexual abuse of children has been widespread in the Australian community. However, the full range of institutions in which it has occurred is not generally understood. Furthermore, the character and effectiveness of the response to allegations of abuse by institutions in which it has occurred has not generally been exposed. The prosecution of a perpetrator who has abused a child within an institution brings the existence of the

abuse to public knowledge but does not, in most cases, tell the community anything about the response of the institution in which the abuse occurred. Furthermore, although many recommendations have been made as to how institutions should be managed to minimise the sexual abuse of children and effectively respond to it when it has occurred, it is readily apparent that many of those issues require a coordinated national response.

I mentioned previously the breadth of the task facing the Royal Commission. As you know in order to assist us in our work the Australian Parliament amended the *Royal Commissions Act* to allow the Commission to hear from victims in private sessions. This followed a similar provision to facilitate the gathering of information in private as part of the Ryan Commission into similar problems in Ireland. It means that the Commission can receive the personal stories of people in private and in circumstances where they feel secure and not threatened by having to confront their alleged abuser. Although the Act provides that information obtained by the Royal Commission in private sessions is not evidence, it may be included in a report if it is “de-identified”, that is, the anonymity of the person is preserved.

The process of gathering material at private sessions poses significant logistical difficulties and resource issues for the Commission. As you are aware the Commission is in various ways attempting to ensure that all persons who wish to give an account of their alleged sexual abuse are able and encouraged to make contact with it. We are grateful to the media for the part it has played in helping us disseminate the Commission’s message, in particular telling people about private sessions. It is important that I again emphasise that in order to respond to those who contact us we have set up a telephone service which is staffed by people trained in relevant disciplines to answer the calls and others who speak with the person and assess whether it is appropriate for the person to come to a private session. If appropriate a caller will also be offered the name of a counsellor who will be able to assist people in need of psychological care.

Each private session requires one or two Commissioners to be present. We also need two Commission staff to carry out the necessary organisational tasks, including making a recording of the session. We must also have a trained counsellor present to provide support for anyone in need and ensure that, if required, they are referred to another service capable of providing the person with ongoing support.

When we first started planning for private sessions we took advice from a psychiatrist. We were told that it would be likely that an individual would require 1 to 1½ hours to tell their story and because of the need to safeguard the health of Commissioners and staff, it would only be possible for a Commissioner to hear four stories in one day. We were also advised that it would not be appropriate, bearing in mind the risk to a Commissioner’s health that a Commissioner sit for five continuous days in any week.

Experience has shown that this advice was sound. Although some people are able to give an account of their abuse in a logical and calm manner many are not. Many people who have come to the Commission have suffered greatly both at the time the abuse occurred and subsequently.

Many have received counselling at various stages of their lives, many have thought of suicide and some have attempted it. Many people, including those who suffered abuse thirty or forty years ago, break down in the course of telling their story and require the assistance of support persons to be able to continue. The recounting of those stories is both traumatic for the persons telling the story and stressful for the Commissioner receiving it.

The Commission has at 13 September received 4,301 phone calls relevant to allegations of abuse. Not all of these people require a private session and some callers fall outside our Terms of Reference. For example we have not been asked to look at familial abuse.

The Commission has now been able to conduct private sessions in Sydney, Brisbane, Adelaide, Perth, Canberra and Melbourne. At 13 September 398 persons have told a Commissioner their story. At that date there were 449 waiting to tell us their story. A further 1178 persons have yet to be assessed for a private session. We receive an average of 22 new callers per day and we expect that at least 10 of them will require a private session. I expect that rate to increase once public hearings start and survivors learn more about what we are doing.

Many people will be hesitant about coming forward until they are satisfied that they can trust the Commission's processes. Because the Commission is permanently located in Sydney private sessions can take place at our city premises whenever a Commissioner is available and it is convenient for a person to come and tell their story. In other cities forward arrangements have to be made. The logistical difficulties have meant that until recently it has not been possible to organise private sessions out of Sydney in more than one place at any one time. However, now that the Commission has adequate staff to assist in organising the sessions and the process of private sessions has, with experience, been refined I am now able to authorise Commissioners to sit in different places at the same time. This will continue throughout the life of the Commission. The availability of Commissioners for private sessions will also depend upon the demand for Commissioners to sit in public hearings.

Although I anticipate that a great many more private sessions will occur before the Commission's work is complete, some preliminary themes are emerging. It is apparent that where an organisation lacks an appropriate culture and there are not appropriate practices and training of staff within the organisation, there is a risk that sexual abuse will occur. In some institutions there may be only one perpetrator. In others there will be multiple abusers and many children may be abused. It is reported to us that when it occurs in residential institutions sexual abuse is almost always accompanied by almost unbelievable levels of physical violence inflicted on the children by the adults who had responsibility for their welfare. Many of the stories we are hearing will shock people.

It is also clear that the damage to an individual, be it a boy or girl, who is abused at a time when, because of their age, they are unable to resist an abuser or report the abuse to others, may be life changing. It is common that a person who has been abused in a school setting, but this may occur elsewhere, will experience significant difficulties in being able to concentrate on

school work compromising the development of the skills necessary to obtain employment and establish appropriate familial and broader social relationships. They lose faith in their teachers and in the school and may come to feel alienated from their friends and family. What many may consider to be low levels of abuse of boys and girls can have catastrophic consequences for them, leading to a life which is seriously compromised from what it might otherwise have been. Both boys and girls are left with a distrust of adults and difficulties with intimacy. Inappropriate touching of boys may leave them with confusion as to their sexual identity. This can result in lifelong difficulty in relationships which can cause problems in other aspects of their lives. Although the impact on the lives of abused persons has been reported within the academic literature I have no doubt that it is not well understood by the general community. In my role as a judge I have been called upon to review many of the sentences imposed upon people convicted of the sexual abuse of children but I readily acknowledge that, until I began my work with the Commission, I did not adequately appreciate the devastating and long lasting affect which sexual abuse however inflicted can have on an individual's life.

It is apparent from the work we have undertaken to date that it will not be possible within any reasonable time frame for the Commission to be able to investigate, hold public hearings and make findings in relation to every institution where there are allegations that children have been sexually abused. We will have to be selective. To make the best use of our resources we have determined to devote public hearings to systemic issues and policy matters. However, where we find evidence of a significant cluster of abused individuals, we may conduct a public hearing into that institution. It may also be that some individual institutions form part of a group of institutions which are themselves part of larger organisational structures which may contain a concentration of alleged individual abusers and systemic issues which we should examine in a public hearing. In order to enable Australians to understand what has been occurring and its potentially devastating consequences for abused persons we will, where the person agrees, also publicly tell the story of some individuals.

In a moment Ms Furness will outline the program she proposes for the public hearings which will be held between now and Christmas. There are many others under consideration and the list will continue to grow as we receive more information and carry out investigations.

Apart from the matters which will be the subject of public hearings the Commission has initiated a program of research which will be conducted both by Commission staff and consultants commissioned for this purpose. Various issues will be examined. Each area of research has been identified because of its significance to future efforts to minimise the sexual abuse of children within institutions. The research process will be assisted by the publication of Issues Papers. Four have already been published. They are:

1. Working with Children.
2. Towards Healing.
3. Child Safe Institutions.
4. Preventing Sexual Abuse of Children in out of home care.

We will also invite submissions from members of the community and bring together round tables where there may be an exchange of ideas. Evidence of problems which have been discussed in public hearings or information obtained in private sessions will play an important part in the Commission's consideration of systemic and policy issues.

The Commission has already commenced work on the preparation of the Interim Report which must be provided to government by 30 June next year. That report will contain an account of various private sessions with the survivors appropriately de-identified as required by the legislation. We will also report conclusions from any public hearings that have been completed. If appropriate any lessons learned from public hearings, round tables and the research program will also be reported at that time.

It is too early in the Commission's work to be able to predict how long may be required for us to complete the task given to us by government. However, as our work moves forward the comments made by various persons when the Royal Commission was announced about the large size of the Commission's task seem accurate.

Public hearings of the Royal Commission allow counsel assisting to bring evidence before the Commission and provide the opportunity for persons or institutions to appear to assist the Commission in understanding their perspective of relevant matters. Although the accommodation for the public to view the proceedings is necessarily limited, conscious of the widespread interest in our work arrangements have been made to webcast the proceedings. Although when it is necessary to protect an individual the broadcast of the proceedings may have to be interrupted or images modified, so far as possible all of the proceedings will, by this means, be available to the public throughout Australia. The Commissioners trust that this will enable more people to understand the Commission's work and appreciate the reasons for the conclusions and recommendations we ultimately provide to government

Case Study 17: Retta Dixon Home

Darwin, 2014

The Royal Commission is sitting today on the land of the Larrakia people – the traditional owners of the greater Darwin area. I acknowledge their deep spiritual connection with this land and sea country and I would like to pay my respects to Larrakia Elders both past and present.

The Royal Commission has now conducted public hearings in each of NSW, Victoria, Queensland, South Australia and Western Australia. This is our first public hearing in Darwin. We will hold a public hearing in Tasmania towards the end of the year.

This hearing is concerned with the events which took place at the Retta Dixon Home which was provided for Aboriginal children. It opened in 1946 and closed in 1980. Although the site remains there is only limited physical evidence of the facilities occupied by the children.

In recent years many Australians have come to understand more about the lives of Aboriginal and Torres Strait Islander people than previously. That knowledge has come from many sources. One in particular is the 1997 Bringing Them Home Inquiry conducted by the Australian Human Rights Commission which is generally acknowledged as providing a wider community understanding of the impact of governments and institutions on the lives of many Aboriginal children.

The Inquiry records the fact that from the late 19th century until the early 1970's Aboriginal children were forcibly removed from their families and placed in institutions run by the State, religious organisations and charities or adopted by non-Aboriginal families. Retta Dixon was one of these facilities. The Human Rights commission records that many Indigenous children who had been removed from their families were cruelly treated – many suffered physical and sexual abuse. Recognised as the Stolen Generation these impacts resonate today.

Since the Royal Commission began to engage with the general public in April last year we have been mindful of the need to ensure that we honoured the obligation in our Letters Patent to provide an opportunity for survivors of sexual abuse as children to have an opportunity to tell their story. As I have mentioned on previous occasions the Commonwealth Parliament amended the Royal Commissions Act to enable us to hold private sessions which provide an opportunity for survivors to speak with a Commissioner and talk of their childhood experience and its consequences for their lives. By this means thousands of people will have the opportunity to tell their story and contribute to our work in both public hearings and the development of appropriate policy responses to systemic issues.

The Royal Commission began our engagement with the Australian community in April last year. As of last week, 827 Aboriginal people have contacted us. This represents 18% of all people who have made contact. Of the people coming to private sessions 9% are from Aboriginal communities.

Aboriginal people have given evidence in public hearings. In particular the Parramatta Girls Home public hearing received evidence from a number of Aboriginal witnesses. Many Aboriginal organisations and advocacy groups have engaged with the Royal Commission through submissions to Issues Papers and participation in roundtables.

In June 2014, the Royal Commission delivered Aboriginal-focused private sessions in Broome and Kununurra in the Kimberley region of Western Australia

In July 2014, we hosted the Cherbourg Weekend, which brought together 50 Aboriginal and Torres Strait Islander survivors to participate in a mix of private sessions and group forums, supported by traditional cultural healing practices.

In May 2015, we will deliver private sessions for people from the Tiwi Islands. We have been working with Elders on the island throughout this year. A number of Tiwi survivors have already registered for private sessions.

Apart from these activities we have conducted community meetings and forums in Aboriginal communities in areas as diverse as Ballarat, Alice Springs, Central West NSW, Adelaide, Darwin, Geraldton, Tenant Creek, Brisbane, Canberra and Wagga. Many people have made contact with us following these occasions. We are also working with Aboriginal inmates in prisons across Australia to make sure they can get in touch with us to share their story if they wish to do so. To facilitate our work with Aboriginal and Torres Strait Islander people we have six Aboriginal staff and provide regular cultural Awareness Training for Royal Commission staff.

I have previously emphasised that the Royal Commission must be selective in the choice of institutions which it considers in public hearings. This is true of all institutions, including those where Aboriginal children lived. The hearing in Darwin this week is an important chapter in our work with Aboriginal and Torres Strait Islander people.

Case Study 25: Redress and civil litigation

March 2015

In January this year, we released the Royal Commission's Consultation Paper on Redress and Civil Litigation. The purpose of this public hearing- the 25th public hearing of the Royal Commission- is to enable invited persons and institutions to speak to the written submissions they have made to the Consultation Paper.

Our Terms of Reference require us to make recommendations in relation to 'ensuring justice for victims through the provision of redress by institutions'. Many institutions have acknowledged that their previous response to survivors has been inadequate. Many survivors have a pressing need for assistance, including effective and just redress. As I indicated when we released the Consultation Paper, it is for these reasons that the Commissioners accepted that we should consider the issue of redress and make final recommendations in relation to it as soon as possible.

When releasing the Consultation Paper, I also noted that a reading of our Terms of Reference indicates that there is agreement amongst all governments, both the Commonwealth and the states, that 'justice for victims' requires appropriate redress. Our discussions with institutions confirm that every major institution also accepts that effective redress is required if victims are to receive justice.

I also noted that, when considering the requirement for justice through redress, it is inevitable that the opportunity provided by the civil law for a victim to recover compensatory damages must be examined. That is, civil litigation and any reforms to it must be considered at the same time as redress.

Consultation process

The issues involved in redress and civil litigation are complex. The Royal Commission has undertaken an extensive program of consultation to ensure that we obtain and understand the views of those affected. We have published issues papers on: civil litigation; redress schemes; statutory victims of crime compensation schemes; and Towards Healing. We have also held a coordinated program of roundtables involving governments, institutions, survivors and others. This consultation program provided us with considerable assistance in developing the Consultation Paper.

Our work on redress and civil litigation has also been informed by the Royal Commission's work in private sessions and public hearings.

Commissioners have now spoken with more than 3,200 survivors in private sessions. Each private session reveals a unique personal story of betrayal of a child's trust with, for many, life-long consequences. Many survivors speak of losing their childhood. Others speak of losing the benefits which come from a stable family and the rewards which come from personal and career achievements.

Many survivors also speak of the experiences they have had in seeking redress or pursuing civil litigation and of what they think would best help them to heal and live a productive and fulfilled life. These private sessions have helped us to understand many survivors' views of redress and civil litigation processes as they have operated to date, and many survivors' views of how they could be changed to better achieve 'justice for victims'.

Evidence has been given about redress and compensation in many of our public hearings. Some of our public hearings have had a substantial focus on these issues. Case Studies in relation to the North Coast Children's Home, the Catholic Church's response to Mr John Ellis, and the Christian Brothers examined aspects of civil litigation in detail. The Case Studies relating to Mr John Ellis and the Christian Brothers also examined aspects of existing redress schemes, as did Case Studies in relation to Towards Healing, the Salvation Army, and the Melbourne Response. Case Studies in relation to The Parramatta Girls' Training School and The Institution for Girls in Hay, the Retta Dixon Home, and Bethcar Children's Home also examined circumstances where no redress was offered.

The Consultation Paper we released in January was informed by the public hearings and private sessions, and by the consultation program.

We have received considerable input from many interested persons in response to the Consultation Paper. We have received formal submissions from over 250 organisations and individuals, and we have received comments through the online form from approximately 100 organisations and individuals.

On behalf of the Commissions I express our appreciation to all of those who took time to give us their views and participate in our consultation program. We are grateful for all of their contributions.

We also greatly appreciate the contributions of all those who will speak at this public hearing, and the time they are giving in accepting the Royal Commission's invitation to speak. We have not summonsed anyone to appear at this hearing, and all those who speak will be doing so voluntarily. We appreciate their willingness to assist us in our work.

This public hearing, and all of the responses we received to the Consultation Paper, will assist us in forming our final views and making our final report on redress and civil litigation, which we intend to do in the middle of this year.

Invitations to speak

It is regrettable but inevitable that we could not invite everyone who has made a submission to speak at this public hearing. We could not invite even all of those who expressed a particular wish to speak. The approach we took to selecting who should speak is designed to ensure that those listening to the public hearing would hear: from governments, whose views are significant in assessing possible options for redress, including structure and funding; from survivor advocacy and support groups, who between them represent many survivors and broader groups of Forgotten Australians and Former Child Migrants; from groups who represent members of the Stolen Generations, and from organisations who have particular expertise in issues of importance to Aboriginal and Torres Strait Islander survivors; from a number of the largest faith-based institutions; and from other institutions that provide services to children.

We have also invited a number of people with expertise in counselling and psychological care to speak on a panel during this hearing. We were also able to include an organisation that advocates for children in out of home care, a number of legal organisations, the Insurance Council of Australia and some individuals who have had particular involvement in the operation of redress schemes.

There are many views and interests that need to be explored in this hearing. However, every submission responding to the Consultation Paper will be considered by the Royal Commission in developing our final report on redress and civil litigation. Unless they raise confidentiality or procedural fairness issues, all submissions will be published on the Royal Commission's website. Any interested person will be able to read any of these submissions, regardless of whether the organisation that made the submission is speaking at this public hearing.

Governments

As I have said, we are concerned to hear the views of governments. The Consultation Paper particularly sought governments' views on a number of issues, including support for a single national redress scheme or state and territory-led schemes in which non-government institutions would also participate. The Consultation Paper also sought governments' views on options for improving the provision of counselling and psychological care for survivors, and options for funding a redress scheme.

We received written submissions from the Commonwealth, New South Wales, Victoria, Western Australia, South Australia, Tasmania and the Northern Territory. We did not receive written submissions from Queensland or the Australian Capital Territory.

We invited each government to speak at this public hearing, including those governments that did not make written submissions. Victoria, South Australia and Tasmania have accepted our invitation, and we will hear from each of them over the next three days. The other six governments declined our invitation to speak.

The Consultation Paper discussed the strong support for a single national redress scheme expressed by many survivor advocacy and support groups and by many institutions. The Consultation Paper concluded that ‘the ideal position for survivors would be a single national redress scheme led by the Australian government and with the participation of state and territory governments and non-government institutions.’ However, the Consultation Paper also noted that ‘the ideal position will be difficult to reach if the Australian Government does not favour it or if the state and territory governments do not favour it.’

Submissions from state and territory governments have expressed a range of views, from support for participating in negotiations for a national scheme to opposition to a national scheme and unwillingness to participate in a state scheme with non-government organisations. As I said, we will hear further from three state governments during this public hearing. The Commonwealth has not accepted our invitation to speak at this public hearing. Its written submission is published on the Royal Commission’s website.

It seems clear from the Commonwealth’s submission that it does not support a single national redress scheme. Its submission refers to a number of concerns that it has about the complexity, time and resources that would be required to establish a national scheme, and the potential overlap with or duplication of state and territory schemes. It suggests that the time required to negotiate a national scheme would be frustrating to survivors and would undermine community confidence in the outcomes of the Royal Commission’s work.

It also seems clear from the Commonwealth’s submission that it does not support an expansion of the public provision of counselling and psychological care for survivors, other than through improving survivors’ awareness of existing services and their confidence in those services.

Finally, in relation to funding arrangements, the Commonwealth submits that the Royal Commission should make recommendations that institutions must accept the legal, financial and moral responsibility for failing to protect children. The Commonwealth does not see itself as having a role as ‘funder of last resort’, and suggests that such a role would not be necessary if the redress scheme were designed to take account of the solvency of institutions and the resources available to them when the maximum payment available to any given claimant is set. These issues need further exploration.

The Commissioners are disappointed that, while our Terms of Reference suggest that the need for effective redress has been accepted by all governments, the structural approach that is overwhelmingly supported by survivor advocacy and support groups and many institutions as being most likely to ensure a just, fair and consistent outcome for all victims wherever they may have suffered abuse is not presently supported by the Commonwealth. That said, we welcome the Commonwealth’s view that institutions must accept the legal, financial and moral responsibility for failing to protect children. This will of course extend to the Commonwealth accepting responsibility for any children who were not protected while in the care of the Commonwealth Government.

Conduct of the hearing

It will be apparent that all six Commissioners are sitting for this public hearing. All Commissioners were involved in finalising the Consultation Paper, and we are all responsible for determining the Royal Commission's recommendations on these issues. It is important that all Commissioners have the opportunity to hear oral submissions from, and ask questions of, those invited to speak at this public hearing.

This hearing will operate a little differently from our previous public hearings. Apart from the panel on counselling and psychological care, each of the organisations or individuals speaking have been told that they will have ten minutes to speak to their written submissions without interruption- and they will be told when their ten minutes are up, if necessary. There will then be some ten minutes for those speaking to respond to questions asked by Commissioners and Counsel Assisting.

Statement by The Hon. Justice Peter McClellan AM regarding arrangements for Cardinal Pell's evidence

February, 2016

The Royal Commission has received requests from some survivors, that they be able to be present in the room where Cardinal Pell will give evidence in Rome next week. The Commission considers that to be a reasonable request.

It's important to state, though, that the Royal Commission will be sitting in Sydney, not in Rome, and will be receiving the Cardinal's evidence in Sydney, transmitted from Rome.

With the assistance of the Australian Embassy in Rome, we have located a room in a hotel in Central Rome which, I am advised, has the technical facilities to ensure an effective signal to Australia. However, those facilities have not been tested.

I understand that testing of the facility is expected to occur late today, Australian time, and when that has taken place, and I expect this will occur tomorrow morning, a further announcement will be made as to the venue. If it happens, and I am advised this is unlikely, that the hotel which has presently been identified is not adequate, an alternative venue will be found in Rome and appropriate arrangements will be made.

Reasons for Decision with respect to Cardinal George Pell

February 2016

The Royal Commission is presently part heard in two case studies. One study, No. 28, relates to the Diocese of Ballarat and the other case study, No. 35 relates to the Archdiocese of Melbourne.

Cardinal George Pell was a priest in Ballarat and for a time was one of the consultors to the Bishop of the Diocese, Bishop Mulkearns. In that role he had responsibilities together with the other consultors to give advice to the Bishop about the appointments of priests to particular parishes and also to advise on other matters more generally relating to the administration of the Diocese. Cardinal Pell was a consultor at a time when some of the priests who have offended against children were serving in the Diocese and was present at meetings where the appointment of priests including at least one who is a known offender were considered.

Cardinal Pell took up a position as Auxiliary Bishop in the Melbourne Archdiocese in 1987. He continued in that role until 1996 when he was appointed the Archbishop of Melbourne. The evidence presently before the Commission indicates that he had responsibilities as an Auxiliary Bishop for areas of the Archdiocese where at least one offending priest was located. He was as an Auxiliary Bishop a member of the Archbishop's Personnel Advisory Board and a member of the Curia. During his period as Archbishop he of course had ultimate responsibility for the management of the Archdiocese. Because of Cardinal Pell's role in both Ballarat and Melbourne the Commissioners consider it essential that Cardinal Pell give evidence and explain his actions during relevant periods. Apart from his roles in Ballarat and Melbourne, Cardinal Pell was the Archbishop of Sydney. In Melbourne he was responsible for creating the Melbourne Response and gave evidence when the Melbourne Response was examined in a case study. When he was the Archbishop of Sydney, the John Ellis case was litigated and Cardinal Pell has given evidence about that matter and the operation of the Towards Healing program in the Sydney Archdiocese. The matters about which the commissioners presently seek the assistance of Cardinal Pell are separate from the matters about which he has already given evidence.

When Cardinal Pell first gave evidence before the Royal Commission he was resident in Sydney. On the second occasion, when the Melbourne Response was discussed, arrangements were made for him to give evidence by video link to Rome, where he is now resident. The evidence which he will be asked to give in the present hearings is more extensive than he has previously given in relation to the Melbourne Response.

At the hearing in Melbourne on the 11th of December last year counsel for Cardinal Pell indicated that because of his present health the Cardinal had been advised that he should not take long international aeroplane flights and for that reason the Cardinal sought to have his evidence given by video link.

The Commissioners did not accede to that application. I said

“Given the complexity of the issues involved, and the fact that there are 2 case studies presently before the commission covering an extensive period of time, coupled with the technical difficulties in Rome of the previous video evidence when the cardinal was in Rome, it is preferable that his evidence be given in person in Australia.”

In the hope that the Cardinal’s health might improve we deferred further consideration of the course which should be taken.

Since the matter was considered in December I am advised that the technical difficulties which existed on the last occasion have been addressed and that a feed from Rome should now be satisfactory. However, because of the other matters that I previously indicated to be relevant it would be preferable, but not essential, that Cardinal Pell give evidence in person in Australia.

Mr Myers QC who appears for Cardinal Pell has renewed the application that Cardinal Pell give his evidence by video link from Rome. In support of that application he tendered a medical report from Professor Patrizio Polisca, the director of complex care emergency medicine ‘Tor Vergata’ University Teaching Hospital, Rome dated 29 January 2016.

The report confirms the evidence previously before the Royal Commission and indicates that Cardinal Pell is suffering from hypertension (for which he is being treated), ischemic heart disease, complicated by a previous myocardial infarction, cardiac dysfunction related to the arterial hypertension and previous ischemia and some other issues not of immediate relevance.

The Professor concluded as follows:

“All the above mentioned functional and clinical changes have a negative synergistic effect with regard to your cardiovascular and respiratory functional capacity, in particular when going on a small walk on [sic] even slight physical exertion, when preparing to spend prolonged periods in a depressurised environment (airplane flight), with consequent relative haematic hypoxia and increase in blood pressure. Due to that outlined above, the undertaking of a long journey could induce an episode of heart failure and were this to occur during a flight it would also be difficult to treat. In conclusion, the clinical problems which Your Eminence presents therefore make it difficult for you to undertake a flight to Australia, which could entail serious risks to Your health.”

Although people with the conditions that Cardinal Pell has may fly long distances it is apparent from the medical report that in the case of Cardinal Pell there is a risk to his health if he undertook such travel at the present time. Having regard to the nature of his ailments it could not be expected that his health is likely to improve and remove those risks. Although it would be preferable if he gave evidence in Australia, when the alternative that he give evidence by video link is available the Commissioners are satisfied that course should be adopted.

I am informed by Ms Furness that there will not be time to take the Cardinal's evidence by video in the period set aside for the further hearing in Ballarat. Accordingly we will program Cardinal Pell's evidence to commence on Monday the 29th of February when the Commission will be sitting in Sydney. It is expected that his evidence may take three sitting days. The Commission staff will discuss with those representing Cardinal Pell the precise hearing times which will have to differ from our usual sitting times. As soon as they have been determined they will be announced by the Commission in the usual way.

Reasons for Decision with respect to Bishop Ronald Mulkearns

February 2016

Case study No. 28 is concerned with the response of the Roman Catholic Diocese of Ballarat to the sexual abuse of children. The Commission is proposing to sit again in the week commencing 22 February 2016 in Ballarat to take further evidence.

The Bishop with ultimate responsibility for the Diocese during much of the period of time that the case study is concerned with was Bishop Mulkearns. He was the Bishop from 1971 until 1997 when he retired. His evidence in relation to the management of offending priests and the Diocese response to survivors is obviously relevant and significant.

Before the case study hearing commenced I issued a summons requiring Bishop Mulkearns to attend the hearing. However, before he could give evidence the Commissioners were informed that the Bishop was suffering from bowel cancer and was seriously ill. It was also indicated that he was suffering cognitive problems, his memory was poor and his health may preclude him from giving evidence. I have previously excused him from attending in answer to the summons.

The Commission has now received in evidence a report from Dr David Fonda, a Consultant Geriatrician, Rehabilitation Specialist and a specialist in Bowel and Bladder Control. Dr Fonda has had access to relevant medical reports in relation to Bishop Mulkearns. He records that the Bishop has suffered a stroke and suffers colon cancer with a tumour in his pelvis attached to his right ureter. He is suffering chronic kidney disease, can only walk short distances with the help of a walking frame, suffers anxiety, and has difficulty sleeping.

When Dr Fonda spoke with Bishop Mulkearns the Bishop apparently expressed concerns that his memory of relevant events was vague and he believed that as a consequence he may be seen as a hostile or unreliable witness if he gave evidence.

Dr Fonda was asked by Bishop Mulkearns lawyers to report on a number of specific questions. Those questions and answers will be annexed to my reasons which will be published shortly on our website.

His report included the following:

- *Bishop Mulkearns did appear to be tiring during the latter part of my assessment with him and I would have thought ideal duration of interaction for cross examination would be between one hour and two hours maximum on any one day with a short interval during this.*
- *Further cross examining should be delayed for a number of days to allow him to recover physically and emotionally.*
- *Given the above provisos in the method of assessment and location of assessment, I believe Bishop Mulkearns should be able to answer "yes or no or I do not recall" to most questions.*

- *If information is provided in a more complex way, this may lead to more confusion in his ability to respond.*
- *If information is prompted then I believe he should be able to provide a response as above.*
- *His speed of processing of information is slow and therefore a lot of patience would be required to allow him to understand the questions, which might need to be paraphrased.*
- *At times, he has trouble finding the right word and prompting with choices would be an effective strategy.*
- *I suspect he would struggle with anything other than simply structured information and questions.*
- *Bishop Mulkearns says he does struggle to follow and retain a thread of information when he is reading something, which he enjoyed doing in the past. Therefore, if information is presented to him in the written form to process before an examination, this may prove difficult. He may need the help of his legal advisors or others to assist in this. If feasible, then having limited information presented to him in the written format to be read, processed and considered (possibly with his legal representative) prior to cross examination then this may lead to a more useful outcome.*
- *It is not clear to me (as I did not pursue this) if he does or does not have knowledge about the events of relevance to the Royal Commission. These may be suppressed but might be accessible under cross examination. However, it would not surprise me if, despite being able to recall information with prompted questions, he may still remain vague about the exact time and place these occurred. This is a common observation I see with older people where that level of detail does not seem to be easily recalled. It is also common in all people for there to be gaps in memory despite prompting.*

When the capacity of Bishop Mulkearns to give evidence was discussed on Friday his counsel indicated that notwithstanding the state of his general health and his cognitive difficulties the Bishop was prepared to give evidence.

However, having regard to his poor health, it was submitted that it would be preferable for him to give evidence for short periods approximately one and a half hours followed by an interval of some days after which his evidence could resume. It was submitted that this evidence should be given remotely, that is from the nursing home in which he resides to avoid the additional burden of travel and stress of the courtroom in which the hearing will be conducted.

Counsel accepted that the proposal required for the Bishop to give evidence would present practical difficulties. It may also become apparent, and having regard to the medical reports likely, that as he attempts to give answers to questions that his cognitive impairments mean that his evidence is unreliable and any questioning would be of no utility and would not assist the Commission in resolving issues relevant to the case study.

Counsel for the various survivors submitted that Bishop Mulkearns should be required to give evidence, accepting that it may be necessary to examine him remotely from his present residence. Dr Hanscombe, for six survivor witnesses, submitted that the medical evidence indicated that the Bishop's evidence would not assist the Commission and he should now be excused from further attendance.

Inquiries have been made and it seems that a room would be available at the nursing home from which Bishop Mulkearns could give evidence. Whether appropriate technical arrangements can be made is still being investigated. Obviously if these arrangements cannot be made, although it would require extra burdens on the Bishop, he could be taken to another place including the Ballarat courthouse where he could give evidence.

In all the circumstances, but without any conclusion as to the likely utility of the process, the Commission will require Bishop Mulkearns to give evidence. Whether that evidence will be taken remotely from the nursing home or another place will be discussed with his lawyers.

In deciding that the Bishop should give evidence it will be important for all parties to bear in mind that the taking of his evidence will be difficult for both him and for counsel assisting seeking a response to questions concerning the Bishop's actions some years previously. Whether his evidence could be of utility will have to be assessed after questioning has commenced.

The need for this assessment is apparent from the comment by Dr Fonda that without the assistance of his lawyers, Bishop Mulkearns may not be able to effectively answer questions. Having regard to the issues which Bishop Mulkearns will be asked to address during the hearing, if the answers are to be provided by the lawyers rather than by him, this will clearly be unsatisfactory.

If it seems to the Commission that questioning is futile we will bring it to an end. If that is necessary it will still be possible for the Commission to reach a conclusion in relation to many relevant factual issues from the many documents already in evidence together with the evidence of the other witnesses.

Annexure A

- (a) What is Bishop Mulkearns' current state of mental and physical health?
- I believe Bishop Mulkearns has mild cognitive impairment (MCI) of vascular etiology. The effects of recent surgery and anesthesia could possibly have impacted on his baseline function as was assessed last year. Notwithstanding, from a cognitive perspective, he performs surprisingly well with the deficits noted above.
 - Bishop Mulkearns' physical health is certainly less good than when he was assessed last year. Unquestionable, he does have colon cancer, which is obstructing one

of his ureters and causing deterioration in his kidney function. He is aware of his reduced life expectancy, which he indicates he has been told could be around six months. He has lost considerable weight but currently is eating reasonably well and is stable with no acute medical problems.

- Bishop Mulkearns says he is very stressed by the events surrounding the Inquiry and the thought of being further involved in the Inquiry. He says this is constantly on his mind. Whilst denying being depressed, he scored at the extreme in the depression scale.
- He does have chronic abdominal pain related to his cancer requiring significant doses of morphine related narcotic medication.

(b) “In your opinion, and in all the circumstances, is Bishop Mulkearns’ state of mental and physical health such that he can appear and give evidence to the Royal Commission? “

- Whilst Bishop Mulkearns is able to slowly mobilise, I feel that in his current state, it would be a hardship for him to have to attend a Commission Hearing lasting more than an hour or two (including travel) outside of his current accommodation.
- From a physical point of view, there is no reason why members of the Commission could not attend Bishop Mulkearns in his residence, which has ample meeting space available.
- Whilst Bishop Mulkearns’ attention and level of cooperation is very good, he does tire and therefore any interaction should be able to tolerate in short bursts. For example, I spent 2 ½ hours with him with a short break in between to stretch our legs and have a drink. That I feel would be maximum time in any one period of cross examining. Further cross examining should be delayed for a number of days to allow him to recover physically and emotionally.
- Bishop Mulkearns did appear to be tiring during the latter part of my assessment with him and I would have thought ideal duration of interaction for cross examination would be between one hour and two hours maximum on any one day with a short interval during this.
- Whilst Bishop Mulkearns is taking significant narcotic pain medication, this in its own right should not preclude him being cross examined by the Royal Commission with the above proviso.
- Whilst he admits to feeling stressed and distressed by the events that took place, I do not feel this would preclude Bishop Mulkearns being able to respond to questions of events that have taken place, given his performance in my assessment today.
- I do not see that his concern about not remembering or giving misleading information should be a basis for him not able to answer simple structured questions (see below).

- (c) “Having regard to Bishop Mulkearns’ current state of mental and physical health, what potential effects may the process of giving evidence, and any related stress, have on the following:

1. Bishop Mulkearns Capacity to process information.

- Given the above provisos in the method of assessment and location of assessment, I believe Bishop Mulkearns should be able to answer “yes or no or I do not recall” to most questions.
- If information is provided in a more complex way, this may lead to more confusion in his ability to respond.
- If information is prompted then I believe he should be able to provide a response as above.
- His speed of processing of information is slow and therefore a lot of patience would be required to allow him to understand the questions, which might need to be paraphrased.
- At times, he has trouble finding the right word and prompting with choices would be an effective strategy.
- Bishop Mulkearns says he does struggle to follow and retain a thread of information when he is reading something, which he enjoyed doing in the past. Therefore, if information is presented to him in the written form to process before an examination, this may prove difficult. He may need the help of his legal advisors or others to assist in this. If feasible, then having limited information presented to him in the written format to be read, processed and considered (possibly with his legal representative) prior to cross examination then this may lead to a more useful outcome.
- Whilst this may slow the overall process of cross examining Bishop Mulkearns over numerous smaller sessions, it may nonetheless lead to more useful responses for the Commission.

2. His Capacity to understand complex questions or multifaceted questions.

- Scores on cognitive testing (MMSE, ACE-R etc) give an indication of cognitive function and areas of deficit. There is no cut-off score that determines Capacity, but rather it helps guide thinking about Capacity and what adaptations might need to be made. His scores were not in a “definite” not capable range.
- I suspect he would struggle with anything other than simply structured information and questions.
- See above how information might be presented.

3. His ability to communicate effectively and accurately.

- I believe Bishop Mulkearns is able to communicate effectively, albeit at times with prompts and reminders, although additional time is required to assimilate information (provided not too complicated) and to allow for his responses.
- I believe, if unable to recall information, then with prompting or additional information, and adequate time to process this information, that he would be able to communicate effectively his response. (This does not mean that he would recall events, which he cannot recall).

4. His ability to give a true and accurate account of events, which occurred between 1971 and 1997.

- Bishop Mulkearns was able to provide me with fairly detailed recollection of events that took place before he was ordained a Bishop, different important times in his life within the Church, and even subsequent to that.
- He was able to provide detailed account of his medical history related to stroke, cancer treatment and medical practitioners.
- It is not clear to me (as I did not pursue this) if he does or does not have knowledge about the events of relevance to the Royal Commission. These may be suppressed but might be accessible under cross examination. However, it would not surprise me if, despite being able to recall information with prompted questions, he may still remain vague about the exact time and place these occurred. This is a common observation I see with older people where that level of detail does not seem to be easily recalled. It is also common in all people for there to be gaps in memory despite prompting.
- I did not question him about his involvement with the events that took place between these years. He clearly understood what the Royal Commission investigation was about and why they would want to speak to him.
- As I did not ask him anything specific about this period of time, I could not comment what his actual recall of detail was. However, it is conceivable that with appropriately structured questions, that he might be able to provide simple answers, (e.g. yes, no) to factual information that is already on record. The fact that he may not be able to spontaneously provide this information would not preclude the fact that with prompting he may be able to recall this.

Case Study 28: Catholic Church authorities in Ballarat

In a few weeks the Royal Commission will pass the half way mark in our work. Our final report will be provided to government by the end of 2017.

There are many elements to our work and many issues we must resolve. As you know, apart from the other tasks we have, a significant component of our work is undertaken in case studies for which we conduct public hearings. We have now held public hearings in every state and territory. Today we commence our 28th public hearing. This is the second public hearing in a regional centre.

At this point ten case study reports have been tabled in Parliament and published on our website. A further four case study reports are nearing completion and will be provided to the Governor General and the various Governors in the near future.

The rate of engagement by the community with the Royal Commission remains consistent. Around 270 people make contact with us each week. In total our call centre has received more than 21,000 calls. Nearly 11,000 people have written to or emailed us since we commenced.

The Royal Commission has the power to refer matters that come to us to other relevant authorities, including the police, for investigation. To date we have referred more than 600 matters to the police in various states.

The Commissioners have now completed more than 3400 private sessions and a further 1400 people are waiting in a queue for their session. The rate of request for a private session has not diminished and from time to time, usually in response to particular public hearings, increases.

We have previously spoken of the research reports we have released. A large number of projects are currently under way. We have recently published the report: Child sexual abuse prevention programs for pre-schoolers: a synthesis of current evidence.

In all we have now published 10 substantial research reports.

As you will be aware the Royal Commission has the major task of considering redress for survivors. The report on that issue is presently being drafted. It will be detailed and comprehensive and will point the way forward for government, both the Commonwealth and the States, and institutions in meeting the needs of survivors. I anticipate that the report will be with the Governor General and Governors in August. The need for a fair and effective redress scheme has not been doubted by any government or the institutions that we have consulted. Fairness and effectiveness will be central to our redress report.

I turn to talk briefly about this hearing. The hearing concerns the response of various institutions, each a part of the Catholic Church, to allegations of child sexual abuse. Although we are conscious that child abuse issues in the Ballarat region extend beyond the Catholic Church it was necessary, having regard to our resources, to define a case study which ensures

the most effective use of those resources. It must also be remembered that we are constrained by our terms of reference and cannot conduct a hearing which may prejudice prospective criminal proceedings. For this reason we cannot presently look at the Ballarat Orphanage in a public hearing.

Early in the life of the Royal Commission I conducted some private sessions in Ballarat. Other Commissioners have also conducted private sessions. In addition, I have met with many local people and spoken at community meetings about the issue of child sexual abuse. In my various discussions I was told of the significant scale of the abuse which has occurred in the Ballarat region and of the great suffering of many people. That suffering extends beyond the individual survivor. Many members of their families and friends have been deeply affected by what has occurred. The impacts have been felt throughout the community.

I am conscious of the work that was done by the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations in the Ballarat region. In undertaking our work in Ballarat it will be necessary to retrace some of the ground which that inquiry traversed. However, Counsel Assisting will in her opening draw upon the investigative work that the Royal Commission has been able to do. The evidence in this public hearing will extend significantly beyond the evidence which was available to the parliamentary inquiry.

Because of the nature of the issues which have emerged in the Ballarat region we have decided to conduct this hearing in two parts. Ms Furness will outline the evidence which she proposes to lead in the first stage of the inquiry. The second stage is likely to occur towards the end of this year.

The evidence in the first stage of this hearing will include the personal stories of a number of survivors. That evidence will describe the gross violations of individuals by ordained members of the Catholic Church. As you are aware, the Royal Commission has revealed many shocking stories of the betrayal of children. As we listen to the evidence in this hearing we should all reflect on the impact for those who have suffered in the Ballarat region, and the thousands of others who have suffered throughout Australia.

In this hearing there will be evidence from perpetrators. The evidence will not be directly concerned with the circumstances of their offences. That has already been dealt with by the Courts. However, the evidence has an important part to play in the Royal Commission coming to understand both why ordained members of the Catholic Church became abusers and how the Church responded to allegations of their abuse. It will be particularly important in helping the community to learn of the knowledge that people in authority in the Church had of the abuse and will assist us to assess the response of those in charge. I appreciate that the evidence of perpetrators may be confronting for some people, in particular survivors. However without the evidence of perpetrators, the true story of the response of the Church in Ballarat may never be completely revealed. Mindful of the possible impact of the hearing, the Commission staff have

been careful to organise, in cooperation with local services, support for any person who may need it during the hearing.

From my discussions and those of Commission staff with members of the community, I am aware that there may be different and strongly held views about the conduct of ordained people and the appropriateness of the response of leaders of the Church in the Ballarat Diocese. Many want this public hearing. There are others who doubt the need for a public hearing. Some may not want the story told. Unless the truth is revealed and known publicly the prospect of effective healing for survivors and institutions is diminished. When he recently visited Sri Lanka Pope Francis said of the suffering brought by civil war in that country

“the process of healing also needs to include the pursuit of truth, not for the sake of opening old wounds, but rather as a necessary means of promoting justice, healing, and unity”

The Pope’s words have relevance to the task we are about to undertake in this hearing.

Case Study 44: Catholic Church authorities in Armidale and Parramatta

September 2016

It is now almost three years since the Commission held its first public hearing. In that time we have been able to complete the hearings and provide reports to the Governor-General and Governors in 26 case studies. Twenty two of those reports have been publicly released and four await publication by government. A further 13 case studies have been conducted and are at various stages of completion. Reports in those case studies will be provided to government in due course.

I have previously indicated that it is not possible for the Royal Commission to conduct a public hearing in relation to every institution about which we have received allegations of the sexual abuse of children. The Commission has received information about over 4,000 institutions. Because of the impossibility of conducting a public hearing in relation to each of these institutions we have carefully selected the institutions we have publicly investigated with a view to providing the government, the institutions and the public with an understanding of the nature of the problems which we have identified. The case studies have been selected to ensure an appropriate geographical spread and also an appropriate reflection of the type of institution where survivors were abused.

A breakdown of the institutions examined in our public hearings reveals the following. 29 case studies have examined at least one state institution (70% of all case studies). In 11 case studies state institutions were examined as a primary institution. Faith based institutions have been examined in 26 of our case studies (63% of all case studies). Catholic institutions have been examined in 14 case studies (34% of all case studies) and Anglican institutions have been examined in 5 case studies (12% of all case studies).

Today we commence a further hearing in relation to issues in the Catholic Church in NSW. This will be our last hearing dealing with Catholic institutions apart from the final review hearing which will occur next year.

As you will be aware the Commission is closing registrations for private sessions on 30 September this year. The Commissioners have now met with survivors in 5,866 private sessions and a further 1,616 people have been approved for a private session. We expect that by the time the Commission completes its work at the end of next year we will have held more than 7,200 private sessions.

The current breakdown of institutions in which survivors in private sessions state that they have been abused is as follows. 62% of attendees reported abuse in a faith-based institution. Around 27% reported abuse at government-run institutions. Abuse in Catholic institutions was reported by 40% of all private session attendees, abuse in Anglican institutions by 8% of attendees and abuse in Salvation Army institutions by 4% of attendees.

Apart from our work in public hearings and private sessions we have

commissioned research across a broad range of issues relevant to the sexual abuse of children in an institutional context. The primary focus of our research has been to identify and document the changes that should be made to the way institutions are structured and governed to ensure so far as possible that children are not abused in the future. As required by our terms of reference we have also been concerned to ensure that the need for a redress response has been considered together with the response of the civil and criminal justice systems to allegations of the abuse of children. We have already published 27 research reports and a further 34 will be published in the near future. Apart from providing a valuable resource for the Commission these reports will be an authoritative source for other research and policy work long after the Commission has completed its final report.

I have previously mentioned that the Commission has worked co-operatively with police. Section 6P of the *Royal Commissions Act 1902* authorises a Royal Commission to provide information to the police with respect to possible criminal offences. The Royal Commission has now referred 1,659 matters to police to consider for further investigation with a view to prosecution. Because of the volume of references the resources of the various police forces have been placed under significant pressure. Although I understand a great many references are awaiting investigation. So far prosecutions have been brought against 71 people.

After the present case study has been completed the Commission will turn its attention in a public hearing to harmful sexual behaviours of children within schools. There may be a limited number of future case studies. These will be followed by a series of review hearings in relation to various institutions and selected topics. I anticipate that our final hearing which has been given the working title 'Nature, Cause and Impact of Child Sexual Abuse' will focus amongst other matters on the 'why' question, and will take place in March 2017.

Case Study 46: On the criminal justice consultation paper

December 2016

In September this year, we released the Royal Commission's Consultation Paper on Criminal Justice.

It became clear to us early in our work that the criminal justice system's response to institutional child sexual abuse to date has not been adequate, although it has improved in some respects in more recent years.

It is true that some survivors have obtained a strong sense of validation from an effective criminal justice response. However, many survivors have told us of the difficulties they have experienced in seeking a criminal justice response, and the disappointment – and in some cases the harm – caused by poor or inadequate criminal justice responses.

Sexual assault of children has the potential to, and often does, cause significant and persistent trauma for the person assaulted. Because it may and generally does take many years for the victim to disclose, although the memory of the essential incidents remains – often resulting in post-traumatic stress disorder symptoms – the recollection of all the details required by the criminal law may not be present.

An effective criminal justice response should be available to condemn and punish child sexual abuse offences, in the interests of victims and the broader community.

Many of the issues in criminal justice are very complex ones. Some of the issues raise very technical difficulties, and many of them involve competing interests between the prosecution and defence.

The purpose of this public hearing – the 46th public hearing of the Royal Commission – is to enable Commissioners to obtain as much assistance as possible from interested parties in considering these issues. The evidence we hear this week, together with all of the written submissions to the Consultation Paper, will help Commissioners to reach our final views and make our final report on criminal justice, which we intend to do in the middle of next year.

On behalf of all Commissioners, I acknowledge and thank all of those who have contributed to our criminal justice work to date, whether through research, roundtables, public hearings, private sessions, responding to issues papers and of course through submissions to our Consultation Paper.

Inevitably we are not able to hear from everyone who has made a submission to the Consultation Paper at this public hearing. However, many views and interests will be explored in this hearing. I acknowledge and thank in advance all those who will give their time this week to assist us in considering these difficult issues. All contributions to our criminal justice work will help to inform our final report.

Case Study 57: Nature, cause and impact of child sexual abuse

March 2017

The Royal Commission commenced its work in early 2013. After taking the necessary preparatory steps, including initiating private sessions, we held our first case study hearing in Sydney in September 2013. Today we commence our last case study hearing.

In my opening remarks at the September 2013 hearing I said that although it was well known that the sexual abuse of children had been widespread in the Australian community, the full range of institutions in which it had occurred was not generally understood. I also said that the character and effectiveness of the response to allegations of abuse within institutions had not generally been exposed.

The information we have now gathered through private sessions and other means has identified more than 4,000 institutions where the abuse of children is alleged to have occurred.

It is remarkable that failures have occurred in so many institutions. It is now apparent that many of the characteristics of failure within institutions are common, although there are sometimes significant individual characteristics. The information we have received would justify a public hearing with respect to a number of the 4,000 institutions. However, there are a number of reasons why this is not possible.

The resources which must be dedicated to the investigation of an institution and the preparation for a public hearing are extensive. In the course of our investigations we have served notice for the compulsory production of more than 1.2 million documents. From the documents produced relevant material must be extracted and organised so that an accurate and comprehensive account can be given of the conduct of people within the institution. Witness statements must be taken. This can be a complex and time consuming task.

Apart from the resources required to conduct a public hearing our terms of reference, rightly, do not require us to publicly investigate issues which have been examined by other inquiries. We must also ensure that any hearing does not trespass upon the fair trial of an individual who has been accused of abusing a child.

Apart from our work in the investigation and conduct of public hearings the Commissioners are required to conduct private sessions throughout Australia. As of today we have conducted more than 6,500 private sessions. But nearly 2,000 people remain awaiting their session. The Commission's schedule will ensure that each of these persons has a private session. Some may take place close to our finishing date in the second week of December this year. Obviously private sessions place demands on Commissioners' time which limit our ability to conduct public hearings.

When the Commission was initiated our terms of reference provided that we should complete our task within three years. We soon realised that this would not be possible and in our interim report in 2014, we recommended to government that our term be extended for another two years. This was done.

Although it was apparent that we could never conduct a hearing in relation to every institution about which we had information we were satisfied that with the additional two years we would be able to publically examine the various types of institutions where abuse had occurred. We would also be able to ensure that at least one inquiry was conducted in every State and Territory.

We have also reflected in our choice of institutions the number of persons who have come to a private session from a particular institution or institutional type.

We have now conducted hearings into both public and private schools, detention centres, out of home care, churches, orphanages and government bodies. We have also inquired into defence establishments, sporting clubs, after school care, dance and performing arts academies, institutions providing services for children with disability, scouts, health care providers, and a yoga ashram. We have also held public hearings into criminal justice. We have sat in every capital city and some regional centres. By the conclusion of this hearing we will have sat for more than 440 days in public. We will have heard evidence from more than 1,200 witnesses.

I appreciate that there are likely to be many people who are disappointed that we have not conducted a public hearing into the institution in which they were abused. As I have previously explained there will be different reasons why a particular institution may not have been examined. It may be that criminal proceedings are underway and a public hearing by the Commission could prejudice a fair trial. It may also be that the documentary trail is inadequate to enable us to ascertain the institutions response to the problems. Apart from these matters our terms of reference require us to focus on systemic issues. In selecting the institutions to examine in a public hearing we have endeavoured to ensure that the hearing will enable us to explore and provide recommendations which respond to those issues.

The Royal Commission has now delivered 33 case study reports to government. A further eight are in the course of preparation. We have also delivered final reports with respect to Working With Children Checks and redress and civil litigation. A significant report in relation to the criminal justice system is presently programmed to be delivered to government in August this year. We have consulted with many people both informally and through a program of issues papers and roundtables.

We have also commissioned and published 44 research reports across a broad range of issues relevant to the Commission's work. Apart from the expertise held within the Commission this has enabled us to draw upon the learning of national and international experts across many disciplines. Our research is unprecedented in its scale and we hope it will be part of the continuing legacy of the Royal Commission.

When the Commissioners advised the government that they were seeking an extended term we indicated that we believed this would enable us to gather sufficient information to give the Commissioners, the public, and relevant institutions an understanding of how institutions failed. I believe this has been achieved.

Apart from our public hearings and private sessions the Commissioners are now, and will for some months be, engaged with our many dedicated staff in preparing the final report which will include comprehensive recommendations designed to better protect children in the future.

After this year the community's resources, both government and institutional, should be focused on providing effective redress and implementing regulatory and other changes designed to ensure that so far as possible no child is abused in an institutional context in the future. Survivors have waited too long for an effective response to their suffering and the future protection of Australian children must be given the highest priority. These objectives can only be fully achieved following the delivery of our final report. That report will be delivered to the Governor General on 15 December this year.

Redress and civil litigation

September 2015.

It is just over two years ago since the Royal Commission was appointed. In that time the Commissioners have spoken with over 2,850 survivors in private sessions. Each session reveals a unique personal story of betrayal of a child's trust with, for many, life-long consequences. Many survivors speak of losing their childhood. Others speak of losing the benefits which come from a stable family and the rewards which come from personal and career achievements.

All who have been abused suffer in some way.

A picture is emerging for the Commissioners that although the sexual abuse of children is not confined in time – it is happening today – there has been a time in Australian history when the conjunction of prevailing social attitudes to children and unquestioning respect for the authority of institutions by adults coalesced to create the high risk environment in which thousands of children were abused.

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 which their relationship with the child gave them. When the silence required 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. When, amongst adults given the power, there are people with an impaired psycho sexual development, a volatile mix is created.

Our Terms of Reference require us to make recommendations in relation to 'ensuring justice for victims through the provision of redress by institutions'. Many institutions have acknowledged that their previous response to survivors has been inadequate. Many survivors have a pressing need for assistance, including effective and just redress. For these reasons, the Commissioners accepted that we should consider the issue of redress and make final recommendations in relation to it as soon as possible.

A reading of our Terms of Reference, which have been adopted by every Australian government, suggests that there is universal agreement amongst governments that 'justice for victims' requires appropriate redress. Our discussions with institutions have confirmed that every major institution also accepts that effective redress is required if victims are to receive justice. Everyone recognises that redress is not only about money. Furthermore, an effective redress scheme cannot offer common law damages. The fundamental object of redress must be to help those who have suffered to heal and live a productive and fulfilled life.

Conscious of the complexity of the issues involved in redress the Commissioners have undertaken an extensive program of consultation. We published issues papers on: civil litigation; redress schemes; statutory victims of crime compensation schemes; and Towards Healing. We have also held a coordinated program of roundtables involving governments, institutions,

survivors and others. From this consultation program we have developed a major consultation paper which I release today. I regret that it is a lengthy document. However, there are many questions to consider and the complexities cannot be avoided.

The Commissioners now seek submissions in response to the consultation paper from interested parties so that our final report can be published in the middle of this year. The closing date for submissions is Monday 2 March. The Commissioners will receive oral submissions at a public hearing over three days commencing on Wednesday 25 March.

As the need for effective redress has apparently been accepted by all governments and many institutions, we are endeavouring to provide recommendations for redress which meet the criteria of justice, practicality and affordability. We understand that this issue emerges in an economic climate where governments must be particularly careful in committing public monies to areas not presently funded. However the need having been accepted, it is important that governments and institutions respond.

It is necessary for me to stress that the Commissioners do not presently have firm views about any issue in the consultation paper. We are seeking informed comment to assist us in forming our final views.

When considering the requirement for justice through redress, it is inevitable that the opportunity provided by the civil law for a victim to recover compensatory damages must be examined. Although there are many hurdles that a survivor faces in prosecuting a claim for damages, for some this course provides the possibility of recovering a money sum in excess of that which could be provided by any redress scheme.

In recent years there have been considerable developments in the manner in which the law, in some countries, approaches the liability of institutions for the sexual abuse of children entrusted to the care of the institution. In simple terms, the law in England and Canada has developed so that depending on the circumstances, an institution owes a duty of care to children entrusted to it which may be breached by the deliberate and criminal act of a 'member' of the institution, without negligence on the part of the institution itself.

Although Australian law has not taken this step it is not difficult to contemplate a duty which is owed by an institution which is absolute in nature. Where an institution holds itself out as providing for the welfare and development of a child, being an organisation which a parent may entrust with the care of their child and the child is abused, many people would expect the institution to be accountable. A crime committed by a member of the institution becomes the responsibility of the institution itself.

Inherent in the contemporary response of the law in England and Canada to these issues is an acceptance that an institution carries an unqualified obligation to care for any child entrusted to its care.

The apparent acceptance by government and institutions in Australia of the need for effective redress, although not in the amount of common law damages, reflects an acceptance of a similar obligation by governments and institutions. The significant questions are of course what should be the elements of redress, how should it be provided and how can it be adequately funded.

The consultation paper contains a detailed discussion of these issues. It suggests that effective redress must have three elements – personal response by the institution to the survivor, guaranteed funding when needed for counselling and psychological care and a money sum which is paid in recognition of the wrong done to the individual.

We have considered options for the formation and ongoing management of a redress scheme. It is clear that a scheme should be structured so that the decision making about redress is independent of the institution in which the abuse occurred. It is also clear that survivors want a scheme that will treat them fairly and equally, regardless of the institutions in which they were abused.

Many people prefer a single national scheme administered by the Australian Government. Institutions would contribute to the funding of the scheme in accordance with their responsibility to individual survivors and in addition would meet their relative proportion of the costs of the scheme's administration.

An alternative considered in the paper is to provide individual State and Territory based schemes which adopt and are administered in accordance with common national principles. Individual institutions would contribute in the same manner as they would contribute to a national scheme. This option would require the Australian Government to at least contribute to State and Territory schemes in respect of survivors who were abused in Commonwealth run institutions.

Another alternative is for individual institutions, either alone, or combining together to provide and administer their own independent scheme also in accordance with common national principles. This would leave governments to either provide their own schemes, but in accordance with the common national principles, or join in a scheme with institutions.

At this stage of the development of a possible redress scheme various assumptions must be made. They include the number of survivors, their need for counselling and its likely cost, and the amount considered to be adequate as a money sum. To assist us in identifying appropriate assumptions we have engaged a firm of actuaries. The consultation paper draws upon their work. The actuaries' paper is available on the Royal Commission website.

Critical to the modelling of a possible redress scheme is the assumption which is made as to the number of survivors who may be eligible. The actuaries have carefully analysed the Western Australian Government scheme to determine the number of people who were accepted to be

entitled to redress for sexual abuse they suffered as a child. From this analysis and using other data, they have estimated the number of survivors who may be entitled to some level of redress nationally to be 65,000.

We know from our private sessions that some survivors will need lifelong counselling and psychological care, while others will need care from time to time. There are existing services, including specialist sexual assault services and public funding through Medicare, that help some survivors to obtain at least some of the counselling and psychological care that they need. However, we have learnt that existing services are not adequate. There are a number of service gaps.

We discuss some possible options in the consultation paper which might ensure that survivors' needs for counselling and psychological care are met. One option is to significantly expand the public provision of appropriate counselling services, either through changing Medicare requirements or through a stand-alone government program. Another option is to establish a trust fund that would operate as part of a redress scheme. It is important that any counselling and psychological care provided through redress should supplement existing public services, and not displace or compete with them. We seek all interested parties' views in relation to counselling and psychological care. We will endeavour to make recommendations that ensure survivors' needs are appropriately met in a way that does not adversely affect existing services.

There are many considerations relevant to the appropriate money sum, including fairness and affordability. The consultation paper considers various options with a cap of \$100,000, \$150,000 or \$200,000. These are used to assist an understanding of the situation. Of course, other options may be appropriate.

It is important to appreciate that the possible cost of a scheme is not significantly dependant on the cap but rather on the spread of amounts within the cap and the resulting average payment which may be appropriate for individual survivors. The consultation paper considers how those amounts might be determined. It suggests that relevant criteria could be severity of abuse – 40 per cent, impact of abuse – 40 per cent and distinctive institutional factors – 20 per cent. Other approaches are possible. Average payments of \$50,000, \$65,000 and \$80,000 are modelled.

A significant issue in our discussions has been the provision which should be made for survivors who were abused in institutions which no longer exist and for which there is no successor or overarching organisation. There are also survivors who were abused in institutions which have no money. If these survivors are to benefit from a redress scheme the funding must come from either government or other institutions. The issue of funder of last resort is important if, as our Terms of Reference contemplate, the community is to ensure justice for victims through the provision of redress.

When designing a redress scheme it is necessary to acknowledge that many institutions and some state governments have already provided redress in different forms. Payments already

made by these schemes would have to be offset. This would also be the case where a survivor has received a common law award or settlement. Various possibilities are discussed in the paper for adjusting for past payments.

Our actuarial advisers have conducted detailed modelling of the possible costs of a redress scheme. The two critical assumptions are the number of eligible survivors and the average cost of payments under the scheme. The consultation paper includes the modelling that assumes 65,000 eligible survivors and average payments of \$65,000. Based on these assumptions, the total cost of redress nationally would be in the order of \$4.378 billion. This number will of course vary depending on the assumptions which are made.

The cost of redress would be spread over a number of years. The actuaries have provided an indicative 10 year model. That model indicates that, adopting the same assumptions of 65,000 eligible survivors and average payments of \$65,000, the maximum cost in any one year is likely to be in the order of \$650 million nationally. This would be funded by contributions from both governments and institutions.

If government is the funder of last resort, and continuing with the same assumptions of 65,000 eligible survivors and average payments of \$65,000, a contribution of \$1.971 billion would be required from all governments of which \$582 million reflects the contribution as funder of last resort. \$2.407 billion would be the contribution required from private institutions.

I should again stress that these numbers change if the assumptions change and if a different level of average payment is chosen.

It is important to emphasise that although it appears that governments must accept a broader role in providing effective and fair redress, the primary responsibility is with the institution, whether government or otherwise, in which a survivor was abused. That institution must provide an appropriate personal response and be responsible for funding the counselling and money sum for each person abused in that institution.

Accepting that effective redress through a redress scheme should be available, it is nevertheless necessary to ensure that survivors have appropriate access to the possibility of common law damages.

Apart from the issue of the duty of care, a number of other issues in relation to civil liability are discussed in the paper.

It must now be clear from the work we have already completed that limitation periods of three, six or even 12 years will be inadequate to allow many victims time to come to the position where they are able to give an account of their abuse and provide information from which the damage which they may have suffered can be assessed. For some people the betrayal of the trust inherent in abuse by an adult inflicts such profound damage that it may be 20 years

or longer before the person is able to talk of their experience. For many it is not until that time or more has passed that they come to understand that they have been damaged and for the first time seek assistance in coping with the psychological trauma. We know that some people who are abused move on from the experience with minimal impact on their lives. Others will experience trauma which in their later life may require a level of intense care. The consultation paper raises the question of amendments to the statutes of limitations which may be appropriate for survivors.

As I have indicated, it is necessary to consider the elements of the duty of care which should be imposed upon an institution and the occasions for its breach. The paper discusses the English and Canadian position. If change is appropriate legislation would be required by each State or Territory.

Related to the duty of care issue is the question of the appropriate onus of proof. Instead of the victim being required to prove a breach of the duty of care, should the institution be obliged to prove that it took all reasonable steps to care for the child? If made, this would be a significant change but many would support it because of the increased discipline it would impose on institutions.

Each of these questions raises a series of complex sub-issues. They are all considered in the consultation paper.

During the course of last year, and after discussions with the Attorney General, who has been supportive of the Commission's work, we reported to the Australian Government that it was necessary, if we were to appropriately complete our tasks, that we be funded for two years beyond the original three years provided in the Letters Patent. The Australian Government agreed and we are now funded to provide our final report by – December 2017. The Commissioners are committed to complete our work by that time.

The Commissioners have throughout our work been conscious of the need to engage with people in regional areas. Apart from many people who we have assisted to travel for a private session in a city, the Commissioners have spoken with many people by telephone. We have now conducted private sessions in the regional centres of Rockhampton, Woorabinda, Launceston, Cairns, the Kimberley, Geelong, Ballarat, Bendigo, and Coffs Harbour. In first half of 2015, we have programed private sessions, including some return visits, in the regional centres of Lismore, Newcastle, Townsville, Launceston, Cairns, Warrnambool, Shepparton and the Tiwi Islands. Depending on the number of people wanting a session in particular locations, we will arrange private sessions in other regional centres. We have also held private sessions in a number of metropolitan and regional prisons and we have planned further private sessions at prisons in 2015.

We have now completed 21 public hearings. We have forwarded nine reports of hearings to government of which six have been released. A number of further reports are close to

completion. Our future program of public hearings contemplates seventeen hearings this year. The program will end in early 2017. This will allow time for the Commissioners to complete private sessions and develop comprehensive policy recommendations.

It is apparent that our capacity to conduct public hearings could never allow a hearing into every institution in which abuse has occurred. We must be selective. The decisions in relation to which institutions to examine in a public hearing are made to cover a broad range of institutions having regard to geographical location, type of institutions and the character of the provider. Eventually the choice reflects the concentration of institutional types which feature more predominately in the information we are gathering, including from private sessions.

On Monday we will commence a public hearing in Melbourne which will examine allegations of child abuse against four individuals of Yeshiva Melbourne and Yeshiva Bondi. This will be followed by a hearing in Sydney which will explore allegations in relation to Knox Grammar School. We will then turn our attention in a public hearing to out of home care.

In April the Commission will travel to Rockhampton where the public hearing will focus on the experiences of children at St Joseph's Orphanage, Neerkol, which was managed by the Sisters of Mercy. The case study will also examine the conduct of priests attached to the Diocese of Rockhampton who carried out duties at the Orphanage.

In May we will travel to Ballarat, a regional centre with a deeply disturbing history of institutional sexual abuse. The hearing will commence in May but is likely to require further sittings at a later date. The first part of the hearing will hear of the experience of many survivors and the damaging impacts which the abuse has inflicted on the social fabric of the community and the families within the community.

Our Terms of Reference require the Commissioners to examine systemic failures by institutions in relation to incidents of child sexual abuse to enable best practice to be identified so that it may be followed in the future. Two imperatives are identified. Firstly to protect against the occurrence of child sexual abuse, and secondly to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims. To assist in defining our work the Letters Patent identify four areas of particular significance to which our inquiries should be directed.

With these areas in mind, the Commissioners have identified the major policy areas which we must investigate with a view to developing appropriate recommendations for change. Our work in this area is supported by a comprehensive program of research. We have already completed and published reports in relation to seven research projects. Three more reports will be published in February. We have also published seven issues papers.

Details are available on the Royal Commission website.

Early in our work we identified a need to provide recommendations in two areas as soon as possible. The first is redress and civil litigation. The other issue is working with children checks, about which I would like to say a few words.

It may come as a surprise to many people that although discussed by governments for years, Australia still does not have a national or otherwise uniform system for checking the pre-employment history of a person who seeks to work in a paid or voluntary capacity with children. This is a significant failure by government which must be rectified. As we know our federal structure of government is accepted as bringing many benefits, however there are some areas where the complexities which result from differing perspectives and expenditure preferences create difficulties. A uniform system of checks for those who seek to work with children has proved to be one of those areas.

Because, although the need is obvious, the criteria which should be adopted has been controversial, the Commissioners decided that these issues should be addressed early in our work and a report provided to Government. Our primary consultation work in this area is now complete. Further detailed discussions are presently taking place and I anticipate that we will publish the final report on this issue in May of this year. It is to be hoped that all governments will respond to the issues raised in a constructive and timely manner. A national framework for working with children checks is long overdue. Its absence is a blight upon the communities' efforts to provide effectively for the protection of children.

Finally, this morning I should reflect on the response which is already evident from both governments and institutions to the issues raised by the Royal Commission's work. It has been overwhelmingly positive reflecting a general acceptance of the need for us all to do more to protect our children. The cooperative goodwill between institutions, governments and survivor groups was evident in our roundtable meetings. These were always productive with every participant expressing a determination to effectively respond to the issues.

We are also aware of significant changes in the general community. Apart from the efforts of major institutions to repair the outcome of previously inadequate redress responses of which each, or at least part, of the Anglican, Salvation Army and some Catholic communities have committed themselves, our work is bringing change to the policy and practices of many institutions involved with children. We know of the work which the YMCA is doing to respond to its identified problems and we understand many other childcare providers have moved to review their practices and ensure they meet a suitable standard. We are also working with the Australian Olympic movement to develop effective policies and practices across all Olympic sports which involve children.

We have also learnt of the development by appropriately skilled organisations of audit programs to ensure that institutions adopt and achieve best practice in the care of children.

Apart from the 493 matters we have referred to the Police for investigation we know that more people than previously are bringing allegations directly to the Police for investigation.

As I have indicated, we have provided a rigorous timetable for consideration of the consultation paper on redress and civil litigation. We have done this because we know that there are many survivors who are frail or ageing who are entitled to an effective response through redress for their abuse.

By releasing this consultation paper today, we are encouraging anyone with an interest in the issue to provide a submission to us. This may be done by making a written submission or by providing comments in a short online form. I stress that no one should assume the Commissioners have a final view on any issue. We are seeking submissions which will help us to establish our views and provide recommendations which are just, practical and affordable.