# Rights of Survivors of Child Sexual Abuse in Criminal Proceedings in Australia

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Abstract

To examine the rights of survivors of child sexual abuse in the Australian adversarial system, this chapter starts with a general description of the Australian criminal justice process. Next, we present an overview of children's rights and of reforms implemented following a five-year Royal Commission into Institutional Reponses to Child Sexual Abuse, including mandatory reporting obligations and the offence of persistent child sexual abuse. The core of the chapter is a review of survivors' rights in three key stages in the course of a criminal case: the police investigation; the trial; and post-trial proceedings. The chapter outlines comprehensive innovations to minimise the distress and re-traumatisation of survivors, such as witness assistance service professionals, communication intermediaries, pre-recorded pre-trial evidence in chief and cross-examination and expert witness opinion evidence. The chapter concludes with a description of a national redress scheme for restoration of damage to survivors. The implications of these rights and entitlements of survivors of child sexual abuse for penal proceedings in canon law are considerable.

Keywords: *expert evidence; institutional child sexual abuse; Royal Commission; witness intermediary; specialist jurisdiction; mandatory reporting, criminal justice process, rights of victims, seal of confession*

## *1. The Australian Criminal Justice Process*

Australian criminal law and procedure is divided into federal criminal law plus eight state or territory criminal law systems.[1] The latter encompass three different types: common law systems,[2] codified systems[3] and hybrid

1 Mark Nolan / Jane Goodman-Delahunty, Legal Psychology in Australia, Thomson Reuters 2015.

2 The Australian Capital Territory (ACT), New South Wales, South Australia and Victoria apply a mixture of judge-made common law and criminal law statutes.

3 The Northern Territory, Queensland, Tasmania and Western Australia apply systems shaped by codes similar to European (Napoleonic) restatements of the law.

systems.[4] It is primarily state and territory criminal laws that affect the day-to-day lives of Australians and deal with the majority of criminal matters, including child sexual abuse (CSA).

The criminal justice process in Australian states and territories is adversarial and accusatorial. The trial is a contest between the prosecution, acting as the state's representative, and the accused, who is typically represented by a defence counsel. Persons who allege that they have suffered the harm (the complainant or abuse survivor) are not parties to the proceedings; they are usually witnesses.[5] Thus, it is not permitted for the complainant to have their own legal counsel appear in the trial.

As in most adversarial legal systems, procedures to protect the rights of the accused are accorded priority, with the right of the accused to a fair trial being paramount. Persons alleged to have committed child sexual offences are entitled to impartial and independent prosecution, legal representation when the accused is charged with a serious offence and cannot afford legal representation, a presumption of innocence, a right to silence, a trial without unreasonable delay and to examine witnesses to test their evidence.[6]

In Australia, when significant concerns arise about the effectiveness of the criminal justice process, these concerns are commonly referred by the Commonwealth or state Attorney-General to federal or state law reform commissions, respectively. Law reform commissions prepare issue papers and consult widely with the community and relevant stakeholders before proposing resolutions. A further mechanism to address legal change is a royal commission. Royal commissions function in a more inquisitorial style and have broad powers to hold public hearings, call witnesses under oath and compel evidence. Both, royal commissions and law reform commissions, recommend changes to government agencies.

Awareness of the dearth of rights for victims in the criminal justice process was expanded by findings of special commissions of inquiry. In New South Wales (NSW), the most populous Australian state, the Paedophile Inquiry[7] examined activities of an organised paedophile network, the

4 The ACT and the Northern Territory partially adopted principles of criminal responsibility from the Criminal Code (Cth) into common law and Griffith Code systems, respectively.

5 Nicholas Cowdery, Discretion in Criminal Justice, LexisNexis 2022.

6 Royal Commission into Institutional Reponses to Child Sexual Abuse (2017a).

7 James R. T. Wood, Report of the Royal Commission in the New South Wales Police Service, vols IV, V (1997).

adequacy of procedures for protecting at-risk minors, and for responding to alleged offences against minors. Corruption in churches and schools was exposed, multidisciplinary team responses were initiated and police were compelled to take on a more proactive role in prosecuting CSA.[8] A subsequent inquiry into Child Protective Service NSW[9] culminated in recommendations to overhaul the state's child protection services, adding a voice for children and young people in decisions which affect them. Multidisciplinary, multi-agency responses implemented for CSA survivors remain current, such as the Joint Investigation Response Teams, with collaboration between police, health, departments of community services, family and community services and nongovernmental agencies.

Nationwide exposure to issues affecting the rights of CSA survivors was provided in a five-year national public inquiry by the Royal Commission into Institutional Responses to Child Sexual Abuse (hereafter "RC"). The term 'survivor' is preferred over 'victim' due to the negative connotations of the latter, such as 'loser', 'powerlessness' and 'helplessness', whereas 'survivor' is associated with self-empowerment.[10]

The RC inquiry, described as a 'landmark' in Australian history, focused on features associated with transitional justice, such as survivors' experiences, truth recovery and non-repetition[11] to ensure justice from the time of the referral through the investigative, prosecutorial and adjudicative trajectory of the criminal proceedings. The RC conducted: (a) 8,013 confidential private hearings; (b) 444 days of livestreamed public hearings with evidence from 1,200 witnesses about abuse in 116 different institutions, including faith-based institutions; (c) a research and policy programme supporting over 100 empirical studies; and (d) public round tables with local and international experts. Catholic institutions were identified as the source of most abuse, accounting for 26 % of the public hearings.

8 Jane Goodman-Delahunty, The Honourable James R. Wood AO QC: New South Wales Supreme Court Judge, in David Lowe / Dilip K. Das (eds), Trends in the Judiciary: Interviews with Judges Across the Globe, Volume Two, CRC Press 2015, 57–76.

9 James R. T. Wood, Report of the Special Commission of Inquiry into Child Protection Services in New South Wales, State of New South Wales 2008.

10 Stephanie Fohring, What's in a word? Victims on 'victim', *International Review of Victimology* 24, n 2 (2018) 151–164.

11 Kate Gleeson / Sinéad Ring, Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia, *Griffith Law Review* 29 (2020) n 1, 109–133.

Two weeks of hearings centred on the rights of CSA survivors in criminal justice processes (summarised in Case Study 38, RC 2017a) and exposed what seasoned legal practitioners acknowledged as 'the poor fit' between traditional criminal processes and a satisfactory environment for CSA survivors.[12] Particular challenges for complainants were identified as: initial police interviews; communication with police and prosecutors; how and when evidence is given; and the nature of cross-examination. Providing meaningful assistance to juries to evaluate the evidence and complainant credibility was a further difficulty noted (RC 2017a).[13]

The findings of the RC were reported in 20 volumes (RC 2017b), of which three addressed criminal justice responses to survivors of institutional CSA (RC 2017a). A total of 85 integrated criminal justice reforms with a timetable for their implementation has impacted police investigations and the prosecution of CSA trials (RC 2017a). This chapter incorporates discussion of these reforms as they bear on the contemporary rights of Australian CSA survivors.

## 2. *The Rights of Child Sexual Abuse Survivors in Australia*

This section provides an overview of the context in which CSA offences and CSA survivors' rights are addressed, taking into account the development of a trauma-informed justice response and the role of Commissioners of Victims' Rights in criminal proceedings. Recent reforms following from the recommendations of the RC are described, in particular the treatment of historical CSA cases and mandatory reporting obligations.

### A. Achieving a Trauma-informed Criminal Justice Process

Across the Australian justice sector, legal professionals are advised to demonstrate "sensitivity to how court processes may re-traumatise those suffering from trauma, awareness of the effect of trauma on memory and

12 Kara Shead, Responding to historical child sexual abuse: A prosecution perspective on current challenges and future directions, *Current Issues in Criminal Justice* 26 (2014) n 1, 55.

13 Ibid.

the delivery of oral evidence".[14] A significant goal of the trauma-informed response is to avoid "secondary victimisation" or further victimisation of a CSA survivor through negative experiences, such as repeated exposure to the perpetrator, repeated questioning about the same events and inappropriate cross-examination. This approach was exemplified by the RC.[15] Guidance for judges on trauma-informed courts emphasises six principles: safety, transparency, peer support, collaboration, empowerment and consideration of cultural, historical and gender issues[16] (NSW Judicial Commission 2022). Educational initiatives for members of the legal profession and the judiciary about the needs and interests of victims and the causes and effects of victimisation are widespread and have included training about memory processes and what a CSA complainant can reasonably be expected to recall. Protection of police, prosecutors, witness assistance support officers and judges from vicarious trauma has been prioritised.

National debate ensued over the merits of specialist CSA courts versus strengthening specialised responses to sexual assault offences within existing court structures.[17] A pilot specialist jurisdiction being trialled in the NSW District Court is described in Section IV below. Major policies and practices implemented within existing criminal proceedings to extend a trauma-informed response to CSA survivors are explicated in Sections III and IV below, most notably, pre-trial recording of the complainant's evidence in chief and cross-examination.

## B. The Role of Commissioners of Victims' Rights in Criminal Proceedings

The Office of Commissioners of Victims' Rights was created to assist in improving "victims' experiences in the criminal justice system without jeopardising the structure of the existing adversarial system between the accused and the state".[18] In Australian states and territories, while the Com-

14 Michael King, The importance of trauma-informed court practice, *Judicial Officers Bulletin* 34 (2022) n 6, 61.

15 Gleeson / Ring (n 11).

16 Peggy Hora, The trauma-informed courtroom, *Judicial Officers Bulletin* 32 (2020) no 12, 11–13.

17 Anne Cossins, Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial, Palgrave 2020.

18 Tyrone Kirchengast / Mary Iliadis / Michael O'Connell, Development of the Office of Commissioner of Victims' Rights as an appropriate response to improving the

missioners of Victims' Rights lack any specific power to represent victims, they can monitor, facilitate and assist CSA survivors. Charters of victims' rights give emphasis to the four tenets of procedural justice: respect, trustworthiness, neutrality and voice.[19] However, rights enumerated in many Australian Charters of Victims' Rights have been unenforceable, except in NSW and South Australia. In NSW, 18 discrete rights of CSA survivors and other crime victims are set out in the charter within the *Victims' Rights and Support Act 2013,* which defines a crime victim as someone who suffers harm as a result of an act committed by another person in the course of a crime. The Act applies to all NSW government agencies that work with crime victims. The NSW Commissioner of Victims' Rights is empowered to make enquiries, conduct investigations and compel evidence.

## C. Initiating Criminal Proceedings in Cases of Child Sexual Abuse

Complainants often delay reporting CSA, and many never report CSA to the authorities.[20] Information gathered across Australia in the period 2013–2017 in over 8,000 private hearings with institutional CSA survivors and more than 1,000 written accounts received from other survivors, revealed that the average delay period before reporting their abuse was 31.9 years.[21] A report to the police about alleged CSA that occurred years before it was reported is referred to as a historical case. Although most complainants have continuous memories of their abuse, erroneous beliefs have persisted that cases of historical CSA involve 'recovered' rather than previously unreported memories.

Limitation periods and immunities that were in place preventing the prosecution of alleged historical CSA crimes reported by adults were removed. Children and adults who delay in reporting CSA are treated alike. In 2021, the NSW Bureau of Crime Statistics and Research reported that approximately one-third of CSA allegations ($n$ = 1,611) were from child victims under the age of 16 years, the majority from female children (81 %) and

experiences of victims in the criminal justice system: Integrity, access and justice for victims of crime, *Monash University Law Review* 45 (2019) no 1, 3.

19 Jane Goodman-Delahunty, Four ingredients: New recipes for procedural justice in Australian policing, *Policing: A Journal of Policing and Practice* 4 (2010) 403–410.

20 Kairika Karsna / Liz Kelly, The Scale and Nature of Child Sexual Abuse: Review of Evidence, Centre on Expertise on Child Sexual Abuse 2021.

21 Ben Mathews, A taxonomy of duties to report child sexual abuse: Legal developments offer new ways to facilitate disclosure, *Child Abuse & Neglect* 88 (2019) 337–347.

children aged 11–15 years (64 %). Delay in reporting CSA was more typical: two-thirds of CSA reports ($n$ = 3,081) were by individuals aged 16 years or older about events that occurred when under 16 years of age.

A report to the authorities of a CSA allegation, once accepted, initiates a criminal justice case. Provisions exist for a complaint to be initiated voluntarily by a minor personally, or through a parent, guardian or advocate or someone concerned about the child's welfare, such as a counsellor, psychologist, teacher or mandatory reporter.

## D. Mandatory Reporting of Child Sexual Abuse

In Australia, the obligation of mandatory reporting of CSA arises when a person of a designated kind (e.g., doctor, teacher) has a reasonable suspicion (knows, suspects or should have known or suspected) that abuse occurred, although there is some variability between states in reporting thresholds.[22] In most Australian states, the seal of confession in the Catholic Church is not a reasonable excuse not to report abuse, which was prompted by findings (RC 2017a Case 50) that confessors did not take steps to report abuse whether raised by survivors or priests.[23] Criminal penalties apply to persons who fail to comply with their obligations: on average, a maximum penalty of two years in prison.

If a victim remains exposed to potential abuse, for instance when the perpetrator resides or works in a context in the presence of available victims, there may be a risk of present danger. A strict standard applies to professionals who work with children in terms of reckless disregard of this risk. Due to this higher standard than "reasonable suspicion", commentators have advocated for education and training to be legislatively mandated and supported for designated professionals and managers of organisations,[24] e.g., child protection workers, teachers, foster-carers, priests and others who work with and have access to children and alleged abusers. Training can provide a working knowledge of their duties and increased awareness of CSA indicators.

22 Natasha J. Ayling / Kerrieann Walsh/ Kate E. Williams, Factors influencing early childhood education and care educators reporting of child abuse and neglect, *Australasian Journal of Early Childhood* 45 (2020) no 1, 95–108.

23 Brian Lucas, The seal of the confessional and a conflict of duty, *Church, Communication and Culture* 6 (2021) Issue 1, 99–118.

24 Mathews (n 21).

An increase in secondary and mandatory reporting of CSA has contributed to a trend of annual increases in CSA reports.[25] Prior research demonstrated that significant proportions of teachers were insufficiently familiar with their legislative reporting duty;[26] 53 % could answer questions about it. Few teachers were aware of immunity from liability and identity protection, yet fear of reprisal was an influential reason for failure to report suspected CSA.

### *3. Rights of Complainants during Investigation and Referral for Prosecution*

In this section, the types of child sexual offences that are prohibited in Australia are specified. Legislative reforms to match legal elements of egregious, persistent CSA to what a CSA survivor of such experiences can reasonably recall are discussed. Innovative special measures available during the police investigation of the alleged abuse to provide emotional support and communication support to vulnerable CSA survivors are described, including witness assistance service officers and witness intermediaries. Finally, circumstances that resolve a CSA matter prior to trial are outlined.

#### A. Types of Prohibited Child Sexual Abuse Offences

Under Australian law, sexual abuse of a child under 18 years of age is a criminal offence. CSA offences include penetrative and non-penetrative contact offences (sexual assault, acts of indecency), as well as non-contact offences (self-manipulation, facilitation to engage in sexual acts) and producing or possessing child pornography/child abuse material.[27] The offence of grooming for sexual conduct with a child targets predatory conduct to facilitate later sexual activity with a child. RC hearings disclosed that, at

25 New South Wales Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics Quarterly Update June 2020* (2020).

26 Ben Mathews and others, Teachers reporting suspected child sexual abuse: results of a three-state study, *UNSW Law Journal* 32 (2009) no. 3, 772–813.

27 Hayley Boxall / Georgina Fuller, Brief Review of Contemporary Sexual Offence and Child Sexual Abuse Legislation in Australia Update, Australian Institute of Criminology 2015.

times, the confessional was an opportunity for grooming a victim and/or where offending took place.[28]

## B. Persistent Child Sexual Abuse

In the course of its activities, the RC observed that 85 % of the CSA survivors experienced multiple incidents of persistent sexual abuse (RC 2017b). Despite (or perhaps because of) repeated exposure to recurring events, these survivors struggled to provide particulars of the alleged abuse to enable charges to be formulated. A decision by the South Australian Court of Criminal Appeal captured the "perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence".[29] To explore what a CSA victim might reasonably be expected to recall and recount about historical and contemporaneous autobiographical events, the RC commissioned a review of research on features of memory for CSA.[30] Studies of the phenomenon of schematic memory processing to encode and recall recurring events show that after approximately three instances of repetition of a similar event, a schematic memory "script" develops for the recurring features, while memory of details of invariant features on specific dates or occasions is rarely retained.[31] The "script" consists of core repeated features or the gist of the offences.

To avoid the unrealistic memory burden of requiring complainants to recount unavailable particulars of multiple similar individual occasions of abuse by the same perpetrator, the states and territories amended this type of offence to focus on the existence of 'an unlawful sexual relationship', nomenclature that has attracted widespread criticism because of the use of the word 'relationship'. Controversial legislative requirements include confusion between the number of acts versus the number of occasions of abuse that a complainant must particularise, variable requirements for jury unanimity, and whether the approval of the Director of Public Prosecutions

28 Lucas (n 23).
29 R v Johnson [2015] SASCFC 170, 2.
30 Jane Goodman-Delahunty and others, Methods to evaluate justice practices in eliciting evidence from complainants of child sexual abuse, Newcastle Law Review 12 (2017) 42–60.
31 Alan Baddeley / Michael W. Eysenck / Michael C. Anderson, Memory, Routledge [3]2020.

(DPP) or Attorney General remains a prerequisite to charges of persistent CSA.[32]

### C. Investigation of Sexual Abuse Allegations

After the report of the alleged offence is received by the police, adult CSA complainants prepare a written narrative of the relevant events, child complainants present their evidence in a video-recorded police interview. In most circumstances, a single investigative interview is conducted by highly trained specialists in a child-friendly setting; in some instances, follow-up interviews may be required.[33]

### D. Witness Assistance Service Officers

A witness assistance service officer in the DPP is appointed to provide emotional support, continuity and consultation with the complainant, and as a conduit of information from police and prosecutors about the criminal justice process and trial.[34] These officers maintain regular contact with CSA complainants and accompany them and their caregivers to all proceedings, from the commencement to the conclusion of the case.[35] These officers become familiar with individual complainants' needs, well-being, infirmities and vulnerabilities. Their presence can be integral in establishing a positive rapport with detectives and prosecutors and in securing the cooperation and willingness of the CSA survivor,[36] thus contributing to the success of the investigation. They may also refer complainants to specialist support services. Few cases proceed against the wishes of the complainant, although instances have been documented of very protective parents or guardians

32 Elizabeth Dallaston / Ben Mathews, Reforming Australian criminal laws against persistent child sexual abuse, *The Sydney Law Review* 44 (2022) no. 11, 77–109.

33 Shead (n 12), 55–73.

34 Cowdery (n 5).

35 Jane Goodman-Delahunty and others, Prosecutorial discretion about special measure use in Australian cases of child sexual abuse, in Victoria Colvin / Philip Stenning (eds), The Evolving Role of the Public Prosecutor: Challenges and Innovations, Routledge 2019, 169–187.

36 Cassia Spohn / Katharine Tellis, Sexual assault case outcomes: Disentangling the overlapping decisions of police and prosecutors, *Justice Quarterly* 36 (2019) no. 3, 383–411.

who discouraged willing children from giving evidence or dominated a child to the extent that the child was unable to express their own view.[37]

## E. Special Measures for Child Sexual Abuse Complainants

Starting in the 1990s, to mitigate the severe anxiety, distress and psychological difficulties experienced by young CSA complainants during the legal processes, a range of special measures was implemented in Australian jurisdictions to assist children in presenting their evidence. Most common are: (a) pre-recorded interviews conducted by a police investigator and submitted as part or all of the child's evidence in chief; (b) witness intermediaries; and (c) closed circuit television (CCTV), so a child can be cross-examined from a remote room without having to attend the same room as the accused. Lesser used special measures are (d) screens to block the accused from the child's view; (e) clearing of the public gallery during the child's evidence; (f) requiring members of the judiciary and counsel to remove wigs and gowns; (g) alternative seating arrangements; and (h) a witness support person of the child's choice to accompany them to legal proceedings.

Despite widespread acceptance in the justice sector of special measures during the investigative process in CSA cases, some areas for improvement were identified: (a) overcoming technological obstacles with pre-recorded interviews and CCTV evidence;[38] (b) better alignment of police interviews with evidence-based guidance; (c) the quality of in-court questioning;[39] and (d) extending special measures to vulnerable adults.[40]

37 Goodman-Delahunty and others (n 35).

38 Eunro Lee and others, Special measures in child sexual abuse trials: Criminal justice practitioners' experiences and views, *QUT Law Review* 18 (2019) no. 2, 1–27.

39 Martine B. Powell and others, An evaluation of the question types used by criminal justice professionals with complainants in child sexual assault trials, *Journal of Criminology* 55 (2022) no. 1, 106–124; Natalie Martschu and others, Judicial and lawyer interventions in trials of child sexual assault, *Journal of Judicial Administration* 31 (2021) no. 3, 1–16.

40 Sarah Deck and others, Are all complainants of sexual assault vulnerable? Views of Australian criminal justice professionals on the evidence-sharing process, *International Journal of Evidence and Proof* 26 (2022) no. 1, 20–33.

## F. Witness Intermediaries

Witness intermediaries were introduced as officers of the court in NSW, Victoria, the Australian Capital Territory, Queensland and Tasmania. Their duty is to impartially facilitate the communication of, and with, the witness, so the witness can provide their best evidence (e.g., Section 88 of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*). They adhere to a *Procedural Guidance Manual*, which includes a detailed Code of Conduct.[41] Increasing acceptance of witness intermediaries led to initiatives to extend this scheme to vulnerable adults and defendants.[42]

Prior to the initial police interview, witness intermediaries interview the complainant to conduct a formal communication assessment of the capacity of the child to understand oral questions. They prepare a detailed communication report specifying linguistic structures and terminology to avoid, and questions within the capacity of the child. The report is available to police working in a child abuse and sex crimes squad, legal counsel and the trial judge, who may consult with the intermediary as is helpful. To facilitate communication, the intermediary often attends the police interview and/or special hearings to pre-record the complainant's cross-examination, as described in Section IV.

## G. Charge Resolution

Once the investigation is complete, if the officer-in-charge is satisfied that sufficient evidence has been collected, police will arrest (if necessary) and charge the accused, and transfer the brief of evidence to the ODPP.[43] Decisions about the charges that proceed depend on whether there is a reasonable prospect of conviction and whether the public interest requires

41 Penny Cooper, A double first in child sexual assault cases in NSW: Notes from the first witness intermediary and pre-recorded cross-examination cases, *Alternative Law Journal* 41 (2016) no. 3, 191–194.

42 Jaqueline Giuffrida / Anita Mackay, Extending witness intermediary schemes to vulnerable adult defendants, *Current Issues in Criminal Justice* 33 (2021) no. 4, 498–516.

43 Cowdery (n 5).

prosecution (Hodgson et al. 2020).[44] In general, prosecuting CSA matters is viewed as furthering the public interest (Goodman-Delahunty et al. 2023).[45]

In conjunction with charge certification, within six weeks, consideration is afforded to the Early Appropriate Guilty Plea process (which applies to prosecutions generally), in which senior prosecutors negotiate with the defence over pleas. Survivors must be consulted and their views considered when the prosecution entertains a plea from the accused and regarding any statement of agreed facts prepared for sentencing.[46] A key benefit for survivors of a negotiated plea is a reduced delay in resolving CSA matters and the certainty of the finalisation.

If all charges against the accused are not finalised by guilty pleas, prosecutors commit to the charges at trial. Rights of CSA survivors during the trial process are reviewed in Section IV.

### *4. Rights of Child Sexual Abuse Survivors at Trial*

In this section, considerations about trial by jury or judge in CSA matters are reviewed. A series of unique practices arising in CSA trials includes the option of a trial by judge, joint trials with multiple complainants, procedures to adduce the evidence of a child complainant in examination in chief and cross-examination, proceedings in courts of specialist jurisdiction, provisions for expert witness opinion evidence in CSA trials and jury directions specific to CSA cases. The section concludes with reflections on the use of these procedures in the Australian historical CSA trial against Cardinal Pell.

#### A. Trial by Jury or Judge Alone

Conviction rates in CSA cases are lower than in other criminal cases. In 2019, of 994 persons charged with 4,705 individual CSA offences in NSW,

44 Natalie Hodgson and others, The decision to prosecute: A comparative analysis of Australian prosecutorial guidelines, *Criminal Law Journal* 44 (2020) no. 3, 155–172.
45 NSW Bureau of Crime Statistics and Research (n 25).
46 Cowdery (n 5).

68 % were found guilty of at least one offence and 51 % of the offences charged were proven.[47]

CSA trials are usually decided by a jury of twelve. Some research suggests that juries are more likely to acquit in CSA matters than in other criminal trials due to the 'word-against-word' evidence, lack of corroborating or physical evidence, and jury susceptibility to CSA misconceptions. A study of jury questions to the court following evidence from 135 CSA survivors in a US jurisdiction revealed common misconceptions that children would resist their abuser, avoid future contact with the abuser, display emotional reactions and disclose abuse immediately, especially older children and survivors of persistent CSA.[48] These findings aligned with the endorsement of CSA misconceptions by Australian jury-eligible community members.[49] Jury simulation research confirmed that the credibility of the complainant and conviction rates are predicted by the accuracy of jurors' CSA knowledge[50] and that women tend to convict more readily and to favour harsher punishment in CSA cases than men.[51] Other relevant juror attitudes in CSA trials may include views on children (whether a child is capable of being coerced or lying), comfort with sexual terminology, attitudes towards pornography, perceptions of sex offenders (deserving of harsher punishment) and high 'homonegativity' in cases of same-sex offending.[52]

47 NSW Bureau of Crime Statistics and Research (n 25).

48 Suzanne St. George Coble and others, "Did You Ever Fight Back?" Jurors' Questions to Children Testifying in Criminal Trials About Alleged Sexual Abuse, *Criminal Justice and Behaviour* 47 (2020) 1032–1054.

49 Jane Goodman-Delahunty / Mark Nolan / Evianne L. van Gijn-Grosvenor, Empirical Guidance on the Effects of Childhood Sexual Abuse on Memory and Complainants Evidence, Royal Commission into Institutional Responses to Child Sexual Abuse 2017.

50 Jane Goodman-Delahunty / Natalie Martschuk / Anne Cossins, Programmatic pretest-posttest research to reduce jury bias in child sexual abuse cases, *Onati Socio-Legal Series* 6 (2016) no. 2, 283–214; Jane Goodman-Delahunty / Natalie Martschuk / Anne Cossins, What Australian jurors know and do not know about evidence in child sexual abuse cases, *Criminal Law Journal* 41 (2017) 86–103; Jane Goodman-Delahunty and others, Greater knowledge enhances complainant credibility and increases jury convictions for child sexual assault, *Frontiers in Psychology* 12 (2021) 624331.

51 Jennifer Pettalia / Joanna D. Pozzulo / Jennifer Reed, The influence of sex on mock jurors' verdicts across type of child abuse cases, *Child Abuse & Neglect* 69 (2017) 1–9.

52 Robert J. Cramer / D. D. Adams / Stanley Brodsky, Jury selection in child sex abuse trials: A case analysis, *Journal of Child Sexual Abuse* 18 (2009) no. 2, 190–205.

Some research indicated that a CSA trial decided by a judge alone is less likely to result in a conviction,[53] although deliberation in a group yields higher acquittal rates due to a 'leniency asymmetry effect' favouring an acquittal faction.[54] Legislation (e.g., section 132 of the *Criminal Procedure Act* [NSW]) allows a criminal matter to be tried by a judge if the accused agrees and the judge considers that it would be in the interests of justice, for instance when the risk of jury prejudice is unavoidable, or a public health emergency such as the pandemic prevents jury trials. In the interests of justice, the accused may seek a trial by judge alone where this request is opposed by the prosecution.

### B. Joint Trials of Multiple Complainants against a Single Defendant

Institutional CSA within religious organisations often involves serial offending by the same individual against multiple children. An early Australian archival study of conviction rates in 158 joint CSA trials with multiple victims versus 43 separate trials showed that the vast majority of the latter resulted in acquittals.[55] Yet prosecutors had little option to include charges by multiple survivors of a single defendant in a joint trial because higher conviction rates in joint trials were presumed to result from impermissible reasoning by juries in response to tendency and coincidence evidence of a similar pattern of conduct, amounting to unfair prejudice to the defendant.[56] An example is the inference that the accused has a criminal disposition or depraved character, such that 'if he did it once, he will do it again'.

To test whether juries would engage in logical and permissible uses of cross-admissible inculpatory evidence in a joint trial, the RC sponsored

53 J. Don Read / Deborah A. Connolly / Andrew Welsh, An archival analysis of actual cases of historic child sexual abuse: A comparison of jury and bench trials, *Law & Human Behavior* 30 (2006) 259–285.

54 Goodman-Delahunty and others (n 50); Norbert L. Kerr / Robert J. MacCoun, Is the leniency asymmetry really dead? Misinterpreting asymmetry effects in criminal jury deliberation, *Group Processes & Intergroup Relations* 15 (2012) no. 5, 585–602.

55 Patricia Gallagher / Jennifer Hickey / David Ash, Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994, Judicial Commission of NSW 1997.

56 Jane Goodman-Delahunty / Anne Cossins / Natalie Martschuk, Jury Reasoning in Separate and Joint Trials of Institutional Child Sexual Abuse: An Empirical Study, Royal Commission into Institutional Responses to Child Sexual Abuse 2016.

a large-scale jury simulation experiment with 1,029 jury-eligible Australians whose age, gender and employment status closely matched those of real juries. They attended realistic video trials in which a District Court judge and real barristers role-played legal professionals and actors played the witnesses, including three male complainants who alleged historical CSA against the same defendant. Jury deliberations were scrutinised for evidence of improper reasoning and unfair prejudice. Results showed that no jury conviction was based on impermissible reasoning, and no verdict was the result of emotional arousal or negative inferences about the defendant's character. The juries did not apply a lesser standard of proof when assessing more charges, or evidence from more prosecution witnesses when tendency evidence was led. Rather, verdicts turned on the extent to which the complainant was rated as credible and events as plausible. Reasons provided for verdicts were logically related to the probative value of the evidence. Credibility assessments of the accused were similar in all trial variations.[57] These outcomes suggested that the capacity of juries to return sound verdicts in trials where tendency and coincidence evidence is led has been underestimated.[58]

The High Court of Australia held that a strikingly close similarity in events reported by different complainants was not required for the admission of tendency evidence.[59] Thereafter, results of the foregoing joinder study were used by prosecutors to support more joint trials where some feature of the offending linked the cases. A focus on the relationship between complainants and the defendant emerged in reports by prosecutors of their decision-making about joint trials.[60] An important attribute of a joint CSA trial is that it provides a more complete picture of the motivation of the accused and the offending, whereas juries attending separate

57 Jane Goodman-Delahunty / Natalie Martschuk / Mark Nolan, Memory science and the Pell appeals: Impossibility, timing, and inconsistencies, *Criminal Law Journal* 44 (2020) no. 4, 232–246; Goodman-Delahunty and others (n 50).

58 Jane Goodman-Delahunty / Natalie Martschuk / Anne Cossins, National jury research published, *Judicial Officers' Bulletin* 28 (2016) no. 5, 45–48.

59 Hughes v The Queen [2017] HCA 20 – 263 CLR 338.

60 Jane Goodman-Delahunty / Judith Cashmore / Natali Dilevski, Prosecutorial decision making in cases of child sexual abuse, in Monica K. Miller / Logan A.Yelderman / Matthew T. Huss / Jason A. Cantone (eds) Cambridge Handbook of the Psychology of Legal Decision-making, Cambridge University Press 2023.

trials wrongfully assume that if there were evidence of any other offending by the accused, they would be appraised of it.[61]

## C. Specialist Jurisdiction for Trials of Child Sexual Abuse

In most Australian jurisdictions, adult CSA complainants give evidence in accordance with standard criminal proceedings; in Western Australia, adults give their evidence via CCTV. Aside from NSW, pre-recording of vulnerable complainants' evidence in chief and cross-examination in the absence of the jury is routine.[62] An intermediary can be appointed when a complainant is over the age of 16 years if the witness has communication difficulties that require assistance outside the court.

However, most courts do not permit the use of pre-recorded evidence for adults, with the exception of the Northern Territory and Tasmania.[63] Resistance to the extension of these and other special measures to adult CSA survivors accords with the view that rigorous cross-examination is necessary to protect the rights of the accused, especially in historical cases.[64]

To address difficulties in prosecuting CSA matters and to improve the experience of children, in 2003 a specialist jurisdiction for CSA matters was established in two NSW courts, incorporating practices similar to those in effect in CSA trials in Western Australia since 1992.[65] Available special measures were those described above to avoid secondary victimisation of the complainant.

In 2016, following consultation with the RC, the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* launched an expanded three-year pilot period, implementing (a) witness intermediaries; (b) procedures to pre-record cross-examination of child CSA complainants about allegations against the accused; and (c) two specially trained District Court judges appointed to manage pre-recorded evidence hearings in child

61 Goodman-Delahunty and others (n 56).
62 Scott Corish, Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses, *Criminal Law Journal* 39 (2015) no. 4, 187–xxx.
63 Deck (n 40).
64 Ibid.
65 Judy Cashmore / Lily Trimboli, An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot, NSW Bureau of Crime Statistics and Research 2005.

sexual offence matters.[66] Practices in specialist jurisdictions are described below.

## D. Pre-recording Special Hearings to Cross-Examine CSA Complainants

In CSA trials, in specialist jurisdictions, a special hearing to review the police interview and pre-record the cross-examination of the complainant, so that the child does not appear in person at trial, is typically scheduled as the first day of the trial, in the absence of the jury. This special hearing may take multiple days to address multiple alleged occasions of offending.

In advance of the special hearing, a witness intermediary provides the court and legal counsel with the report prepared for the police interview or interviews the child to assess their communication capacity and prepare a report. Uniquely, this creates an opportunity for the defence counsel to confidentially consult the intermediary about the manner of cross-examination and to gain insight into questioning approaches effective for that child.

In cases where communication is especially complex, a witness intermediary may recommend a series of ground rules for communication with that specific witness. The court may schedule a separate ground rule hearing to review and resolve the appropriate communication protocol. Ground rules are typically set out at the start of the special hearing to assist lawyers and judges in asking questions and understanding children's responses.[67]

Before the special hearing, the child reviews the videotaped police interview, so it is fresh in their memory. The hearing may be attended by the witness intermediary. Together, after editing the videotapes of the police interview and the pre-recorded cross-examination, these are played to the jury at trial in lieu of live, in-person or CCTV evidence from the complainant.

Rigorous cross-examination of a complainant is appropriate for robust advancement of the defence case. In sexual assault matters, the questions must not be posed to confuse or annoy the complainant, and the law does not permit cross-examination or questions about the complainant's prior sexual history. Other standard constraints on cross-examination in the *Evidence Act 1995* (Cth), s 41 apply regardless of the age or other vulner-

66 Cooper (n 41).
67 Ibid.

ability of a witness, requiring a court to disallow an improper question. The *Uniform Evidence Act* imposes a duty on the court to intervene when questions cause harassment or are intimidating, offensive or oppressive.

Ironically, many questions asked on cross-examination reinforce acknowledged misconceptions about CSA survivors that courts have striven to preclude, such as ongoing contact with the offender or failure to resist or cry out.[68] Under the *Uniform Evidence Act,* in criminal trials, the child must be given the opportunity to say whether something they have said, and which the accused disputes, is true (*Brown v Dunne,* 1893; *Ward v R,* 2017).[69] To meet this legal obligation, some intermediaries recommend that the witness be instructed to agree or disagree in response to propositions from the defence, while others instruct the child to respond by stating that a proposition is true or false. Avoidance is recommended of confusing negative or "tag" questions which seek a yes/no response with a bias towards agreement.[70]

An evaluation of the use of witness intermediaries and ground rules for lawyers questioning child witnesses in pre-recorded court hearings demonstrated "strong widespread support for the special measures. The reasons for this support are that the measures partially level the 'playing field' in communicative capacities for child witnesses, helping to reduce the stress of the investigatory and prosecution process for them and helping child witnesses to give better quality evidence".[71]

As a group, defence counsels have tended to resist witness intermediaries and other special measures, adhering to the view that the most reliable evidence from survivors is provided via traditional in-person cross-examination.[72] Although the evaluation showed intermediary use was perceived to elicit more reliable CSA evidence and to reduce complainant distress, some defence lawyers raised concerns about fairness to the accused. Overall, there was "very strong support for expanding the special measures in

68 Jaqueline Horan / Jane Goodman-Delahunty, Expert Evidence to Counteract Jury Misconceptions About Consent in Sexual Assault Cases: Failures and Lessons Learned, *University of New South Wales Law Journal* 43 (2020) no 2, 707.

69 Brown v Dunne (1893) 6 R 66; Ward v R [2017] VSCA 37, [3] (Maxwell P and Redlich JA).

70 Corish (n 62).

71 Judy Cashmore / Rita Shackel, Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report, Victims Services, NSW Department of Justice 2018, 3.

72 Lee and others (n 38).

the Pilot to other geographical areas and extending it to other groups, including vulnerable adults and child defendants".[73]

## E. Forensic Expert Evaluations of Children's Evidence in Child Sexual Abuse Cases

An expert is a witness with specialised knowledge based on their training, study or experience, whose opinion is relevant to a fact in controversy in a CSA case. Their opinion must be wholly or substantially based on their specialised knowledge to be admissible.

Misconceptions about CSA, such as misconstruction of reasons for delayed reporting, can damage the credibility of a child complainant. Accordingly, Sections 79(2) and 108C of the *Uniform Evidence Act* 1995 permit expert opinion evidence about children's behaviour and reactions to CSA to bolster a child's credibility at trial. The function of this evidence, sometimes referred to as "counter-intuitive expert evidence", is to educate the jury about common behavioural patterns of CSA survivors and relevant aspects of child development and autobiographical memory which may account for their reactions.

Expert evidence can be proffered in historical CSA cases regarding adult witnesses, as well as cases in which the complainant is a child. In some states, prosecutorial policy mandates expert evidence when the complainant is under five years of age at the time of the offending and when a complainant has special needs such as developmental disabilities. An example of a question from a jury in a recent trial of historical institutional CSA that prompted a request for an expert report was how an adult with learning disabilities might recall distinct childhood events of abuse.

Potential topics of expertise on CSA survivor behaviour can include self-blame, embarrassment and shame, denials, retractions, or non-reporting of CSA, continued contact with the alleged offender after the abuse, susceptibility to suggestion, avoidant coping styles, typical reporting practices by children in different age-ranges, the impact of post-traumatic stress disorder on social and cognitive functioning. Factors that make memory more or less durable and that might trigger recollection are important in historical cases, as are forgetting rates, accounting for gaps and inconsisten-

73 Cashmore, Shackel (n 71), 7.

cies between accounts, and the impact of learning difficulties or intellectual disabilities on memory. Studies of what jurors do not know about CSA or about memory processes can assist in establishing a foundation for this evidence.[74]

Two broad types of expert evidence can be identified. 'Social framework evidence' by an expert provides a summary of general research findings on the relevant topics at issue, but the expert refrains from expressing an opinion applying those findings to a particular complainant, leaving that task to the jury.[75] By comparison, 'diagnostic expert evidence' includes an opinion on how the research applies to a particular complainant. Generally, a prerequisite to diagnostic evidence is an interview by the expert of the complainant, and administration of some standard assessment procedure or testing.[76]

A challenge by defence counsel to evidence from a proposed prosecution expert witness can be made in a pre-trial *voir dire* hearing, in the absence of the jury. The defence counsel may cross-examine the expert on their qualifications as an expert on a particular topic, the scope of their opinion and the basis of any opinion. The court may rule that all or some of the experts' report is inadmissible.

The scientific consensus since 1999 has been that most memories of child sexual abuse recovered in therapy are genuine, and that full false memories of sexual assault are rare. Australian Psychological Society guidelines for psychologists include advice to avoid methodologies known to be suggestive when working with people who present mental health issues that require counselling, such as anxiety, acute stress, intrusive thoughts and nightmares. The purpose of counselling is to alleviate the distress, not recover new memories.

Australian courts have been unreceptive to Statement Validity Analysis (SVA), despite extensive support for this approach by experts to analyse CSA accounts in European and South American courts, and its mandatory status since 1999 in CSA cases in Germany.[77] SVA is often misperceived as discriminating between real and false memories. Appropriately applied, SVA entails hypothesis development through examination of possible

74 Goodman-Delahunty and others (n 49); Goodman-Delahunty and others (n 50).
75 Aziz (a pseudonym) v R [2022] NSWCCA 76.
76 Ma v R [2013] VSCA 20; 40 VR 564; 226 A Crim R 575.
77 Gunter Kohnken and others, Statement validity assessment: Myths and limitations, *Anuario de Psicología Jurídica* 25 (2015) 13–19.

sources of a CSA account to test the risks of unintentional errors (e.g., schematic and inferential memory processing, exposure to specific sources of misinformation).

One Western Australian District Court conceded the relevance of SVA by a psychologist with expertise on human memory, based on a review of transcripts of interviews and pre-recorded evidence of the complainant. Nonetheless, its admission was denied on the grounds that educative expert evidence to counteract CSA misconceptions was not intended to facilitate the introduction of evidence about the behaviour of a particular child. The expert evidence was rejected as too subjective to offer useful psychological insights either with respect to this specific complainant or children of the complainant's age group.[78]

A survey to assess perceptions of expert witness evidence in CSA trials showed that two-thirds (63 %) of criminal justice professionals (e.g., police, lawyers, judges) with experience in Australian CSA trials endorsed expert evidence on children's behaviour cases as helpful to juries.[79] Interviews with prosecutors reconfirmed this;[80] defence counsels were more ambivalent.

## F. Jury Directions in Child Sexual Abuse Trials

In some Australian courts, in lieu of expert evidence, a court may instruct the jury about common misconceptions in CSA cases, such as delays in reporting the matter to the police. In addition, after hearing submissions from the prosecution and the accused person, if the judge considers that there is evidence that suggests a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability, a jury direction on inconsistencies and gaps in the memory of a complainant may be given (*Criminal Procedure Act 1986, s* 293a). Illustrative examples from the jury trial of Cardinal Pell are provided below (ss 52 and 54D(2)(c), *Jury Directions Act 2015* (Vic)).

A further jury direction that may be given in historical CSA cases describes the nature of the disadvantage experienced by the accused and

78 WA v KAP [No 2] [2011] WADC 51.

79 Lee and others (n 38); Martine B. Powell and others, An evaluation of how evidence is elicited from complainants of child sexual abuse, Royal Commission into Institutional Responses to Child Sexual Abuse 2016.

80 Goodman-Delahunty and others (n 60).

instructs jurors on the need to take the disadvantage into account when considering the evidence (s 39 of the *Jury Directions Act*). This direction favours the accused and is not available to prosecution witnesses. The judge must not say, or suggest in any way, to the jury that it would be dangerous or unsafe to convict the accused or that the victim's evidence should be scrutinised with great care. (*s* 39(3)(a) and (b)).

## G. Case Study: The Trial of Cardinal Pell

The trial of Cardinal Pell in Melbourne, Australia attracted global attention, even though a suppression order banned all media reporting on the matter until months after the delivery of a verdict. This case illustrates practices in Australian courts to balance special measures for the complainant and the forensic disadvantage to the accused in cases of historical CSA.

In 2017, Cardinal Pell pleaded not guilty to allegations that in 1996, while he was Archbishop of Melbourne, at St. Patrick's Cathedral, he committed one act of sexual penetration and four acts of indecency against two choirboys aged 12–13 years. One survivor passed away in 2014 before providing a police statement. The evidence in chief of the remaining complainant, an adult in his 30s, was presented by means of an audio-visual recording (per s379(b)(i) of the *Criminal Procedures Act 2009 (Vic)*). Cross-examination took place in court during the five-week jury trial.

The focal controversy was between the complainant's direct evidence of what transpired after Cardinal Pell entered the sacristy and evidence of the improbability that the accused had an opportunity to be alone in the sacristy with the boys. That evidence came from 23 defence witnesses, who described weekly practices and protocols at Mass. The prosecutor did not question all opportunity witnesses about whether their memory of key events could be mistaken, in violation of the rule in *Browne v Dunn* because the trial judge permitted that submission to the jury without raising the matter in cross-examination, for example due to the advanced age and apparent infirmity of witnesses such as sacristan Max Potter, aged 84.

With respect to the 20-year delay by the complainant in reporting the alleged offending to police, the defence's contention was that this silence 'was proof it didn't happen'.[81] The trial judge instructed the jury as follows:

81 Pell v The Queen [2019] VSCA 186 (Ferguson, CJ, Maxwell, P) 26.

> I want to give you some legal directions which relate to the issue of failure to complain and delay. The first one is this. Experience shows that people react differently to sexual offences and there is no typical, proper or normal response to a sexual offence. Some people may complain immediately to the first person they see, while others may not complain for some time, and other[s] may never make a complaint. It is a common occurrence for there to be [a] delay in making a complaint about a sexual offence.[82]

With respect to gaps and inconsistencies in the memory of a vulnerable complainant, the court provided the following direction to the jury:

> When you are assessing the evidence, also bear in mind that experience shows the following. One, people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time. Two, trauma may affect different people differently, including by affecting how they recall events. Three, it is common for there to be differences in accounts of a sexual offence. For example, people may describe a sexual offence differently at different times to different people or in different contexts. And finally, both truthful and untruthful accounts of a sexual offence may contain differences.[83]

In light of the lapse of 22 years between the time of the alleged offences and the trial, the defence sought a direction to the jury to take the forensic disadvantage of the accused into account when considering the evidence. The judge noted the lost opportunity that Pell had to make enquiries at, or close to, the time of the alleged offending, including exploration of the alleged circumstances of the offending in detail. Due to the delay, most witnesses could only give evidence of general practice and routine, rather than specific recollection, and the memory of some of the witnesses had diminished in the time that elapsed before the trial. In relation to the evidence of the complainant, his Honour advised the jury that:

> the effluxion of time has […] also diminished the capacity for the defence to fully test [the complainant's] evidence […] if this investigation and trial had been run […] at a time proximate to 1996 then one might have

82 Ibid., 29.
83 Ibid., 24–25.

> expected [the complainant] to be in a better position to answer questions about some of the details [of the offending].[84]

Other disadvantages enumerated by the judge included that Cardinal Pell had lost the opportunity to ask church witnesses about any specific recollection of the dates in question and whether they recalled accompanying him on the particular occasions; to call evidence from the then administrator of the Cathedral, who had been present at Sunday Masses in the relevant period but was now mentally infirm; and to call evidence from the deceased choirboy. His Honour directed the jury that if they found that the lucidity of a witness had been affected by the 22 years that had passed between the alleged offending and the trial, they must take this into account as a disadvantage to the defence.

A mistrial ensued after a week of deliberations when the jury was unable to agree on a verdict. In a retrial in 2018 before the same judge, the complainant was spared from repeating his evidence as his videotaped direct evidence and videotaped cross-examination from the first trial were presented to the second jury.

The second jury deliberated for four days and returned a unanimous verdict of guilty on all charges. At sentencing, written victim impact statements were submitted by the complainant and the father of the deceased choirboy (whose self-medication culminated in a heroin overdose at age 31). Neither asked to read their statements in open court. The court took their statements of the harm experienced into account along with authorities "that sexual activity with children is presumed to cause long term and serious harm, both physical and psychological to the child".[85] The defence sought mitigation on the grounds that the offending was spontaneous, not pre-planned. The court found that at the time of the two alleged occasions of brazen, opportunistic abuse, the accused had the capacity to reason and reflect on his actions; that no medical or psychological evidence was presented to support any inference that the mental functioning of the accused was impaired or diminished, and that the offending breached a relationship of trust with the victims.

The jury verdict was appealed. The Victorian Court of Appeal reviewed 2,000 pages of transcripts and videotapes of the complainant's evidence and those of eleven opportunity witnesses nominated by the accused,

84 Ibid., 282.
85 Ibid., 8.

including master of ceremonies Charles Portelli (age 60). The Court of Appeal was critical of the lack of detailed recollection of events on the crucial date in December 1996 when the complainant said Pell entered the sacristy alone. Mr Portelli, who had attended 140–150 Masses with Cardinal Pell, claimed to recall standing outside the Cathedral with Cardinal Pell on that day and returning to the sacristy with him. The Victorian Court of Appeal affirmed the jury verdict.[86]

Cardinal Pell appealed to the High Court of Australia. The High Court criticised the Court of Appeal for watching the complainant's videotaped evidence and commenting on the complainant's demeanour, instead of relying exclusively on the trial transcript. The High Court accepted that the jury had assessed the complainant's evidence as credible and reliable. However, the evidence of Mr Portelli was found to create a real possibility that the offending did not occur, which should have been enough to produce a reasonable doubt in the minds of the jury of Pell's guilt. The High Court declared that any doubt about memories of witnesses who may have been able to provide an alibi for Cardinal Pell had to operate in his favour, because the delay and its effect on witnesses' memories disadvantaged Cardinal Pell. Accordingly, the High Court unanimously quashed the convictions and entered judgements of acquittal in their place.[87]

Legal commentators noted that the analysis by the High Court did not declare the jury verdict unsafe or egregiously misguided[88] and appeared to separate assessment of the complainant's credibility from that of other evidence in the case, contrary to how trial judges direct juries to assess the totality of the evidence.[89] A review of memory science and likely errors in the schematic memories of opportunity witnesses and older witnesses supported the majority decision by the Victorian Court of Appeal.[90]

In all, five years elapsed from the time the complainant reported allegations against Cardinal Pell to police until the final resolution of the case. Reducing the delay in the prosecution of CSA cases remains an abiding concern for both survivors and the accused.[91]

86 Ibid.
87 Pell v The Queen [2020] HCA 12.
88 Malcolm Knox, There are 12 unmentioned victims in the Pell verdict: The jurors, Morning Herald 2020.
89 Greg Byrne, The High Court in Pell v The Queen: An 'unreasonable' review of the jury's decision, *Alternative Law Journal* 45 (2020) no. 4, 284–290.
90 Goodman-Delahunty et. al. (n 57).
91 Goodman-Delahunty (n 35).

### H. Standards of Proof in Criminal Trials

The Pell case underscores the centrality of the legal standard "beyond reasonable doubt" for conviction in a criminal trial. The standard of proof in Canon law of "moral certainty" is very close to "beyond reasonable doubt".

In some Australian courts, jurors are required to be instructed that these words mean exactly what they say without any further definition; in other courts, judges may provide some explanation of this standard (*Jury Directions and Other Acts Amendment Act 2017 (Vic))* as the highest standard of proof and/or compare it with the civil standard, the 'balance of probabilities'.[92] In the absence of guidance on the meaning of 'beyond reasonable doubt', many jurors err on the side of caution by applying a threshold that is too stringent, interpreting it to mean incontrovertible proof, 100 % certainty.[93]

## *5. Post-trial Rights of Child Sexual Abuse Survivors*

### A. Access to Decisions by Prosecutors and Courts and Rights of Review

Since CSA survivors are witnesses within criminal proceedings at the discretion of the ODPP, the RC recommended that the ODPP implement a "robust and effective formalised complaints mechanism to allow survivors to seek internal merits review of key decisions" in their cases[94] (RC 2017b). To increase transparency and public access, the ODPP publishes its complaints mechanism online, along with data on its use and outcomes. In NSW the ODPP's treatment of victims and witnesses is set out in Chapter 5 of the publicly available Prosecution Guidelines and complaints are included at 5.11 (ODPP 2021). Results of internal audit processes monitoring ODPP consultation with CSA survivors are published in the ODPP annual report.

As witnesses within the criminal proceedings, CSA complainants have no rights to appeal decisions during or at the conclusion of those proceed-

92 Jonathan Clough and others, The Jury Project 10 Years On: Practices of Australian and New Zealand Judges, Australasian Institute of Judicial Administration 2019.

93 Ryan Essex / Jane Goodman-Delahunty, Judicial directions and the criminal standard of proof: Improving juror comprehension, *Journal of Judicial Administration* 24 (2014) no. 22, 5–94.

94 Kirchengast (n 18), 12.

ings. Typically, rulings by a court during the pretrial and trial phases of a case are unpublished but publicly available in open court. When a case is decided by a judge alone, written reasons for the verdict are issued, to which the complainant has access. Jury deliberations are confidential, and juries are not required to provide reasons for their verdicts. Thus, grounds to overturn a jury conviction are limited; appeals are commonly premised on errors in jury directions by the trial judge or legal error in the course of the trial (e.g., wrongful admission or exclusion of evidence or procedural irregularity).

### B. Participation of Child Sexual Abuse Survivors in Sentencing Procedures

If the accused is convicted of one or more of the alleged offences, legislation such as the NSW *Crimes (Sentencing Procedure) Act 1999* and the common law require a sentencing court to consider the effect of the crime on a victim and others in the community. Survivors can describe the experience and impact of an offence (or offences) committed against them by preparing a victim impact statement. Usually, the impact statement is submitted to the court in writing, and at the sentencing hearing, the survivor may read it aloud in open court. The survivor is not obligated to attend the sentencing hearing or to submit a victim impact statement. A survivor may make a claim for victim compensation (see below).

Indirect secondary victims, such as siblings or parents of the complainant who did not witness the alleged offences but who are deeply affected by the crime, are entitled to submit a victim impact statement and a claim for victim compensation.

#### *6. Rights of Child Sexual Abuse Survivors to Restoration of Damage*

Like other crime victims, CSA survivors can apply to state victims of crime compensation schemes, without awaiting resolution of a criminal charge. Compensation awards in these systems are very low, but somewhat high-

er for male than female victims, with a maximum recoverable of AUD 10,000.[95]

The RC determined that higher payments to many CSA survivors were warranted and estimated that 60,000 survivors were potentially eligible to make a redress claim under a national Commonwealth-led Redress Scheme that commenced in 2018, with a ten-year tenure. It allows payments up to AUD 150,000 for institutional CSA survivors. Available relief comprises (a) a monetary payment; (b) access to counselling and psychological services; and if requested, (c) a direct personal response from the participating institution responsible including an apology, an opportunity to meet with a senior institutional representative to receive acknowledgement of the abuse and its impact, and assurance that steps were taken to protect against further CSA at that institution. In 2021, recommendations were made to extend the redress scheme to survivors who were initially excluded, i.e., non-citizens, non-permanent residents, prisoners, survivors with serious criminal convictions and certain care leavers abused between the ages of 18 and 21 years.[96] Based on feedback from stakeholders, operational procedures were refined to enhance survivor-focused, trauma-informed features, e.g., by streamlining the application to a single filing and providing support for applicants with a disability.

In the first 30 months of operation, over 9,000 applications were lodged for redress, of which 58 % alleged abuse by three or more institutions. In that period, a total of AUD 376.9 million was dispensed in redress payments, with an average payment of AUD 83,201. These sums do not include the costs of counselling, which was sought by approximately half of the survivors. Compensation is determined by a "reasonable likelihood" of exposure abuse, contact abuse and/or penetrative abuse. Consideration of vulnerability and extreme circumstances, such as multiple, repeated occasions of abuse, can increase the award. Approximately 2,000 applicants self-identified as disabled. By 2022, approximately 200 claims were lodged per week, adjudicated by a nationwide team of approximately sixty independent decision makers. Applicants may request an internal review of their redress

95 Kathleen Daly / Robyn Holder, State payments to victims of violent crime: discretion and bias in awards for sexual offences, *British Journal of Criminology* 59 (2019) no. 5, 1099–1118.

96 Robyn Kruk, Final Report, Second Year Review of The National Redress Scheme, Department of Social Services 2021.

determination if found ineligible or dissatisfied with the outcome; institutions have no right of review.[97]

A survivor may consult a legal representative to recover monetary compensation via a private civil lawsuit, alleging a breach of institutional duty of care (Foster 2018).[98] Generally, these claims are based on significant injuries that result in settlement payments. In 2015, the RC determined that 80 % of settlements in private civil actions were in the range of AUD 100K, and 10 % exceeded AUD 200K (RC 2015).

## *7. Conclusions*

The foregoing review of rights of CSA survivors in criminal proceedings in Australia demonstrates the use of innovative measures to standardise consultation with and support for survivors in all phases of the criminal justice process, guided by trauma-informed principles. Some special measures are well-established, others are still undergoing testing before extension to other courts and jurisdictions. Further evaluations are likely to lead to additional refinements over time.

Failure to enforce the rights of victims is a failure of the criminal justice system with adverse consequences that extend beyond those of the victim to many others in the community.[99] High rates of consensus exist that special measures accorded to CSA survivors in the Australian criminal justice process in conformity with the recommendations of the Royal Commission have enhanced the fairness of trials, the experiences of CSA survivors and jury understanding of those experiences.

This array of procedures to accommodate child and vulnerable adult CSA survivors provides a rich set of considerations for implementation to increase their access to justice under canon law.

97 Ibid.

98 Neal J. Foster, Tort liability of churches for clergy child abuse after the Royal Commission: Implications of developments in the law of vicarious liability and non-delegable duty, 2018, available on www.works.bepress.com/neil_foster/127/download/, access 30.07.2022.

99 Cowdery (n 5), 5.44.

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