responding to sexual assault:
the challenge of change

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Responding to sexual assault: the challenge of change

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## Contents

Acknowledgments .............................................................................................................. iii  
Summary ........................................................................................................................... xv  

1 Introduction .................................................................................................................. 1  
  1.1 Sexual offences in Australia.................................................................................. 2  
  1.2 Sexual offences in the ACT................................................................................ 3  
  1.3 History of law reform ...................................................................................... 4  
  1.4 Background to this report ............................................................................. 8  
  1.5 Methodology .................................................................................................. 8  
  1.6 Scope of the report ....................................................................................... 9  
  1.7 Terminology .................................................................................................. 9  
  1.8 Basic assumptions .....................................................................................10  
  1.9 Areas not covered .....................................................................................10  

2 Investigation, prosecution and services for victims of sexual offences .............13  
  2.1 ACT Policing and the Sexual Assault and Child Abuse Team .......................13  
    2.1.1 Background to SACAT ........................................................................... 14  
    2.1.2 SACAT’s current operations ................................................................. 15  
  2.2 The ACT Office of the Director of Public Prosecutions .............................. 17  
    2.2.1 Background and structure ................................................................. 17  
    2.2.2 Current operations .......................................................................... 18  
  2.3 The Office for Children, Youth and Family Support .................................. 21  
  2.4 ACT Health .................................................................................................. 22  
    2.4.1 The Child at Risk Assessment Unit ................................................. 22  
    2.4.2 The Forensic and Medical Sexual Assault Clinic .............................. 23  
  2.5 The Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault ................................................................. 24  

3 Investigatory structures and processes ................................................................. 25  
  3.1 The police role in the investigation of sexual offences ................................. 26  
  3.2 The Sexual Assault and Child Abuse Team ................................................ 27  
    3.2.1 Offences SACAT investigates ............................................................ 27  
    3.2.2 SACAT recruitment and retention .................................................... 29  
  3.3 The initial response to victims of sexual assault ......................................... 33  
  3.4 Taking the statement ................................................................................... 35  
    3.4.1 Provision of support during the interview .......................................... 36  
    3.4.2 Location .............................................................................................. 36  
    3.4.3 The gender of interviewers ............................................................... 37
3.5 Other models of initial response

3.5.1 Victoria Police and the Code of Practice for the Investigation of Sexual Assault

3.5.2 London Metropolitan Police Service and Project Sapphire

3.6 A first-response model for the ACT

3.6.1 Training for all members

3.6.2 Written guidelines

3.6.3 Early collection of evidence in recent sexual assaults

3.6.4 The availability of counsellors

3.6.5 Specialist officers

3.7 Written guidelines and protocols

3.7.1 Guidelines

3.7.2 The Victoria Police Code of Practice for the Investigation of Sexual Assault

3.7.3 Project Sapphire

3.7.4 Other resources

3.7.5 Interagency agreements

3.8 Protecting the victim: bail conditions and protection orders

3.8.1 Arrest

3.8.2 Summons

3.8.3 The advantage of bail conditions in sexual offences

3.9 Protection orders

3.10 Interaction with the Director of Public Prosecutions

3.11 Over-reliance on forensic and corroborative evidence

3.12 Referrals to the Director of Public Prosecutions for adjudication

3.13 False reports

3.14 Victim preference

3.15 Innovative responses to investigation—pretext conversations

3.16 Contact with victims during the investigation

3.17 Forensics and SACAT

3.18 The forensic medical examination

3.19 Interagency collaboration: a one-stop shop

3.19.1 Sexual assault response teams in the United States

3.19.2 The sexual assault referral centres and Project Sapphire in the United Kingdom

3.19.3 A one-stop shop for adult victims of sexual assault in the ACT?

3.19.4 Location of police at a one-stop shop

3.20 Conclusion
4 Collaborative approaches to investigating child sexual abuse

4.1 Interaction between child protection and police investigations in the ACT

4.2 Multi-agency approaches in Australia and elsewhere

4.2.1 One-stop shops

4.2.2 Joint interviewing and investigation: the Joint Investigative Response Teams in New South Wales

4.2.3 Another interagency approach: the Queensland Suspected Child Abuse and Neglect Teams

4.3 A comprehensive interagency model for the ACT

4.3.1 A one-stop shop

4.3.2 Joint interviewing and investigation

4.3.3 Regular meetings of all relevant agencies to discuss cases and coordinate responses

4.3.4 Regular meetings of all relevant agencies to discuss systemic matters and problems

4.4 Specialist interviewers

4.4.1 New Zealand: the Evidential Video Units

4.4.2 New Zealand: diagnostic interviews

4.4.3 Victoria: the Sexual Offences and Child Abuse Units

4.4.4 South Australia

4.4.5 New South Wales and Queensland: joint investigation and joint training

4.4.6 Specialist interviewers for the ACT

4.5 Guidelines for interagency approaches to child protection

4.6 Support for family members of the victim

4.7 Conclusion

5 The Director of Public Prosecutions and the prosecution of sexual offences in the ACT

5.1 Conviction rates in sexual offences

5.2 The review of DPP files

5.2.1 The Supreme Court files

5.2.2 The Magistrates Court files

5.2.3 Written advice

5.2.4 Issues arising from the file review

5.3 Discussions with prosecutors

5.3.1 Continuity

5.3.2 Gender

5.3.3 Sensitivity and understanding the dynamics of sexual assault

5.3.4 Victims who are reluctant to give evidence

5.3.5 Closed-circuit television

5.3.6 Rapport with victims

5.3.7 Consultation with victims

5.3.8 Magistrates Court matters
6.2.4 Evaluation of the use of pre-recorded evidence in New South Wales
6.2.5 Pre-recorded evidence-in-chief in the ACT
6.2.6 Custody and copying of videotapes in the ACT
6.2.7 Pre-recording all the witness’s evidence
6.2.8 Does pre-recording of evidence make a difference for children?
6.2.9 Conclusion
6.2.10 Implementation of recommendations
6.3 Closed-circuit television
6.3.1 Problems with closed-circuit television in the ACT
6.3.2 Application of provisions
6.3.3 Screens
6.3.4 Closed-circuit television and jurors’ decision making
6.4 Intermediaries
6.4.1 Intermediaries in South Africa
6.4.2 The United Kingdom
6.4.3 Western Australia
6.4.4 Intermediaries elsewhere in Australia
6.4.5 Conclusion
6.5 Cross-examination of victims by the accused
6.5.1 Legislative responses
6.5.2 A prohibition in the ACT?
6.6 Supplementary measures in Western Australia
6.6.1 Legislative change
6.6.2 Judicial and professional support
6.6.3 Technological support
6.6.4 The Child Witness Service
6.6.5 Conclusion
6.7 Special measures: aspects to consider
6.7.1 The accused’s right to a fair trial and the ACT Human Rights Act
6.7.2 Special measures: presumption or discretion?
6.7.3 Who should benefit from special measures provisions?
6.8 Conclusion
7 The rules of evidence and jury directions
7.1 Current evidentiary provisions in the ACT
7.2 Development of the rules of evidence
7.3 Reform of the rules of evidence
7.4 Complaint evidence
7.4.1 The admissibility of complaint evidence
7.4.2 Complaint evidence and proposals for reform
7.4.3 Jury warnings about delayed or absent complaint
7.5 The Longman direction
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.6</td>
<td>Hearsay evidence of children who are unavailable to give evidence</td>
<td>188</td>
</tr>
<tr>
<td>7.7</td>
<td>Expert evidence</td>
<td>191</td>
</tr>
<tr>
<td>7.7.1</td>
<td>Admission of expert evidence</td>
<td>193</td>
</tr>
<tr>
<td>7.7.2</td>
<td>Approaches to the admission of expert evidence</td>
<td>194</td>
</tr>
<tr>
<td>7.7.3</td>
<td>Conclusion</td>
<td>196</td>
</tr>
<tr>
<td>7.8</td>
<td>Evidence of uncharged acts</td>
<td>196</td>
</tr>
<tr>
<td>7.8.1</td>
<td>Joint trials of multiple victims: the rule in Hoch's Case</td>
<td>199</td>
</tr>
<tr>
<td>7.8.2</td>
<td>Uncharged acts committed on a victim</td>
<td>201</td>
</tr>
<tr>
<td>7.8.3</td>
<td>Admissibility of relationship evidence</td>
<td>203</td>
</tr>
<tr>
<td>7.8.4</td>
<td>Previous convictions</td>
<td>205</td>
</tr>
<tr>
<td>7.9</td>
<td>Competence</td>
<td>206</td>
</tr>
<tr>
<td>7.10</td>
<td>Conclusion</td>
<td>207</td>
</tr>
<tr>
<td>8</td>
<td>Sexual offence provisions in the ACT</td>
<td>209</td>
</tr>
<tr>
<td>8.1</td>
<td>Proposals for change in the ACT</td>
<td>209</td>
</tr>
<tr>
<td>8.2</td>
<td>Unlawful sexual penetration</td>
<td>211</td>
</tr>
<tr>
<td>8.2.1</td>
<td>Consent</td>
<td>212</td>
</tr>
<tr>
<td>8.2.2</td>
<td>The mental element: knowledge or recklessness</td>
<td>214</td>
</tr>
<tr>
<td>9</td>
<td>Court practices, procedures and facilities</td>
<td>219</td>
</tr>
<tr>
<td>9.1</td>
<td>The delay between the instigation of proceedings and the trial</td>
<td>219</td>
</tr>
<tr>
<td>9.1.1</td>
<td>Time frames in the ACT</td>
<td>220</td>
</tr>
<tr>
<td>9.1.2</td>
<td>Reducing delays in the ACT: the Magistrates Court</td>
<td>221</td>
</tr>
<tr>
<td>9.1.3</td>
<td>Investigation and delays: forensic results</td>
<td>222</td>
</tr>
<tr>
<td>9.1.4</td>
<td>Reducing delays in the ACT: the Supreme Court</td>
<td>223</td>
</tr>
<tr>
<td>9.2</td>
<td>Waiting at court to give evidence</td>
<td>223</td>
</tr>
<tr>
<td>9.3</td>
<td>Court facilities</td>
<td>225</td>
</tr>
<tr>
<td>9.4</td>
<td>A support person in court</td>
<td>226</td>
</tr>
<tr>
<td>9.5</td>
<td>Closing the court</td>
<td>227</td>
</tr>
<tr>
<td>9.6</td>
<td>Court personnel</td>
<td>227</td>
</tr>
<tr>
<td>9.7</td>
<td>Wigs and robes</td>
<td>228</td>
</tr>
<tr>
<td>10</td>
<td>Support for victims during investigation and prosecution</td>
<td>229</td>
</tr>
<tr>
<td>10.1</td>
<td>The criminal justice system and the rights of victims of crime</td>
<td>229</td>
</tr>
<tr>
<td>10.2</td>
<td>Why are victim support services necessary?</td>
<td>230</td>
</tr>
<tr>
<td>10.3</td>
<td>Types of support needed</td>
<td>231</td>
</tr>
<tr>
<td>10.4</td>
<td>Witness assistance services in DPP offices</td>
<td>232</td>
</tr>
<tr>
<td>10.5</td>
<td>Victim support services in the ACT</td>
<td>232</td>
</tr>
<tr>
<td>10.5.1</td>
<td>The Domestic Violence Crisis Service</td>
<td>232</td>
</tr>
<tr>
<td>10.5.2</td>
<td>The Victim Services Scheme</td>
<td>233</td>
</tr>
<tr>
<td>10.5.3</td>
<td>The Victims of Crime Assistance League</td>
<td>233</td>
</tr>
<tr>
<td>10.5.4</td>
<td>Support services generally</td>
<td>233</td>
</tr>
</tbody>
</table>
10.6 Witness assistance in the ACT ............................................................... 234
10.6.1 The Sexual Assault and Child Abuse Team’s victim liaison officer ……………… 234
10.6.2 The DPP witness assistant ............................................................... 234

10.7 Witness assistance services elsewhere in Australasia............................. 236
10.7.1 Western Australia ...................................................................... 236
10.7.2 New South Wales ..................................................................... 237
10.7.3 Victoria .................................................................................... 239
10.7.4 The Northern Territory ............................................................. 240
10.7.5 New Zealand ........................................................................... 240

10.8 A witness assistance service for the ACT............................................... 241

10.9 Separate legal representation for victims................................................ 245
10.9.1 Separate representation for victims in overseas jurisdictions ………………… 245
10.9.2 Separate legal representation in the Australian context …………………… 246
10.9.3 Separate legal representation for children in the ACT …………………… 248

10.10 Conclusion ...................................................................................... 248

11 Technology .............................................................................................. 249
11.1 Closed-circuit television in ACT courts ............................................... 249
11.1.1 The Magistrates Court ............................................................... 249
11.1.2 The Supreme Court .................................................................. 250
11.1.3 Sound quality.......................................................................... 251

11.2 Why technology matters ......................................................................... 251

11.3 The Child Sexual Assault Court at Parramatta ....................................... 252

11.4 Western Australia ................................................................................... 254

11.5 Improving the facilities in the ACT........................................................ 254

11.6 Video-link facilities to a remote location ............................................... 256
11.6.1 People in custody................................................................... 256
11.6.2 Interstate and overseas witnesses ……………………………………… 256

11.7 Recording evidence ................................................................................ 256

11.8 Where to from here? ............................................................................... 257

11.9 Recording of interviews with child witnesses .......................................... 258

12 Training ........................................................................................................... 261
12.1 The legal profession ................................................................................ 262
12.2 The judiciary and the magistracy............................................................. 265
12.2.1 Training in Australia ................................................................ 265
12.2.2 Training in other countries ........................................................ 267
12.2.3 Summary .................................................................................. 267

12.3 Prosecutors ........................................................................................... 268

12.4 Defence lawyers .................................................................................... 270

12.5 People working in a support role ............................................................ 271
12.6 Court staff ........................................................................................................ 272
12.7 The Police ...................................................................................................... 273
  12.7.1 Current AFP training ................................................................. 273
  12.7.2 Training for a joint investigation team ...................................... 274
  12.7.3 Training for SACAT Child Abuse Team members ............... 275
  12.7.4 Training for the Adult Sexual Assault Team ..................... 275
  12.7.5 Training for recruits and general duties officers .................. 277

Appendix A  Part 2 of the ACT Victims of Crime Act ............................... 279

Bibliography ........................................................................................................ 281
Summary

Many victims of violent crimes endure additional stress during the subsequent police investigation and prosecution process. The experience can be particularly harrowing for victims of sexual offences. Such offences are difficult to prosecute because they usually take place in the absence of any witnesses, the victim must provide evidence of a most personal nature, and there is often little evidence other than the victim’s word. Giving evidence and being cross-examined in court can be very daunting.

Less than 20 per cent of victims of sexual offences report the offence to police, and conviction rates are lower than for other types of offences. In recent decades there have been major reforms to substantive, evidentiary and procedural provisions that operate in sexual offence trials. More recently there has been a focus on the experience of child victims of sexual offences in the court process, leading to important changes to how children give evidence in the majority of Australian jurisdictions.

Investigation, prosecution and services for victims of sexual offences

The two primary agencies involved in the investigation and prosecution of sexual offences in the ACT are ACT Policing and the ACT Office of the Director of Public Prosecutions. A number of other agencies—such as the Office for Children, Youth and Family Support, which has responsibility for child protection; ACT Health, which provides medical services for victims of sexual assault through the Forensic and Medical Sexual Assault Clinic and the Child at Risk Assessment Unit; specialist counselling services; and court support services—all have important roles during the investigation and prosecution of those offences.

Investigatory structures and processes

A specialist ACT Policing unit for victims of serious sexual offences has existed since 1988. The unit—now known as the Sexual Assault and Child Abuse Team—has expanded over time and investigates allegations of child physical and sexual abuse as well as of adult sexual assault and serious acts of indecency. Other ACT Policing officers also come into contact with victims of sexual offences.

The first response to such victims is vitally important, and police services in Australia and abroad are focusing attention on how the response can be improved. Training, innovative investigative techniques and the development of guidelines are constantly improving the response. Greater collaboration with medical and counselling services and with prosecution services allows for greater sensitivity in dealing with victims and leads to more streamlined investigations and ultimately a greater number of successful prosecutions.
Recommendation  Retaining a specialist response to sexual assault in ACT Policing

3.1 The ‘Guidelines for the Investigation of Sexual Offences’ should be distributed throughout ACT Policing. In particular, the Territory Investigations Group reception officers, station sergeants and SACAT team leaders should be familiar with them.

ACT Policing should develop a written policy on the investigation of matters that fall within the Guidelines, to cover situations when SACAT lacks the time or resources to conduct investigations. In these instances matters should be allocated to investigators who have had SACAT experience in the first instance and then investigators who have completed the Sexual Offences Investigator Program. SACAT team leaders should retain a supervisory role, and in busy periods consideration should be given to teaming SACAT investigators with investigators from the two supporting groups. To facilitate the allocation of investigations to members of the two groups, the SACAT team leaders and reception officers should keep a list of all relevant officers.

Recommendations  Recruitment to SACAT

3.2 ACT Policing members seeking to join SACAT should be interviewed by a panel consisting of the SACAT team leaders and the AFP psychologist. Suitability for the work should be a primary selection criterion.

3.3 ACT Policing management should take steps to identify members who have the relevant skills and encourage them to join SACAT.

3.4 Completion of the Sexual Offences Investigator Program should be a prerequisite for membership of SACAT.

Recommendations  Rotation and retention of SACAT members

3.5 The current policy of members joining SACAT for three years with the option of a fourth year should remain, and consideration should be given to allowing some members who are suited to the work and want to remain longer to do so. An assessment of members’ continued suitability should be conducted in consultation with the AFP psychologist.

3.6 If they are not suited to the work, members of SACAT should be permitted to leave within the three-year period without prejudice.

3.7 Succession planning for SACAT should occur, so that there is a hand-over period of one month to assist in the smooth progress of investigations. The change of members should also be staged, to ensure the retention of substantial experience in SACAT.

3.8 The health and wellbeing of members of the SACAT team should be secured by the following means that have been adopted in other police services:

- regular psychological testing
- compulsory quarterly sessions with a police psychologist
health and wellbeing days, where members can participate in stress-reduction activities such as meditation and yoga and other techniques for dealing with a stressful work environment.

Recommendations  Improving the initial response

3.9 Police should be required to contact the Canberra Rape Crisis Centre within a specified time to attend in all cases of serious sexual offences (other than those against children). The Centre would need a funding increase in order to provide this service. For children, counsellors should be on call.

3.10 All ACT police stations should have at least one room for victims of sexual offences to await the attendance of counsellors and SACAT members. The room should be away from public areas. As soon as a person comes to a police station and reports a sexual offence, they should be taken to the room: they should not be left waiting in the public waiting area. A police officer should remain with the victim at all times to provide support and take initial brief details of the incident.

3.11 All ACT Policing members who might have contact with victims of sexual offences should receive training in the following:

- responding appropriately and sensitively to victims—including accepting what the victim says and calling the Canberra Rape Crisis Centre—at the initial stage

- taking initial urine samples and oral swabs

- suitably accommodating the victim at the police station—in separate rooms, away from public areas

- preserving the crime scene if first contact with the victim is where the offence occurred

- if the offence was recently committed, obtaining basic information to allow the crime scene to be preserved and secured and offenders to be located.

The training should be delivered to members of ACT Policing through the AFP Training College in Barton, using the model of the Family Violence Intervention Program.

3.12 The current two-hour training for recruits on sexual offences should be revamped at the first opportunity, to provide more extensive training on sensitively dealing with victims and on crime scene preservation. The training should cover the points listed in recommendation 3.11.

3.13 A model for first-response officers whose main concern is care of the victim should be adopted in the ACT, along the lines of the Sexual Offences Investigative Techniques, or SOIT, officers of the London Metropolitan Police Service. Enough members with appropriate skills and aptitude should be trained to provide a 24-hour response in both ACT Policing districts. These officers would be attached to SACAT. Their role would be to provide the first response to victims of sexual assault—including care of victims, arranging forensic medical examinations and taking statements—and then maintain contact with the victim. SACAT members would continue to conduct investigations.
3.14 An ‘early evidence kit’ based on the London Metropolitan Police Service kit (allowing the collection of urine samples and oral swabs from victims) should be developed, and all ACT Policing members who might be the first response to victims of sexual offences should be trained in its use.

3.15 In the case of recent sexual assaults, attending police should take sufficient details to ascertain the nature of the offence, the location and the identity of the offender, as well as any other information that will help police obtain physical evidence, and ensure the safety of the victim. Interviews should be audio-recorded.

3.16 Consideration should be given to amending the current protocol between SACAT and the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault to require that the Centre and the Service be contacted by police whenever a sexual assault is reported.

3.17 SACAT members should obtain a preliminary statement from the victim at the time the offence is reported; a more detailed statement should be obtained within 24 to 36 hours.

3.18 Where possible—and where apprehension of the offender will not be compromised—the forensic medical examination should be conducted before the detailed statement is taken.

3.19 The victim should be given the opportunity to have Canberra Rape Crisis Centre counsellors present when giving a statement to police. If they do want a counsellor present, arrangements for that need to be made before the victim attends to give the statement. Additional funding for the Canberra Rape Crisis Centre might be needed in order to allow it to provide this service.

3.20 All SACAT investigative teams should have at least one woman in them, to give victims a choice of gender when being interviewed.

3.21 Investigators should ensure that in all cases of recent sexual offences photographs are taken of any injuries to the victim. Within 48 hours the injuries should again be photographed.

**Recommendation**

**A code of practice for the ACT**

3.22 A code of practice modelled on the Victoria Police Code of Practice for the Investigation of Sexual Assault should be developed by SACAT and ACT Policing in consultation with the following agencies:

- the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit
- the ACT Director of Public Prosecutions
- the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault.

The code should cover all aspects of the investigation of sexual offences, including victim care, the taking of statements and the collection of physical evidence. It should guide ACT Policing’s investigation of all sexual offences.
Recommendation  Relationship with other agencies
3.23 The protocol between ACT Policing and the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault and that between ACT Policing and the Child at Risk Assessment Unit should be immediately reviewed and signed. All protocols and memorandums of understanding relating to the investigation of sexual offences should be widely distributed throughout ACT Policing and be readily available to all police who might have contact with victims of sexual offences.

Recommendations  Bail conditions
3.24 Police should be encouraged to rely on s. 212 of the ACT Crimes Act 1900 and consider the safety of the victim when deciding whether to proceed by way of summons or arrest in relation to alleged sexual offences. Preference should be given to proceeding by way of arrest (rather than summons) in sexual offences and offences of violence upon children, applying the provisions of the Crimes Act. Unless there is no possibility of the alleged offender coming into contact with the victim, bail conditions protecting the victim from the alleged offender should generally be imposed in cases where proceedings are instituted.

3.25 Section 212 of the ACT Crimes Act 1900 should be amended so that police can arrest without warrant, and without the need to consider the requirements of s. 212(1)(b) of the Act, a person suspected of having committed a sexual offence.

Recommendation  Protection order applications by ACT Policing
3.26 Pursuant to s. 11(3) of the Protection Orders Act 2001, and unless the bail conditions applying adequately protect the victim, ACT Policing should apply for protection orders on behalf of victims of sexual offences where criminal proceedings have begun.

Recommendation  Feedback between the Director of Public Prosecutions and SACAT
3.27 The Director of Public Prosecutions and SACAT should establish a procedure whereby constructive feedback can be provided at the conclusion of prosecutions. Each agency should keep a register of problems arising from the investigation and prosecution of individual cases, with a view to providing feedback.

Recommendation  Pretext calls
3.28 Police should exercise caution when asking a victim to make a pretext call. They should take into account the nature and circumstances of the alleged offence, the relationship between the alleged offender and the victim, and the victim’s attitude. The SACAT team leader should authorise the making of the call. All victims who agree to make a pretext call should be required to speak with a counsellor from the Canberra Rape Crisis Centre, and the counsellor should be present to offer support afterwards.
Recommendation Contacting victims

3.29 DPP prosecutors and SACAT investigators should ensure that they are aware of their obligation to inform victims of sexual offences of the progress of court proceedings.

Recommendation Submitting items for forensic analysis

3.30 When a SACAT investigator intends to submit items to the Australian Federal Police’s Forensic Services for analysis, the investigator should brief Forensic Services before doing so, to discuss which items would be the most suitable for analysis. The request to Forensic Services should go through the SACAT team leader. In some cases, the ACT DPP should also be consulted, to provide advice on what should be tested. SACAT team leaders and Forensic Services officers should meet regularly to discuss any problems or concerns, as well as particular cases. SACAT investigators should be encouraged to attend Forensic Services to learn more about forensic analysis.

Recommendations Forensic samples

3.31 When the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit take samples from victims during forensic medical examinations, there should be provision for those samples to be submitted anonymously to ACT Policing for analysis.

3.32 When the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit take samples and the victim does not want the matter to be investigated by police, the samples should be retained for 12 months, after which the victim should be contacted. Further counselling should be offered before victims consent to their samples being destroyed.

Recommendations A one-stop shop for adult victims of sexual assault in the ACT

3.33 Consideration should be given to police being called to the Forensic and Medical Sexual Assault Centre when a victim of sexual assault attends, in order to meet the victim on an informal basis and explain the role of the police. If the victim chooses to have the matter investigated, the police member can make arrangements for them to attend the relevant police station or police centre. A room where police can speak with victims and videotape the interviews should be available in the Forensic and Medical Sexual Assault Centre.

3.34 All forensic medical examinations should take place at the Forensic and Medical Sexual Assault Centre; preferably, none should be carried out at the Winchester Centre. Interview facilities should be located at the Forensic and Medical Sexual Assault Centre, so that police can conduct the initial interview with the victim there. Victims can attend the Winchester Centre for subsequent interviews.
Recommendation  Continuing research

3.35 One or more SACAT members should be allocated on a permanent basis to the task of keeping well informed about developments in best practice for the investigation of sexual offences, nationally and internationally. Funding should be made available to allow that member (or those members) to spend a specific number of hours each month to do this work and to travel to conferences and other meetings in order to stay up to date. The member (or members) should report their findings to the team leaders of SACAT and other senior ACT Policing members on a regular basis. In particular, they should study innovative programs such as the London Metropolitan Police Service’s Project Sapphire.

Collaborative approaches to investigating child sexual abuse

Although the actual extent of sexual abuse of children is not known, it is widely accepted that the incidence of such offences is still under-reported. Redressing the problem of child sexual abuse has become a major community concern, and there is growing emphasis on the need to reduce the legal system’s impact on children who have disclosed sexual abuse. In Australia and elsewhere there is a trend towards greater collaboration between police, child protection agencies and health professionals, with the aim of improving the quality of the investigation process and reducing the negative effects of the prosecution on child victims. The United States and New Zealand have established centres where children who have been sexually abused are attended to by all relevant agencies in one place. The ACT is in an ideal position to establish such a centre.

Joint investigation by police and child protection workers is becoming established practice nationally, as is the establishment of units of people who are specially qualified to conduct interviews, the tapes of which can be used as evidence in court. This collaborative and specialised approach is in its infancy in the ACT, but there is great potential for moving forward.

Recommendation  A one-stop shop for child victims in the ACT

4.1 A one-stop shop (or multi-agency centre) modelled on Puawaitahi in Auckland should be established in the ACT. The principle calling for the centre’s establishment is that children and young people who are victims of abuse, as well as their families, should need to attend only one location to gain access to the following officers and agencies:

- the Child Abuse Team of ACT Policing’s SACAT
- child protection officers from the Office for Children, Youth and Family Support
- relevant services of ACT Health’s Child at Risk Assessment Unit.

The centre should be established near The Canberra Hospital, in premises that are neutral for all participating agencies.

A working group, with representatives from the management and operational levels of the three agencies that will be located at the centre, should be established. The SARP team could attend meetings of this group in a consultative capacity, to provide information about the models it examined.
Recommendation  Joint interviewing and investigation

4.2 Joint interviewing and joint investigation by police and the Office for Children, Youth and Family Support, along the lines of the New South Wales Joint Investigative Response Teams model, should be instituted, with the following features:

- One member of the police and one child protection officer should work together on the initial response and when interviewing the child.
- Police and child protection officers should be trained in interviewing, and the most appropriate person should conduct the interview.
- The two interviewing officers should pre-plan the interview, so that the maximum amount of information is elicited in one interview.
- The New South Wales Joint Investigative Response Teams policy and procedures on debriefing and developing action plans after an interview should be adopted.

Recommendation  Other interagency approaches

4.3 Regular meetings of all the agencies involved should be held to discuss ongoing cases and ensure a coordinated response, as occurs with the Suspected Child Abuse and Neglect Teams in Queensland. Systemic matters and problems should also be discussed regularly.

Recommendations  Specialist interviewers

4.4 A specialist interviewing unit should be established to conduct interviews with children on behalf of ACT Policing and the Office for Children, Youth and Family Support. Interviewers should have qualifications and experience in child psychology and should receive training in legal aspects. Alternatively, people with an understanding of the legal framework (such as police) could receive comprehensive training in interviewing children. The unit should be located in ACT Policing or in the Office for Children, Youth and Family Support.

4.5 All police and child protection interviews with child victims under the age of 7 years should be conducted by specialists in child development or child psychology who have also received training in relation to admissible evidence.

4.6 Diagnostic interviews should be conducted with children who do not disclose but in relation to whom there are suspicions of abuse, as occurs in New Zealand.

Recommendation  Interagency guidelines for child protection intervention

4.7 Comprehensive interagency guidelines for child protection intervention should be developed, with involvement on the part of all the relevant agencies—among them ACT Policing, ACT Health, the Chief Minister’s Department, the Department of Justice and Community Safety, the Office of the Director of Public Prosecutions, the Department of Education and Training and the Office of the Community Advocate.
The Director of Public Prosecutions and the prosecution of sexual offences in the ACT

The prosecutor’s role is crucial and can significantly affect the experience of victims of sexual offences. There is scope for reforming procedures so as to make the experience less harrowing for victims of sexual offences and to strengthen the prosecution of these matters.

Recommendation Promoting consistency in the ACT DPP

5.1 DPP managers and senior prosecutors should discuss trends in the prosecution of sexual offences with a view to developing a consistent approach. In particular, the following should be dealt with:

- the ‘reasonable prospects of a conviction’ test and how it applies to sexual offence prosecutions
- the importance or otherwise of corroborative evidence
- factors considered important in assessing credibility
- intoxicated victims and the provisions of s. 67 of the ACT Crimes Act 1900.

Recommendation A specialist sexual offences unit in the ACT DPP

5.2 A specialist sexual offences unit comprising a senior prosecutor and a junior prosecutor should be established within the ACT DPP. The unit would be responsible for the following:

- conducting committals and summary hearings, conducting or instructing in trials, and instructing in appeals
- monitoring all sexual offence matters dealt with in the DPP
- maintaining an up-to-date library of case law and legislation
- providing policy advice
- liaison between SACAT, other relevant areas of ACT Policing, and the DPP
- liaison between the DPP and outside agencies
- coordinating training for prosecutors
- coordinating the provision of training by the DPP to outside agencies
- collaborating with the DPP Family Violence Unit
- developing a sexual assault manual along the lines of the New South Wales DPP’s Child Sexual Assault Manual
- developing protocols and policy documents in relation to the DPP’s interaction with other relevant agencies
- maintaining a database on all sexual offence prosecutions
- providing to SACAT policy advice on interagency agreements, protocols and guidelines for investigation.

**Recommendations**

**Strengthening the relationship between the ACT DPP and ACT Policing**

5.3 A senior prosecutor should attend SACAT for half to one day each week to discuss with investigating officers legal and evidentiary matters arising in particular investigations. Initially, this could be done for a trial period of three months. Consultation with the prosecutor should be approved by the relevant SACAT team leader.

5.4 Regular meetings between the SACAT team leaders and the senior prosecutor from the proposed sexual offences unit (or another senior prosecutor if there is no such unit) should be held to discuss current prosecutions and systemic problems. The senior prosecutor should be briefed by other prosecutors on the current status of all sexual offence prosecutions; the SACAT team leaders should also be briefed by the investigators. These briefings should include non-SACAT sexual offence prosecutions.

**Recommendations**

**ACT Policing's requests for advice**

5.5 Guidelines should be developed for ACT Policing’s requests for advice from the DPP. The guidelines should cover the types of matters to be referred, the material to be provided by SACAT, timelines, and procedures for communication between the two agencies. All requests for advice should be in writing, with urgent requests made by email to the Deputy Director. Prosecutors should record their responses, which should be kept in a central location.

5.6 Unless in unusual circumstances it is deemed unnecessary, prosecutors preparing an advice should meet the victim and other relevant witnesses. If a prosecutor proposes to write an advice without discussing the matter with the victim or other relevant witnesses, this should be discussed with a manager and noted on the file.

5.7 All written advice should be authorised by either the Deputy Director or the Assistant Directors of the Magistrates Court and Supreme Court practices.

5.8 Where the DPP recommends to SACAT that charges not be laid, the prosecutor providing that advice should meet the victim—as well as the informant, separately—to explain the decision. The prosecutor should also provide to the victim written reasons that have been approved by a manager.

**Recommendation**

**Continuity of prosecutor**

5.9 There should be a policy of promoting continuity of prosecutor between the Magistrates Court and the Supreme Court in all sexual offence matters. Depending on their degree of experience and the complexity of the matter, prosecutors appearing in committal proceedings should either instruct or appear as counsel in the Supreme Court.
Recommendations Discontinuation of prosecutions

5.10 Decisions to discontinue sexual offence proceedings in the Magistrates Court should be authorised by the Assistant Director of the Magistrates Court practice or the Deputy Director after receiving advice from the allocated prosecutor. For matters before the Supreme Court, the current procedure for discontinuance of prosecutions, involving authorisation by the Director or Deputy Director, should continue. Consideration should be given to having all sexual offence matters to be discontinued in the Magistrates Court and all advice matters recommending that no charges be laid considered by a panel of two or three senior prosecutors, including at least one of the Deputy Director or Assistant Director, to ensure that there is consistency and that the decisions are in keeping with the DPP Prosecution Guidelines.

5.11 All decisions to discontinue proceedings should be supported by written reasons, prepared by the allocated prosecutor. The reasons should be conveyed to both the victim and the informant in writing. Because of the sensitivity of such matters, the written reasons should be authorised by the Assistant Director of the Magistrates Court practice or the Deputy Director. For Supreme Court matters, the reasons should be authorised by either the Deputy Director or the Assistant Director of the Supreme Court practice.

Recommendations Involving victims of sexual assault in the prosecution process

5.12 The ACT DPP’s procedures for prosecutors’ contact with victims in relation to charge negotiations and negotiations on the facts to be tendered for sentence should be clarified. The following guidelines should be included:

- Victims in sexual assault matters should be informed when any charge negotiations are initiated.
- Victims should be informed of the rationale for and the principles governing charge negotiation and agreement, as well as being told why a charge agreement is being considered in their case.
- The victim’s views should be obtained before any formal decision about a charge agreement is made.
- Prosecutors should discuss with victims the statement of facts and the reasons why that version is to be tendered.
- Victims should be asked to sign any proposed statement of facts and should sign a copy of the indictment, asserting that they are aware of the charges to which pleas will be entered. If they have no objection, they should sign the statement of facts to indicate they have seen them and agree with them. If they do object, they should be invited to sign a copy of the document and make a notation that they do not agree to the statement of facts. This procedure should also be applied to police informants.

5.13 The ACT DPP’s procedures for prosecutors’ contact with victims when it is intended to discontinue sexual offence proceedings should be clarified. The following guidelines should be included:
Unless circumstances obviate the need for it, decisions to discontinue proceedings should be made after interviewing the victim and other relevant witnesses.

When proceedings are discontinued against the victim’s wishes, the reasons should be carefully and sensitively explained to the victim by the prosecutor with conduct of the trial or the prosecutor with conduct of the matter in the Magistrates Court or Children’s Court. If it is thought that the victim will find this a distressing experience, the DPP witness assistant could be involved. A follow-up appointment should also be offered.

5.14 In the case of victims who are reluctant to testify, every effort should be made to encourage them to attend court and give evidence. This can be achieved through the encouragement and support of the witness assistant and the prosecutor conducting the case. If the victim fears harm from the offender, every effort should be made to ensure that they are protected from the offender.

Recommendation Giving victims choice

5.15 Prosecutors should decide whether or not to discontinue a case before asking the victim for their opinion. In cases where there is some doubt about reasonable prospects of a conviction, the practice of suggesting that victims decide whether to proceed with the prosecution should be discontinued.

Recommendations Improving the court experience for victims

5.16 Prosecutors should be encouraged to consider ways of making the court process less stressful for victims. In particular, prosecutors should receive training in s. 41 of the Commonwealth Evidence Act 1995 and be encouraged to rely on that provision when necessary.

5.17 Before any victim gives evidence in court without the use of closed-circuit television, the victim should be seen by the DPP witness assistant, who should fully explain the victim’s right to give evidence via closed-circuit television. If a victim aged less than 18 years wishes to give evidence in court, the prosecutor should discuss this with the Deputy Director, providing reasons for the victim’s decision.

Recommendations Interviewing facilities

5.18 The DPP should set aside a purpose-made room for interviewing children. The room should be large enough to be divided in two by a soundproof glass wall, so that young children can see their carers while a prosecutor or the witness assistant is speaking with them. The room should be furnished with a couch, an armchair and beanbags. Toys, games and a video recorder—to allow children to watch their interviews and to entertain them while their carers are speaking with the prosecutor—should also be provided.
5.19 The interview room on the ground floor of the DPP should become the designated interview room for victims in sexual offence matters. It could be used as a more general witness interviewing room, but priority should be given to victims of sexual offences. Priority could also be given to victims of family violence. The room should be furnished with couches and be decorated in such a way as to make it a friendlier, more comfortable environment.

5.20 A booking system for both interview rooms should be introduced.

Recommendation Interviewing children

5.21 Prosecutors should receive from a child psychologist or a counsellor who works with children training in how best to establish rapport with children of different ages, appropriate ways of dressing, and the most suitable environment for interviewing children. The prosecutors should be encouraged to dress casually when interviewing children.

Recommendation Contact with victims

5.22 Victims—or their carers in the case of children—should be kept well informed throughout the prosecution process:

- Within 14 days of the DPP’s receipt of the file, the victim should be contacted and an appointment should be arranged for them to see either the allocated prosecutor or the witness assistant to explain the court process, the prosecutor’s role and the victim’s role.

- After the first mention date in court, the victim should be sent an information package informing them of the court process and providing contacts for relevant services, the name of the allocated prosecutor and details of the next court date.

- After each mention in court, the victim should be advised by letter or phone of the next court date.

Recommendation Proofing of medical witnesses by prosecutors

5.23 Whenever a doctor is to be called to give evidence in a matter involving a child victim of physical or sexual abuse, and in all cases involving adult sexual offences, the prosecutor with carriage of the matter should confer with the doctor and comprehensively cover the evidence that will be given. Such a conference should not occur on the day of the hearing or trial.

Giving evidence

Most Australian jurisdictions have introduced legislative reforms designed to make the experience of giving evidence in court less daunting for victims of sexual offences, particularly children. Among the reforms are restrictions and prohibitions on children attending committal proceedings; the use of taped interviews with child victims as evidence in court proceedings; pre-recording a child’s evidence; and using closed-circuit television to allow victims to give evidence from outside the courtroom. With the
exception of closed-circuit television legislation, the ACT is lagging behind other Australian jurisdictions in this regard.

**Recommendation  Calling of complainants in committal proceedings**

6.1 The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings. Failing this, child complainants should not attend committal proceedings. For adult complainants, the court should be satisfied that there are special reasons for the complainant to attend. In making an application to have a complainant attend, the defence should specify the areas they wish to cross-examine the witness about and why. There should be no deviation from those areas during the committal hearing.

**Recommendations  Pre-recording the evidence-in-chief of child witnesses**

6.2 The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a child complainant as the child’s evidence-in-chief. The provisions should apply to child witnesses who are victims of sexual or physical violence as well as witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.

6.3 The legislation should be supported by investment in up-to-date technology and a comprehensive training program for interviewers. Consideration should be given to the training of specialist interviewers. Participants in the criminal justice system should receive training in relation to the new provisions, including the rationale for them. Suitable equipment will need to be bought for the Supreme Court and the Magistrates Court.

**Recommendations  Pre-recording of the entire evidence of the witness**

6.4 Witnesses aged less than 18 years at the time the alleged offence was committed should be permitted to give their evidence via closed-circuit television at a pre-trial hearing attended by the judge, the prosecutor, the defence lawyer, the accused and any other person the court deems appropriate. That evidence should be recorded and played at the trial as the witness’s evidence.

6.5 Recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances—for example, where the child witness’s evidence is admissible as coincidence or tendency evidence.
Recommendation  Custody and copying of tapes of children's interviews

6.6 ACT Policing and the ACT Director of Public Prosecutions should immediately develop a policy prohibiting the copying and distribution of tapes of interviews between police, child protection workers and children where sexual abuse is discussed. Copies of tapes should be made only when necessary for the court proceedings. Defendants and their lawyers should not be given copies of tapes; instead, they should be invited to attend the offices of the DPP or a police station to view the tapes. The DPP should liaise with the ACT Law Society in formulating the policy and informing ACT lawyers of it and its rationale. If these measures are not sufficient, consideration should be given to legislation. The same approach should be taken with tapes of medical examinations involving intimate body parts of children and adults.

Recommendations  Complainants not viewing the accused while giving evidence via closed-circuit television

6.7 The ACT’s Evidence (Miscellaneous Provisions) Act 1991 should specify that the accused is not to be in the view of a complainant giving evidence via closed-circuit television.

6.8 The closed-circuit television provisions should be extended to apply to witnesses other than the complainant in sexual offence proceedings who give evidence of similar acts committed upon them by the accused.

Recommendation  Screens

6.9 The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused. The accused could be provided with a monitor allowing them to see the witness.

Recommendation  Child communicators

6.10 The ACT should introduce legislation permitting the use of communicators, or intermediaries, for child witnesses in sexual offence proceedings. The role of the communicator would be to rephrase, in age-appropriate language, the questions of counsel and the judge or magistrate. The child could then respond in their own words, which would not need to be interpreted. If necessary, the judge could seek clarification of an answer from the intermediary. The communicators should have qualifications in child psychology, should be specifically recruited to the position, and should receive training in court procedure. There should be a presumption that communicators can be used for all witnesses aged less than 18 years—in the same way there is a presumption that child witnesses can give evidence via closed-circuit television.
Recommendation  Prohibiting an unrepresented accused from cross-examining complainants in sexual assault proceedings

6.11 An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses. Consideration should be given to extending this to other categories of witnesses such as complainants in domestic violence and stalking proceedings. An unrepresented accused should be advised that they will need to arrange their own representation; if they fail to do this the court should appoint a lawyer for the purpose of cross-examining the complainant. Legislation should provide that the court may arrange for the accused, through the ACT Legal Aid Office, free legal representation to cross-examine the complainant. If the accused does not want to put questions through the appointed representative, they should be refused the right to cross-examine the complainant.

Recommendation  Application of special measures

6.12 A presumption in favour of special measures should be adopted in the ACT for the following classes of witnesses:

- child witnesses
- witnesses with a mental or physical impairment that will affect their ability to give evidence satisfactorily.

For adult complainants, there should be a presumption in relation to the following special measures:

- a prohibition on cross-examination of the complainant by the accused
- use of closed-circuit television, as is currently the case.

Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.

The rules of evidence and jury directions

The rules of evidence have a major impact on how trials of sexual offences are conducted. The past two decades have seen reforms aimed at mitigating the effects of some of the harsher common law rules that applied to sexual assault cases. Often the way the rules of evidence operate does not take into account the typical features of sexual offences—particularly in relation to child sexual abuse. A number of jurisdictions have sought to redress the situation through legislation.
Recommendation Review of sexual assault trials

7.1 A reference group within the ACT Office of the Director of Public Prosecutions should be established to conduct a review of sexual offence trials—particularly those involving child victims—to examine evidentiary questions that arise, with a view to making a submission to the ACT Government or the Australian Law Reform Commission inquiry in relation to possible changes to the laws of evidence as they affect sexual offence proceedings.

Sexual offence provisions in the ACT

Most of the ACT’s sexual offence provisions were enacted in 1985 and are under review. The ACT Government is considering adopting the sexual offence provisions of the Model Criminal Code, allowing for an overhaul of the provisions applying in the ACT.

Recommendation Review of the impact of the rules of evidence in sexual assault trials in the ACT

8.1 The proposed reference group within the ACT Office of the Director of Public Prosecutions should conduct a review of ACT Supreme Court trials involving sexual intercourse without consent, to examine the elements of consent and the mens rea of the offence, with a view to making a submission to the ACT Government in relation to changes to the substantive law of sexual offences.

Court practices, procedures and facilities

Some practical aspects of the court process—such as what facilities are available for witnesses, the presence of a support person near the victim while they give evidence in court, delays in proceedings, and waiting at court to give evidence—can have a deleterious effect on victims of sexual offences. There are various ways of dealing with the problems that arise. One important improvement would be to establish a facility—away from the ACT Magistrates Court and Supreme Court buildings—where witnesses and their families can wait and then give evidence using video-conferencing facilities. The Child Sexual Assault Court at Parramatta in New South Wales has taken this approach.

Recommendation Listing of sexual offence proceedings in the Magistrates Court

9.1 A special weekly list for all sexual offences that do not fall within the Family Violence List should be established in the ACT Magistrates Court. Sexual offence matters should proceed through the Magistrates Court as quickly as possible, and a record-keeping system should be established to monitor their progress. Police, prosecutors and defence lawyers should be encouraged to facilitate the fast-tracking of such matters. Court time should be allocated in advance for hearings in sexual offence matters, to ensure that they proceed as quickly as possible.
Recommendation  Waiting at court to give evidence

9.2 As far as possible, there should be pre-trial determinations on the admissibility of evidence or any other matters that could delay the start of a trial or hearing. Pre-trial hearings could determine the time the victim should attend court to give evidence, and the parties and the court should make every effort to ensure that the victim gives evidence on the agreed day at the agreed time. The Magistrates Court and the Supreme Court should develop practices whereby victims in sexual offence proceedings are not required to wait in the precincts of the court before giving evidence.

Recommendation  Waiting facilities at court

9.3 A waiting area for child victims of sexual offences and their families should be established, and separate waiting facilities for adult victims should be provided. These facilities should be situated away from both court complexes, in a location that is not known to the general public. Witnesses could give their evidence from these locations, linked to the court by video-conferencing facilities. Alternatively, urgent consideration should be given to establishing, for witnesses attending the Supreme Court and the Magistrates Court, separate waiting facilities for adult and child witnesses and their families in the Magistrates Court. The facilities should have their own entrance, so that witnesses do not come into contact with the alleged offender.

Recommendation  A support person in court

9.4 Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness. For children, this right could be waived only if in the opinion of the court that is in the child’s best interests.

Recommendation  Applications to close the court

9.5 Unless the victim opposes it, prosecutors should make applications pursuant to the ACT’s Evidence (Miscellaneous Provisions) Act 1991 for the court to be closed while a victim is giving evidence in sexual offence proceedings.

Recommendations  Increasing the responsiveness of court personnel

9.6 Selected court and sheriff’s officers should receive training in dealing with victims of sexual offences and child witnesses in the court environment. Once that training is completed, those officers should be allocated to accompany all victims and child witnesses while they give their evidence by closed-circuit television.

9.7 All court staff, in both the Magistrates Court and the Supreme Court, should receive general training on the special needs of victims of sexual offences and child witnesses when they attend court.
Recommendation Wearing of wigs and robes by judges and counsel

9.8 The Bar Association should allow its members to appear without wigs in the Supreme Court when a child witness is giving evidence. Further, judges of the Supreme Court should direct counsel to appear without robes when a child witness is giving evidence.

Support for victims during investigation and prosecution

In many prosecution agencies in Australia comprehensive witness assistance services are now seen as essential—particularly for victims of sexual offences. Because of resource constraints, the ACT Office of the Director of Public Prosecutions is well behind in this.

Recommendations Witness assistance in the ACT

10.1 A child witness service modelled on the Western Australian Child Witness Service should be established in the ACT. The service should be staffed by social workers or psychologists who have experience in dealing with abused children. Alternatively, two additional witness assistant positions should be created within the ACT DPP. One of these assistants should deal specifically with child witnesses and should have qualifications in child development, child psychology or counselling as well as experience in working with children. The other assistant should provide support for adult victims of sexual offences.

10.2 The two new witness assistants should provide the following services:

- support for witnesses from early in the prosecution until the completion of proceedings
- pre-court non-evidentiary preparation that is comprehensive and appropriate to the age of the witness
- advocacy on behalf of the witness in relation to things such as their preferred mode of giving evidence
- liaison with agencies and organisations that have contact with victims
- for witnesses and their families, referrals to other support services
- information about the progress of a case—taking the initiative rather than waiting to be contacted
- assistance in the preparation of victim impact statements
- support during court proceedings
- post-court debriefing
- policy input in relation to services and legislation affecting sexual assault victims
- provision of advice about victims’ right to financial assistance.
10.3 Funding should be made available to produce an ACT-specific video and booklets designed to help prepare witnesses for attending court to give evidence. Separate booklets should be prepared for different age groups and should be available in a variety of languages.

Technology

New technologies allow victims of sexual offences to give evidence from outside the courtroom, connected by closed-circuit television. Advances in video-conferencing technology and the use of large plasma screens in courtrooms—as in the New South Wales Child Sexual Assault Court—allow victims to give evidence from another location, thus avoiding contact with the alleged offender.

The closed-circuit television technology in the ACT is outdated and difficult to use. If the ACT were to adopt some of the legislative provisions recommended in this report (such as those relating to pre-recorded evidence), upgrading of the technology would be essential.

Recommendations Technology in ACT courts

11.1 The closed-circuit television equipment in the Magistrates Court and the Supreme Court should be improved as a matter of urgency by taking the following measures:

- installing plasma screens in the two Magistrates Court courtrooms
- installing projector screens (as in Perth) in front of the jury box and monitors for the judge, lawyers and accused in Supreme Court courtrooms one and two
- using lapel microphones for witnesses in the remote room
- replacing the seating for witnesses in the Magistrates Court remote room
- placing the television screen in the Supreme Court remote room directly in front of the witness
- improving the sound quality in both the Supreme Court and the Magistrates Court
- providing training for judicial officers, sheriff’s officers, court officers and associates who are to operate the new equipment
- if possible, adjusting the camera view to improve the view of the witness on the monitors in court. Generally, only a witness’s head and shoulders should be visible
- equipping the closed-circuit television courts and remote witness rooms with the technology to allow the exchange and viewing of documents and video or digital photographs. This includes terminals for laptops connected to the screens on the bar table, DVD players, document scanners and a fax machine.
This should be done in consultation with members of the SARP team. Immediate problems with the equipment—such as the sound quality and the fact that in the Supreme Court witnesses can see their own image while giving evidence—should be rectified as soon as possible.

11.2 In relation to the SARP team’s recommendations in Chapter 6—such as those dealing with playing pre-recorded evidence as evidence-in-chief, pre-recording further evidence, and recording evidence taken by closed-circuit television for use in later proceedings—consideration should be given to the equipment required, training in the use of the equipment, and the provision of continuing technical support. Equipment will be required by ACT Policing, the Office for Children, Youth and Family Support, the ACT Director of Public Prosecutions, the Supreme Court and the Magistrates Court.

11.3 A consultant should be employed to develop costings for the various technology options. This should be done in consultation with a technology steering group.

Training

Legislative amendments and procedural reforms need to be supplemented by training for people who come into contact with victims of sexual offences during the investigation and prosecution process. Training—for prosecutors, defence lawyers, the judiciary and police—in legal and non-legal aspects of sexual offences would improve outcomes and victims’ experiences. Further, professionals from other agencies that work with victims of sexual offences would benefit from training in the legal system’s operations and requirements.

Recommendation  Training for the judiciary and magistracy

12.1 A working group should be established in the ACT—along the lines of the Child Sexual Assault Jurisdiction Team Education Working Group in New South Wales—with representatives of the judiciary and magistracy, the Director of Public Prosecutions, Legal Aid, the Bar Association, the Law Society and other relevant organisations to discuss and plan training for judges and magistrates on legal and other aspects of sexual offences and child witnesses. The working group should consider adopting the New South Wales Judicial Commission’s Child Sexual Assault Manual and circulating it to all members of the ACT judiciary and magistracy.

Recommendation  Training for prosecutors

12.2 It is recommended that the ACT Director of Public Prosecutions develop a training program that covers the following areas:

- aspects of sexual assault trials
  - trial directions
  - tendency, relationship evidence and uncharged acts
  - consent
  - complaint evidence
cross-examination—the role of the DPP in protecting the victim from harassing and offensive cross-examination

special measures
- current measures—closed-circuit television and closed court
- proposed measures—justification and substance as they are implemented

understanding victims and the dynamics of sexual assault
- statistical overview
- trauma and responses to it—immediate and long term
- child victims of abuse and their responses to it—why they don’t tell
- the experience of sexual assault and of participating in the criminal justice system from a victim’s perspective

the role of the DPP witness assistant

children as witnesses
- basic child development information
- communicating with children
- communicating with teenagers
- children’s responses to trauma

special-needs groups
- Indigenous women and children
- mentally impaired women and children
- physically disabled women and children
- non–English speaking women and children

other agencies—what they do and how they operate
- overview of services in the ACT
- the Sexual Assault and Child Abuse Team
- ACT Policing general duties officers
- the Canberra Rape Crisis Centre
- the Service Assisting Male Survivors of Sexual Assault
- the Domestic Violence Crisis Service
- ACT Health—in particular, the Forensic and Medical Sexual Assault Service and the Child at Risk Assessment Unit
- the Victims of Crime Assistance League
- the Victims of Crime Coordinator
- the Office for Children, Youth and Family Support.
**Recommendation Training for defence lawyers**

12.3 Defence lawyers should be offered training similar to that offered to prosecutors. This could be arranged through the Bar Association, the Law Society and the ACT Legal Aid Office. Consideration could be given to the Legal Aid Office requiring lawyers in the private profession who are seeking legal aid work to have completed such training before being allocated cases involving sexual offences and child sexual offences. The Bar Association and the Law Society should be encouraged to provide training as part of Continuing Legal Education for their members.

**Recommendations Training for people working in a support role**

12.4 The ACT Director of Public Prosecutions should develop a PowerPoint presentation on the prosecution of sexual offences, providing information about the law, court procedure and rules of evidence relating to sexual offences, as well as the role of the DPP in such proceedings. The presentation should be directed at people working in agencies involved with victims of sexual offences and child abuse.

12.5 The DPP should develop a Giving Evidence workshop for doctors from the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit.

12.6 A working group on the training needs of agencies involved in sexual offences and child abuse should be established to discuss and organise training. Funding for the training should be made available after a needs assessment and should be administered through one of the government agencies dealing with victims of crime.

**Recommendation Training for court staff**

12.7 Magistrates Court and Supreme Court staff who deal with and accompany witnesses to the closed-circuit television rooms should receive training in how to deal sensitively with vulnerable witnesses.

**Recommendations Training for SACAT members**

12.8 The current Sexual Offences Investigator Program should be divided into two courses—one dealing with the investigation of offences against children, including the interviewing of child witnesses, and the other dealing with adults.

12.9 Training for SACAT members should be reviewed with the aim of providing comprehensive training in interviewing child witnesses. Guidance should be sought from the ICARE course in Queensland, the Evidential Video Unit training in New Zealand, and the NSW Police course on interviewing children. Members of the Child Abuse Team in SACAT should be required to attend one of those courses until a comprehensive course is available in the ACT.

12.10 If joint interviewing is adopted in the ACT, ACT Policing and the Office for Children, Youth and Family Support should work together to develop a training package covering the investigation of allegations of child abuse and the interviewing of children.
12.11 The Australian Federal Police should develop a comprehensive training package dealing with the investigation of sexual offences. The package should be based on the New Zealand and Victorian training packages.

Recommendation Training for recruits and general duties officers

12.12 All ACT Policing recruits and general duties officers who might have contact with victims of sexual offence should receive the training described in recommendation 3.11. It should be delivered using the model of the Family Violence Intervention Program.
1 Introduction

Many victims of violent crimes feel angry and powerless and endure continuing stress as a result of the crime, the police investigation and the court process. Many of them need support and understanding, and all of them have a right to be treated with sensitivity.¹

The particular features of sexual offences warrant special consideration. For example, the nature of the conduct is intensely personal for the victim. The conduct often occurs in the absence of any witnesses, and in any resulting criminal prosecution it is often the victim’s word against that of the offender. The patterns of sexual abuse of children are such that the abuse is often repeated in a relationship of power, and many children do not or cannot tell anyone.

The criminal justice system’s adversarial nature is starkly illustrated in prosecutions for sexual offences. In the past, the sexual reputation and experience of the victim dominated court proceedings. Laws now exist to limit such evidence, but giving evidence about a traumatic event in intimate, and often repetitive, detail is a difficult experience for the victim. Cross-examination by the legal representatives of alleged offenders can be one of the most harrowing parts of the process.

The daunting nature of the system for child victims of sexual offences is highlighted in a report on such victims’ experiences in three Australian states. Legal personnel—prosecutors, defence lawyers, and members of the judiciary—were asked whether, if their child was a victim of a sexual assault, they would want them to give evidence in a criminal proceeding. Only 33 per cent said they would. Of the defence lawyers asked, none wanted a child of theirs to give evidence.² Such an indictment of current processes by people with a thorough knowledge of the system points to serious problems that require closer scrutiny.

This report represents the outcome of the Sexual Assault Response Program, which was funded by the ACT Government to look at ways of improving practices and procedures in the ACT criminal justice system as they affect victims of sexual offences. If victims’ experience can be improved by means of changes in practices and procedures and the establishment of comprehensive support mechanisms, the victims themselves, and the community generally, will have greater confidence in the criminal justice system’s ability to deal adequately with sexual offences. More victims of these offences might be willing to report incidents to police and give evidence. And a change in procedures and how evidence is given in court might lead to more matters being prosecuted. A number of recommendations are made with a view to improving victims’ experience while upholding the rights of accused people to the presumption of innocence and a fair trial.

The report reflects the situation in the ACT as at 1 December 2004.

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¹ This is acknowledged in the ACT in the Victims of Crime Act 1994 and the structures established in the Territory to provide that support.
² C Eastwood & W Patton, The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System, Queensland University of Technology, Brisbane, 2002, p. 89.
1.1 Sexual offences in Australia

The results of the 2002 National Crime and Safety Survey, conducted by the Australian Bureau of Statistics, constitute the most recent national data on sexual assault in Australia. They show that in the 12 months to April 2002 there were 81,500 instances of sexual assault perpetrated on people aged 18 years or more, as reported by 33,000 victims. The estimated 28,300 female victims reported they had experienced a total of 62,700 incidents, and the estimated 4,800 male victims reported they had experienced a total of 18,800 incidents. Statistics consistently show that the incidence of sexual offences is greatly under-reported: the Survey found that only 20 per cent of adult female victims of sexual assault had reported the most recent incident to police.

The Recorded Crime Statistics for 2003 show that both the number of incidents and the victimisation rates (that is, the proportion of the general population who are victims) for sexual assault have increased in recent years. This does not necessarily mean these sorts of crimes are increasing: rather, it may be attributable to a greater willingness on the part of victims to report offences and to changes to police practices.

Victims of sexual assault are overwhelmingly female: the 2002 National Crime and Safety Survey found that women accounted for 86 per cent of all adult victims.

Victimisation rates differ according to age, with children and young people being over-represented. The Recorded Crime Statistics for 2003 show that the age group at highest risk is 15–19 years; it is followed by the 10–14 year age group. The highest rate recorded for females is in the 15–19 year age group, whereas the highest rate for males is in the 0–9 year age group. Children aged less than 15 years accounted for 41 per cent of all victims of recorded sexual assault.

Only in a minority of cases is sexual assault committed on a person by a stranger. Australian data show that a large proportion of perpetrators are known to the victim and that victims are less likely to report the assault to police if the offender is known to them.

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3 Australian Bureau of Statistics, *Sexual Assault in Australia: a statistical overview*, Cat. no. 4523.0, ABS, Canberra, 2004, pp. 16–17. The Survey found the incidence for the 12 months to April 2002 to be approximately 600 sexual assaults per 100,000 adults. The Women’s Safety Survey of 1996 estimated a much higher incidence for women aged over 18 years—1,500 adult women per 100,000 women. The ABS statistical overview notes that the difference between the two estimates is a result of differences in survey methodology and focus—p. 18.

4 ibid., p. 57. Low reporting rates are not unique to Australia and are reflected internationally. Despite the low rates, there have been increases in reporting in European countries in the past 20 years. However, conviction rates in Europe have fallen in the same period: more women are reporting such offences, but proportionally fewer offenders are being convicted. See L Kelly, *A Research Review on the Reporting, Investigation and Prosecution of Rape Cases*, HM Crown Prosecution Service Inspectorate, London, 2002, pp. 22–3.

5 The Recorded Crime Statistics are published annually by the Australian Bureau of Statistics. They contain uniform national crime statistics relating to a selected range of offences that have become known to and recorded by police. They are compiled on a victim basis and measure the number of victims in each offence category, rather than the number of breaches of the criminal law.


7 ibid.

8 ibid., p. 33.

9 ibid., p. 34.

10 ibid.

11 In the ABS Women’s Safety Survey of 1996, among women aged 18 years who had experienced one or more incidents of sexual assault since the age of 15 years, only 11 per cent had been assaulted by a stranger—ibid., p. 45.
especially if the offender is a current partner. Rates of repeat victimisation are relatively high: the 2002 National Crime and Safety Survey found that one-third of adult victims reported they had experienced two or more incidents in the previous 12 months. There is a correlation between domestic violence and sexual violence, and repeat levels of victimisation are high among women who are assaulted by someone with whom they have an intimate partnership.

1.2 Sexual offences in the ACT

Statistics from the Canberra Rape Crisis Centre, a non–government funded centre that provides counselling and other services for female victims of sexual offences, reflect the broader Australian picture. In 2002–03, 8 per cent of clients who had contact with the Centre had been sexually assaulted by a stranger, and 61 per cent of sexual assaults occurred in the home of the victim or the perpetrator. Fifty-four per cent of the women had not reported the offence to the police.

ACT Policing figures for offences reported to and recorded by police show fluctuations in the number of sexual offences recorded from year to year but significant increases in 2002–03 and 2003–04 (see Table 1.1).

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of offences reported</th>
<th>No. of offences cleared</th>
<th>No. of offenders apprehended</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995–96</td>
<td>274</td>
<td>177</td>
<td>119</td>
</tr>
<tr>
<td>1996–97</td>
<td>238</td>
<td>113</td>
<td>83</td>
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<tr>
<td>1997–98</td>
<td>351</td>
<td>272</td>
<td>138</td>
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<td>1998–99</td>
<td>273</td>
<td>168</td>
<td>134</td>
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<tr>
<td>1999–00</td>
<td>169</td>
<td>100</td>
<td>59</td>
</tr>
<tr>
<td>2000–01</td>
<td>203</td>
<td>99</td>
<td>79</td>
</tr>
<tr>
<td>2001–02</td>
<td>318</td>
<td>241</td>
<td>80</td>
</tr>
<tr>
<td>2002–03</td>
<td>403</td>
<td>316</td>
<td>156</td>
</tr>
<tr>
<td>2003–04</td>
<td>480</td>
<td>263</td>
<td>132</td>
</tr>
</tbody>
</table>

a. Includes all sexual assault offences, sexual intercourse without consent, all offences relating to acts of indecency, all sexual offences including acts of indecency committed on persons aged less than 16 years, incest, and abduction.

b. Does not necessarily relate to offences reported in that year. It means offences resulting in an arrest, summons, charge before court, diversionary conference, caution or other resolution.

Data from the ACT Supreme Court, the Magistrates Court and the Children’s Court show the total number of sexual offence charges concluded and the conviction rates (see Table 1.2). The conviction rates are less than those for other offences; the ACT is not unique in this regard.

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12 The Recorded Crime Statistics for 2003 show that 58 per cent of female victims of sexual assault knew the offender and, of the offenders, approximately half were family members—ibid.
14 D Lievore, Non-reporting and Hidden Recording of Sexual Assault: an international literature review, Office of the Status of Women, Canberra, 2003, p. 23.
Table 1.2  ACT conviction rates for sexual offences and other offences, 1995–96 to 2003–04

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of sexual offence charges concluded</td>
<td>63</td>
<td>55</td>
<td>96</td>
<td>77</td>
<td>100</td>
<td>149</td>
<td>215</td>
<td>214</td>
<td>177</td>
</tr>
<tr>
<td>Convictions for sexual offences (%)</td>
<td>53.20</td>
<td>63.60</td>
<td>43.80</td>
<td>46.75</td>
<td>55.00</td>
<td>29.00</td>
<td>35.00</td>
<td>40.00</td>
<td>38.00</td>
</tr>
<tr>
<td>Convictions for all offences (%)</td>
<td>66.40</td>
<td>73.60</td>
<td>76.60</td>
<td>67.86</td>
<td>62.00–</td>
<td>64.00–</td>
<td>60.00–</td>
<td>62.00</td>
<td>54.00</td>
</tr>
</tbody>
</table>

a. The range of percentage points is due to the fact that separate figures for the Children’s Court, the Magistrates Court and the Supreme Court were provided.

Source: ACT Director of Public Prosecutions, annual reports for 1997–98 to 2003–04.

There is a considerable difference between the number of incidents of sexual assault that occur and the number that are subject to court proceedings—a factor referred to as ‘attrition’. Sexual assault matters drop out of the criminal justice system at all stages, so the number of resultant convictions represents only a very small proportion of sexual assault incidents. The actual incidence of sexual assault will never really be known, although, as noted, it is estimated that about 80 per cent of women do not report sexual assault. Not all reports to police are recorded, and a significant proportion of those that are recorded do not result in the instigation of criminal proceedings. Further, a significant proportion of those in which criminal proceedings are instigated will not proceed to trial or hearing for various reasons—such as withdrawal of the complaint by the complainant or evidential problems. In the cases that do proceed, some offenders will plead guilty. For offenders who plead not guilty and proceed to hearing or trial, the rate of convictions is relatively low, as Table 1.2 shows. This pattern of attrition is repeated nationally and internationally.¹⁶

With the current data collection of the various agencies in the ACT, it is not possible to quantify the numbers involved at each stage of the process. ACT Policing is able to say how many offences are recorded and, at the other end of the process, court figures show how many sex offences result in convictions. There is little ascertainable data for what happens inbetween those two stages.

Good data collection would inform further debate. The ACT can always draw on data from other Australian jurisdictions as representative of the likely situation in the ACT, but it is of course preferable that the ACT collect its own data. The Department of Justice and Community Safety is working on improving data collection throughout the criminal justice system, and a pilot project is looking specifically at data on sexual offences.

1.3  History of law reform

In Australia rape has traditionally been defined as carnal knowledge of a woman against her will.¹⁷ The offence of rape evolved not to protect women but to safeguard male property interests¹⁸, and many of the principles governing rape law developed during the

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¹⁶ For an excellent and detailed analysis of non-reporting and attrition in relation to sexual offences, see Lievore, *Non-reporting and Hidden Recording of Sexual Assault*.


seventeenth century. At common law, rape came to be defined as the slightest insertion by a man of his penis into a woman’s vagina, without her consent and knowing she was not consenting. Rape in marriage did not exist because wives could not withhold consent, the assumption being that a wife was the property of her husband. Men could not be raped under this narrow definition. Rape trials revolved around the victim’s past sexual activity: courts held that the victim’s sexual reputation went to his or her credibility, and rape victims were seen as inherently unreliable witnesses, as were children.

Apart from the common law definitions, the application of those laws has historically reflected class and race. In the early years of European colonisation of Australia, Indigenous women were seen as the property of white men, and their sexual abuse by these men was endemic and widely accepted.

The 1970s and the advent of the feminist movement saw calls for law reform, internationally and in Australia, in an effort to meet women’s needs. Things such as rape, abortion and domestic violence were part of that agenda.

The first review of rape law and procedures in Australia was conducted in South Australia in the 1970s. The first national conference on rape law reform, held in 1980 in Tasmania, provided the opportunity for a range of government and non-government agencies to meet and discuss substantive laws, laws of evidence and procedure, police practices, and support services for victims.

The campaigns for law reform that followed sought to redress a range of problems—such as low reporting rates, insensitive treatment of victims by police, police perceptions of high rates of false reporting, the narrow definition of rape, the trauma of the courtroom experience, the use of sexual history evidence, rules of corroboration, the marriage immunity, low prosecution and conviction rates, judicial interpretation reflecting sexist assumptions in relation to women, and lenient sentences.

In many Australian jurisdictions the substantive law was amended in the 1980s. Reforms were introduced in New South Wales in 1981 and in the ACT in 1985. All jurisdictions removed the ‘rape in marriage’ immunity and amended the substantive laws in different ways, and all jurisdictions amended the evidentiary laws affecting the conduct of trials of sexual assault allegations. For example, cross-examination on sexual reputation is no longer permitted.

The legislative reforms of the 1980s were accompanied by procedural reforms and the establishment of support services for victims. Some police forces introduced specific training in investigating rape and sexual assault and formed specialist squads for

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19 ibid.
20 ibid.
25 Mason, ‘Reforming the law of rape’, p. 53.
26 Bargen & Fishwick, Sexual Assault Law Reform, p. 6.
investigating such offences. Many specialist counselling services emerged. But, despite these reforms, the shortcomings in the legal response to sexual violence against women and children are still seen to be significant. In the past decade reports from various states and overseas have revisited sexual offences, and further law reform has ensued.

In 1995 the Office of the Status of Women released *Sexual Assault Law Reform: a national perspective*. In 1996 the New South Wales Department of Women commissioned a study of all sound-recorded sexual assault trials held in the state over a year; the resultant report, *Heroines of Fortitude*, made a number of recommendations. In 1997 the ACT Law Reform Commission released a discussion paper on sexual assault, and in 2001 it released a report that resulted in procedural amendments to some evidentiary provisions that apply in sexual offences. The 1998 report of the Task Force on Sexual Assault and Rape in Tasmania reviewed the responses in that state to sexual assault and rape. The Victorian Law Reform Commission recently completed a reference on sexual offences. In Western Australia the Government recently introduced a Bill that will amend aspects of law relating to sexual assault. In the United Kingdom a review of sexual offences was carried out in 2000, resulting in legislation in 2003.

Nationally in Australia, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General has issued a Draft Model Criminal Code for Sexual Offences, which the ACT Government is considering. As part of the Office of the Status of Women’s National Initiative to Combat Sexual Assault in Australia, the Australian Centre for the Study of Sexual Assault has been established within the Australian Institute of Family Studies. The aim of the Centre is to improve access to current information on sexual assault and so assist policy makers in developing evidence-based response strategies.

The focus in 1970s was on the experience of women in the legal system, but more recently attention has turned to child sexual abuse, particularly the experience of child victims of sexual abuse in the legal system. In 1989 the Australian Law Reform Commission published *Children’s Evidence by Video Link*. In response, the ACT legislated to allow

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28 NSW Department of Women, *Heroines of Fortitude—the experience of women in court as victims of sexual assault*, Department of Women, Sydney, 1996.
31 Those amendments were enacted by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT). They are discussed in Chapters 7 and 8.
34 Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004.
36 *Sexual Offences Act 2003* (UK).
38 The Centre’s website is at <www.aifs.gov.au/acssa/>.
children and victims of sexual assault to give evidence by closed-circuit television.\textsuperscript{40} In Western Australia two major reports\textsuperscript{41} on child sexual abuse and the evidence of children led to significant reforms. In 1997 the Wood Royal Commission into the New South Wales Police Service conducted the Paedophile Inquiry\textsuperscript{42} and made a number of recommendations on court processes involving victims. This was followed in 2002 by the New South Wales Legislative Council’s Standing Committee on Law and Justice inquiry into child sexual assault prosecutions.\textsuperscript{43}

In 1997 the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission reported on children in the legal process, looking, among other things, at children as victims.\textsuperscript{44} In 2000 the Queensland Law Reform Commission published \textit{The Receipt of Evidence by Queensland Courts: the evidence of children}\textsuperscript{45}, and many of the recommendations in that report have found their way into recently enacted legislation in that state.\textsuperscript{46} In the United Kingdom the \textit{Speaking up for Justice} report on the treatment of vulnerable and intimidated witnesses led to the enactment of important reforms affecting the way children and other vulnerable witnesses give evidence.\textsuperscript{47}

In response to these various reports, many Australian jurisdictions have introduced a range of measures designed to make it easier for children to give evidence in criminal proceedings. Western Australia has been at the forefront of innovative legislation and practices since the early 1990s, and other Australian jurisdictions are following. Many jurisdictions now allow children’s evidence to be pre-recorded, and all bar the ACT have restricted the need for children to give evidence at committal hearings. In all jurisdictions there is legislation allowing for children to give evidence from a room located outside the courtroom and linked by closed-circuit television. Since the 1991 legislative reforms in the ACT allowing children and adult victims of sexual offences to give evidence by means of closed-circuit television, no significant procedural reforms (such as admission of pre-recorded evidence) have been introduced—in contrast with the majority of other Australian jurisdictions.

\textsuperscript{40} \textit{Evidence (Closed-Circuit Television) Act 1991} (ACT). The provisions are now found in the \textit{Evidence (Miscellaneous Provisions) Act 1991}.
\textsuperscript{46} \textit{Evidence (Protection of Children) Amendment Act 2003}.
\textsuperscript{48} \textit{Youth Justice and Criminal Evidence Act 1999}. 

\section*{Introduction}
1.4 Background to this report

In 2002 Theresa Davis, a prosecutor from the ACT Office of the Director of Public Prosecutions, travelled to England and the United States as a part of a Churchill Fellowship to look at innovative practices in the investigation and prosecution of sexual assault offences on adults and children. Her areas of study were the use of videotaped interviews as the evidence-in-chief of child victims, the use of multidisciplinary teams to provide a more comprehensive initial response to victims of sexual assault, the establishment of specialist centres to investigate child sexual abuse, and innovative investigative techniques.

Ms Davis concluded that the use of integrated responses to sexual assault of children and adults aids in the investigation of offences, facilitates victims’ recovery, and offers scope for greater success in prosecutions. She recommended that the responses in the ACT include a ‘one-stop shop’ for victims of sexual assault, in purpose-built premises where victims could be medically examined, interviewed by police and put in contact with support services. This would facilitate the coordination of all agencies involved in the response to sexual assault—police, the prosecution, child protection services, rape crisis counsellors and medical practitioners. Ms Davis also recommended that the ACT adopt legislation permitting the use of pre-recorded evidence in proceedings involving child victims of sexual offences.

The ACT Government subsequently provided funding to ACT Policing and the ACT Office of the Director of Public Prosecutions, so that they could follow up Ms Davis’s research. The funding allowed a senior prosecutor from the Office of the Director of Public Prosecutions, Ms Margaret Jones, and an experienced member of ACT Policing’s specialist Sexual Assault and Child Abuse Team, Sergeant Anthony Crocker, to be assigned to the project full time for a number of months. Ms Jones and Sergeant Crocker are referred to in this report as the Sexual Assault Response Program, or SARP, team.

1.5 Methodology

In the initial stages of the project the SARP team consulted a number of people involved in the investigation and prosecution of sexual offences in the ACT as well as representatives of victim support services and health services. The aim of these initial consultations was to discuss broadly the investigation and prosecution of sexual offences in the ACT and the provision of support for victims. The central agencies dealing with victims of sexual offences in the ACT criminal justice system—the Canberra Rape Crisis Centre, the Service Assisting Male Survivors of Sexual Assault, the Forensic and Medical Sexual Assault Centre, the Child at Risk Assessment Unit, and the Victims of Crime Coordinator—were all consulted.

The team visited Perth, Sydney and Melbourne, and Auckland and Wellington in New Zealand. While in Perth, the team was able to see the effect of the state’s leading-edge reforms and to visit the impressive and unique Child Witness Service, which works with child witnesses before they give evidence in court.

In Sydney the team spent time with one of the Joint Investigative Response Teams, which are specialist teams of police officers and Department of Community Services officers who investigate sexual and physical abuse of children, and visited the Child Sexual Assault Court at Parramatta, a specialist courtroom recently established to deal with child sexual assault prosecutions. The team was particularly interested in the technology that has
been installed in the Court to allow children to give evidence from a location away from the court house. The team also spoke with the New South Wales Judicial Commission about judicial education, met with policy officers from the New South Wales Attorney-General’s Department, and had discussions with academics who have been working in this area for a number of years.

In Melbourne the team spoke to prosecutors, witness assistants, court support officers, and police from the specialist sexual offence and child abuse units of Victoria Police. The team attended the Gatehouse Centre at the Royal Children’s Hospital, which conducts forensic medical examinations of abused children, and the Victorian Institute of Forensic Medicine, which provides forensic medical services to victims of sexual offences. The team also met workers from a Centre Against Sexual Assault, a service that provides counselling for victims of sexual offences.

The team travelled to Auckland to visit Puawaitahi, a recently established one-stop shop for child victims of sexual and physical abuse. On this trip the team was accompanied by Laurann Yen, manager of Community Health within ACT Health; and Sue Ashe, manager of the Family Services Branch of the ACT Office for Children, Youth and Family Support. A central recommendation of this report is that a centre similar to Puawaitahi be established in the ACT. The team also spent some time talking to specialist interviewers who interview child witnesses on behalf of the police, as well as prosecutors and police.

Throughout the project the team received valuable assistance from a steering group made up of the Director of Public Prosecutions, Richard Refshauge; the Deputy Director of Public Prosecutions, Michael Chilcott; Detective Superintendent Chris McDevitt, until recently in charge of the Territory Investigations Group of ACT Policing; Sergeants Lesa Gale, Robert Ball and Anthony Marmont, team leaders in ACT Policing’s Sexual Assault and Child Abuse Team; and Laurann Yen and Sue Ashe.

In addition to consultations with numerous agencies, preparation of the report involved a review of the literature and a review of some police and DPP files. What the team wanted to do was draw information from as many sources as possible; it relied on a number of recent reports into child sexual abuse and sexual assault as well as the experiences of organisations both interstate and overseas.

1.6 Scope of the report

The report deals with sexual offences in the ACT and aims to cover matters pertinent to both adult and child victims. Nevertheless, many aspects of the investigation and prosecution of offences perpetrated on children do not apply to adult victims. For example, the question of child protection, involving other agencies, often arises. On the whole, the report deals with matters relating to children as they arise, although Chapter 3 specifically deals with factors affecting child victims.

1.7 Terminology

The term ‘victim’ is used in the report to describe a person who has been a victim of a sexual offence. There has been some controversy surrounding this term in the literature in the past three decades. Often the term ‘survivor’ is preferred, to indicate the reality of the life of someone who has been sexually assaulted. Use of ‘victim’ in this report is in no way intended to be negative or to label people who have experienced sexual assault: it
reflects the use of the term in the legal context. For example, ‘victim’ is used in the ACT Victims of Crime Act 1994.

Another term that is often used to describe a victim of a sexual offence is ‘complainant’. This word is also used in legislation; it is not intended to be a derogatory term but is instead a technical term used in the legal setting. For consistency, the word ‘victim’ is mainly used in the report, but ‘complainant’ is used where the relevant legislation is being discussed.

The word ‘offender’ is used to describe a person who is alleged to have committed an offence. Since this report deals with the legal process until conviction, ‘offender’ should be taken to mean ‘alleged offender’ unless otherwise indicated by the context.

The report discusses ‘sexual offences’ and ‘sexual assault’. In the ACT Crimes Act 1900 ‘sexual assault’ encompasses a range of offences where harm is inflicted on, or threatened to be inflicted on, a person with an intent to engage in sexual intercourse, as well as the act of having sexual intercourse without consent.49 There is a variety of sexual offences—for example, the commission of acts of indecency, having sexual intercourse with a child aged less than 16 years, and incest. The term ‘sexual offences’ is therefore used to cover all these offences. The word ‘rape’ is rarely used. In some jurisdictions the offence of rape still exists, but in the ACT and a number of other places ‘rape’ has been replaced by ‘sexual assault’.

‘He or she’ and ‘his or her’ are sometimes used in the report when discussing victims of sexual offences. Victims can be male or female, but the general use of the feminine reflects the fact that victims are overwhelmingly female.

1.8 Basic assumptions

For the purposes of this report, a number of basic assumptions were made in relation to the criminal justice system. We operate within an adversarial court process, whereby each party to a proceeding calls witnesses and the other party tests the evidence of those witnesses through cross-examination. The judicial officer presides as an independent arbiter. The SARP team’s recommendations in relation to special measures for the taking of evidence, court procedure, evidentiary provisions and the substantive law are made in this context. The accused’s right to a fair trial is also assumed. This right has now been enshrined in the ACT’s Human Rights Act 2004, but it is a concept that exists at common law.

1.9 Areas not covered

Although a report of this nature seeks to be comprehensive, some important considerations are not fully dealt with for want of space and time. In particular, the report does not cover the specific needs and concerns of members of a number of groups in the community who can be victims of sexual offences:

- Indigenous Australians

49 ‘Sexual intercourse’ is defined in s. 50 of the Act. It means some sort of penetration of the vagina or anus of a person, the introduction of any part of a penis into the mouth of a person, and cunnilingus.
• people of non–English speaking background
• people who are cognitively impaired
• people with a mental illness
• people with physical disabilities
• males.

The lack of focus on these people does not mean their needs are unimportant. The SARP team makes a broad range of recommendations in the hope of improving the experience of the criminal justice system for all victims of sexual offences. It must be acknowledged, however, that the groups just listed have particular needs that extend beyond the scope of the recommendations made. The SARP team urges that representatives of these communities be consulted in order to identify their particular needs and concerns, using the recommendations put forward in the report as a basis for discussions.

Another area the report does not cover is what happens after offences are proved in court. The ACT Department of Adult Corrections administers treatment programs for sex offenders who are not in custody. The availability of such programs for prisoners is, however, dependent to some extent on the programs operating in the New South Wales prison system. The ACT will soon have its own prison, and treatment programs for sex offenders will no doubt be considered.

In relation to other sentencing options, some jurisdictions have passed legislation allowing for preventive detention and indefinite sentences for serious offenders, including child sex offenders, where the offences are serious or have been repeated.\(^{50}\) This allows for offenders to be released on lifetime parole, which means that, once released, they can be supervised in the community for many years. New South Wales has opted to introduce mandatory sentences for certain classes of child sex offences.\(^{51}\) The ACT Government is establishing a register of child sex offenders, which will allow police to monitor such offenders. The role of restorative justice for people who have committed sex offences is not discussed in the report, but it does warrant more consideration. Further, the SARP team makes no recommendations in connection with sentencing, although it raises the matter for attention.

Another area not covered but worthy of further attention is the way the school education sector deals with allegations of sexual abuse. For example, there have been instances of teachers not cooperating with police in their investigations, and this can impede successful prosecutions. Development of guidelines might contribute to closer cooperation between the police and the education sector. A further sector not specifically discussed is the health sector.

The team hopes this report and the recommendations made in it will prove useful for people who work with victims of sexual offences and support those victims in their interaction with the criminal justice system. It hopes, too, that more victims of sexual offences will feel they are able to report the offences and participate in the associated criminal proceedings.

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\(^{50}\) See ss. 6D and 18A of the Sentencing Act 1991 (Vic) and ss. 87–90 of the Sentencing Act 2002 (NZ).

\(^{51}\) Crimes (Sentencing Procedure) Act 1999 (NSW), ss. 54A–54D.
2 Investigation, prosecution and services for victims of sexual offences

The two primary agencies involved in the investigation and prosecution of sexual offences in the ACT are ACT Policing (the arm of the Australian Federal Police that provides policing services to the ACT) and the ACT Office of the Director of Public Prosecutions.1 Several other agencies also play an important part in investigation and prosecution:

- the Office for Children, Youth and Family Support within the Chief Minister’s Department2, which has primary responsibility for child protection services in the ACT
- ACT Health, which provides medical and other support services to victims of sexual assault, primarily through the Child at Risk Assessment Unit and the Forensic and Medical Sexual Assault Clinic
- the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault.

Many other agencies come into contact with victims of sexual assault; the work of some of them is discussed in Chapter 10.

2.1 ACT Policing and the Sexual Assault and Child Abuse Team

ACT Policing provides policing services to the ACT pursuant to a purchase agreement with the ACT Government. The role of the police is to collect evidence of suspected criminal activity and to institute criminal proceedings where sufficient evidence exists. Primary responsibility for the investigation of sexual offences lies with the Sexual Assault and Child Abuse Team, or SACAT, which is part of the Territory Investigations Group. The Territory Investigations Group investigates serious and complex crimes.

The 2002 SACAT Guidelines provide that SACAT is responsible for investigating the following matters:

- serious sexual assaults committed in such a manner as to suggest the incident is a single event
- serious sexual assaults committed in such circumstances as to suggest a serial offender
- all child abuse of a sexual or physical nature committed on a child or young person under the age of 16 years
- incest offences committed on a child or young person under the age of 16 years
- historic sexual offences that require a commitment of resources for a lengthy period

1 The Commonwealth Director of Public Prosecutions is responsible for the prosecution of Commonwealth offences committed in the ACT, although there is provision for the ACT DPP to prosecute some Commonwealth offences.
2 In November 2004 the Office was moved from the Chief Minister’s Department to the Department of Disability, Housing and Community Services.
paedophilia

offences relating to internet crime—in particular, child pornography.

The Guidelines provide that responsibility for all other offences—including acts of indecency and physical assault—remains with the attending patrol investigators.

2.1.1 Background to SACAT

In 1988 the Sexual Assault Unit, the first specialist service in the ACT for victims of sexual assault, was established within ACT Policing. Before this, a lack of specialisation, training and sensitivity towards victims of sexual offences had led to poor responses on the part of police. The Unit’s charter was to assist in the investigation of sexual offences against women, men and children. Until 1994 the role of the Unit was limited to interviewing and providing support for victims of sexual assault: investigations were carried out by detectives in the Criminal Investigation Branch.

The Sexual Assault Unit was established because ACT Policing recognised that providing support helped victims recover, minimised further trauma for them, and gave them greater confidence to participate in criminal proceedings as witnesses. It was hoped that victims who were reluctant to become involved with the police would come forward, knowing they would be supported. The ACT Magistrates Court and Supreme Court agreed to allow members of the Unit to provide support for victims in court.

Locating the Unit away from police stations was considered important. Thought was given to placing it at one of Canberra’s public hospitals, but the low rate of reporting incidents and the lack of private space at the hospitals led to this option being rejected. It was decided to locate the Unit in Civic, 1 kilometre from Royal Canberra Hospital (then on Acton Peninsula), in case immediate medical care was required. The premises included a bedroom with en suite, an interview room, a lounge area, a conference room, and work areas. The conference room and work areas were away from the other rooms to minimise contact with officers.

In 1992 the Sexual Assault Unit’s responsibilities were broadened to include assisting children who were victims of physical abuse. A new title—the Sexual Assault and Child Abuse Unit—reflected this change. The Unit’s function was extended in 1994 to include investigation of offences in addition to provision of support. In 1996 the Unit acquired its present name—the Sexual Assault and Child Abuse Team—and was relocated to the Winchester Police Centre in Belconnen, which houses a number of specialist teams of investigators, as well as some uniformed members of ACT Policing.

The SACAT premises now provide a fully integrated environment for victims of sexual offences. Victims can be medically examined in a purpose-built suite, which has an en suite attached to it so that victims can wash after their examination. A bedroom is provided so that they can rest if they need to. There is also an interview room, a lounge area, and a playroom for children, where officers can build a rapport with children prior to interviewing. The investigators’ workspace is separated from these rooms. The interview room has equipment for video-recording interviews and is linked to another room where child protection officers can observe interviews with child victims.

3 This information was obtained from Detective Sergeant Fiona Crombie, Inaugural Officer in Charge, AFP Sexual Assault Unit, Canberra, July 2004.
Until recently SACAT consisted of a sergeant and up to 12 investigators. It was restructured in early 2004, however, and now operates as two separate but interconnected teams—the Child Abuse Team and the Adult Sexual Assault Team—each headed by a detective sergeant. The teams are located in different parts of the Winchester Police Centre but share resources.

The number of investigators has been increased. As well as the detective sergeant, the Child Abuse Team has nine investigators; since April 2004 one of them has been placed in the Office for Children, Youth and Family Support as a liaison officer. The Adult Sexual Assault Team has eight investigators.

The SACAT investigators are trained in investigating offences involving both child and adult victims, and one team assists the other. Most of the investigators have completed the Investigation Development Program, which is a core component in detective training. Team members are required to complete the three-week Sexual Offences Investigators Program in their first year of joining SACAT if they have not completed it beforehand.

### 2.1.2 SACAT's current operations

Referrals to SACAT come from a variety of sources, among them the following:

- victims and their families
- general duties police officers
- Crimestoppers and information reports
- other state and territory police forces
- the Canberra Rape Crisis Centre
- the Office for Children, Youth and Family Support
- the Child at Risk Assessment Unit and the Forensic and Medical Sexual Assault Clinic at The Canberra Hospital
- other government and non-government agencies
- school counsellors and principals
- people who are required to report suspicions of child abuse.4

Because the referrals can come from such differing sources, the process can differ from case to case. When police receive notification of a sexual offence, the normal practice is that, if the victim has not come to a police station, general duties officers are dispatched to where the victim is. Basic details of the incident, the victim, and the alleged offender are taken from the victim and any other witnesses. Once the officers ascertain that a sexual offence is being reported, they contact the sergeant in charge of the station to which they are attached. The sergeant then authorises the officers to contact the Territory Investigations Group’s reception officer, who determines whether SACAT members should attend.

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4 Section 159 of the *Children and Young People Act 1999 (ACT)* provides that certain categories of people—such as doctors, nurses, police, teachers, and child care workers—must report to the Chief Executive of the relevant department any suspected sexual abuse or non-accidental physical injury.
If the alleged assault was recent (in the preceding seven days) a forensic medical examination is arranged. For children aged less than 15 years, the examination is carried out by paediatricians at the Child at Risk Assessment Unit. For people aged 15 years or more, the examination is conducted by doctors from the Forensic and Medical Sexual Assault Clinic. These doctors conduct examinations at the Clinic’s premises, at SACAT or at Calvary Hospital, depending on the time of the report and the location of the victim. When a victim is not already at a hospital, after-hours examinations take place at SACAT’s premises. The doctor conducting the examination passes his or her observations on to the SACAT investigators. Samples taken are given to police, who then take them to AFP Forensic Services for analysis. The forensic analysis can take some weeks.

Immediately after the medical examination, or some time later if the victim needs to rest, police take a full statement from the victim. Interviews with victims aged less than 14 years are recorded on videotape; a written statement is generally taken from victims over that age. There are no written guidelines on the most suitable age for a taped record of interview or a written statement: it is left to the investigating officer to decide this on the basis of their assessment of the mental capacity of the child or young person and time constraints. Interviews with children are conducted by two police officers. Beforehand, they spend time with the child to develop a rapport.

Pursuant to s. 159 of the ACT’s Children and Young People Act 1999, police officers dealing with child victims must report suspected sexual or physical abuse to the Chief Executive of the department in which ACT child and protection services are located, in the recently created Office for Children, Youth and Family Support. The ACT also requires police to report to the Office for Children all suspected sexual abuse and non-accidental physical injury.

A draft memorandum of understanding between ACT Policing and Family Services (now the Office for Children, Youth and Family Support) requires that the Office for Children also be notified by SACAT in situations where it is agreed that a joint investigation and appraisal need to occur. In that case, child protection officers from the Office for Children are able to observe the police interviewing the child by means of a monitor in an adjacent room. In practice, however, child protection officers rarely attend. The SACAT members who conduct the interview verbally provide to the Office for Children details of what the child said in the interview and transcripts are provided if requested.

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5 Queensland is the only jurisdiction in Australia where legislation requires that police take a statement from a victim reporting a criminal offence. In all other jurisdictions the exercise of a police officer’s discretion is circumscribed by legislation, case law, precedent and professional obligation.

6 This is at variance with practices in jurisdictions such as New South Wales, Victoria and New Zealand, where it is considered that the presence of two adults during the interview process is too intimidating. In those jurisdictions one officer interviews and the other observes from outside via a monitor.

7 Care and Protection Services was located within the Family Services Branch of the Department of Education, Youth and Family Services until April 2004, when the Family Services Branch was renamed the Office for Children, Youth and Family Support and placed in the Chief Minister’s Department. The draft MOU was between SACAT and Family Services. As noted, the Office was moved in November 2004.

8 Section 28 of the Children and Young People Act enables the Chief Executive to request information relevant to the safety, welfare and wellbeing of a child or young person from a Territory authority or statutory office holder and that authority or office holder is required to provide it.
After the statement is taken or the interview is concluded, police may decide to investigate the matter further. Such an investigation typically involves obtaining written statements from all relevant witnesses, conducting a crime scene investigation, and interviewing suspects. The police retain discretion to initiate criminal proceedings. When they do decide to charge someone, that person is either arrested or summoned to attend court. In court, the alleged offender is formally charged by the magistrate, and the Director of Public Prosecutions then becomes responsible for prosecution of the offender in the Magistrates Court and the Supreme Court.

The Sexual Assault Victim Liaison Officer
Since 2002 the civilian position of Sexual Assault Victim Liaison Officer has been located within SACAT, with the aim of improving the response to victims. Part of the Liaison Officer’s task is to keep victims informed of the progress of the investigation and any criminal proceedings and to respond to any concerns a victim might have about their dealings with the police and the criminal justice system. The Liaison Officer ensures that victims are in touch with the relevant services, represents SACAT at external meetings with other agencies, runs information sessions in schools and other agencies about the role of SACAT, and develops policy documents such as memorandums of understanding between SACAT and other agencies.

The Family Services Liaison Officer (Child Abuse Team Referrals)
In March 2004 the position of Family Services Liaison Officer (Child Abuse Team Referrals) was created in SACAT. This Liaison Officer is responsible for establishing and maintaining effective contact and consultation with the Office for Children in relation to sexual and physical abuse of children. The purpose is to facilitate effective interagency collaboration and to screen matters referred to SACAT by the Office for Children in the hope of promoting consistency in the referral process. The Liaison Officer is located at the Office for Children during business hours; it is expected that he or she will train Office for Children staff in evidentiary requirements, police policies and procedures, police investigative practices and relevant legislation.

2.2 The ACT Office of the Director of Public Prosecutions

The ACT Office of the Director of Public Prosecutions is the authority responsible for prosecuting offences against laws of the ACT. It conducts both summary and indictable prosecutions and in this way differs from its counterparts in the states and the Northern Territory, where police services prosecute summary matters and the Director of Public Prosecutions is responsible for prosecutions on indictment.

2.2.1 Background and structure

In the ACT the position of Director of Public Prosecutions was created in 1991, pursuant to the Director of Public Prosecutions Act 1990. Between 1983 and 1991 prosecution of criminal offences in the ACT had been a responsibility of the Commonwealth Director of Public Prosecutions. The creation of an independent Commonwealth Director of Public Prosecutions in 1983 had brought about significant changes to the initiation and conduct of prosecutions by removing the prosecution process from the political arena. The Commonwealth Attorney-General retained the right to issue guidelines and directions, but

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9 Initiation of proceedings by arrest or summons is discussed in Chapter 3.
only after consultation with the Director, and the guidelines and directions were required to be tabled in Parliament.\footnote{10}

The independence of the DPP Office was retained when the ACT Office was created in 1991. As a statutory body, it is independent of both the police and government. The Director has the power to institute or discontinue criminal proceedings and can exercise this power independently of the views of the police; the Director will, however, consult with police when seeking to arrive at a decision about the exercise of this power.

The Director is not a public servant and, although reporting to the Attorney-General, is independent of the executive arm of government in relation to the DPP’s operation. The functions and powers conferred on the Director under s. 6 of the Act are as follows:

- instituting and conducting prosecutions for summary and indictable offences committed in the ACT
- taking over prosecutions commenced by private informants
- declining to proceed with the prosecution of a person committed for trial
- instituting and conducting appeals
- assisting coronial inquiries.

Like other Australian offices of directors of public prosecutions, the ACT DPP has no formal investigative function. It employs a number of prosecutors who represent the Director in court pursuant to the Act. With two exceptions, these prosecutors are generalist prosecutors, conducting prosecutions on a range of matters, depending on their experience. The exceptions are the specialist Family Violence Unit, which prosecutes the majority of family violence offences (including sexual offences) where a familial or domestic relationship is involved, and one specialist prosecutor who prosecutes matters on behalf of ACT authorities.

In the past there was a specialist Sexual Offences Unit, which had been established in 1991 as a point of contact between the DPP and the then Sexual Assault Unit of ACT Policing. The Unit (consisting of one prosecutor) was one of a number of specialist positions in the DPP. It managed all sexual assault matters in the Magistrates Court, conducting most of the committals, keeping up to date with case law and legislation, and providing written advice to SACAT. The Unit was disbanded in 1996 when the DPP changed the policy and dispensed with specialist positions.

\subsection{2.2.2 Current operations}

DPP prosecutors are guided by the Office Prosecution Policy and the Guidelines for Prosecutors.\footnote{11} The test prosecutors must apply in deciding whether a criminal prosecution should proceed is whether, on the evidence, there are reasonable prospects of a conviction and, if so, whether it is in the interests of the public that the prosecution proceed.

Generally, the Office becomes involved in criminal proceedings when the matter is listed in the General List in the ACT Magistrates Court. All sexual offence matters are identified

\footnote{10}The Attorney-General retains some power to institute and discontinue the prosecution of an offence—Director of Public Prosecutions Act 1990 (ACT).

\footnote{11}Both documents are available on the DPP’s website <http//:www.dpp.act.gov.au> and in the DPP’s annual reports.
as major matters by the prosecutor on the first mention date. From there, a matter is allocated to a prosecutor, who will have carriage of it until the completion of the committal process or until it is finalised in the Magistrates Court. If the matter is one of family violence it will remain with the prosecutors working in the DPP’s Family Violence Unit.

At this mention stage the defendant can enter a plea of guilty or not guilty. If they enter a plea of guilty, and if the maximum sentence for the offence is 10 years or less, the magistrate can sentence the defendant. The maximum penalty a magistrate can impose for any charge is two years’ imprisonment. Even though a magistrate has jurisdiction to pass sentence, he or she can decline to do so on the basis that the maximum penalty is insufficient in the circumstances of the case. In this instance the magistrate will commit the defendant to the Supreme Court for sentence.

A defendant entering a plea of guilty to an offence with a maximum penalty of more than 10 years’ imprisonment cannot be dealt with by the Magistrates Court and will be committed to the Supreme Court for sentence. All charges of sexual intercourse without consent and sexual intercourse offences involving children aged less than 16 years carry penalties in excess of 10 years’ imprisonment and can thus be brought to finality only by the Supreme Court. The Magistrates Court has jurisdiction to deal with a charge of committing an act of indecency without consent and the commission of acts of indecency on children aged over 10 years.

If a plea of not guilty is entered at the Magistrates Court and the defendant is not in custody, the matter is set down for a case management hearing; if the defendant is in custody the matter is set down as a case status inquiry. Both are pre-hearing mentions in which the defence indicates which witnesses are required to attend to give evidence at the hearing. Some weeks before the case management hearing or the case status inquiry the DPP serves on the defence a full brief of evidence provided by the police. The brief contains written statements and transcripts of interviews with all witnesses the prosecution intends to call, as well as a list of all exhibits the prosecution intends to tender. The prosecutor assesses whether there is sufficient evidence and whether the evidence provides reasonable prospects of a conviction, in keeping with DPP policy. Assessing the strength of the prosecution case can involve having conferences with all or some witnesses.

If the plea of not guilty is maintained at the case management hearing or case status inquiry, a hearing date is set. This will be a committal hearing if the charge carries a maximum penalty of more than 10 years’ imprisonment; matters involving a maximum penalty of 12 months’ to 10 years’ imprisonment begin as committal hearings until the close of the prosecution case, when the defendant can consent to summary jurisdiction. If the defendant consents to summary jurisdiction, the matter can be finalised in the Magistrates Court. The Court can, however, decline to deal with these serious offences (in terms of maximum penalty) and can commit them to the Supreme Court.12

Some time in the weeks or days before the hearing in the Magistrates Court the prosecutor meets with the victim to discuss their statement and court procedure, including the mode of giving evidence.13

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12 The relevant provisions relating to the jurisdiction of the Magistrates Court are contained in s. 375 of the Crimes Act 1900 (ACT).
13 In the ACT complainants in cases of sexual offences and child witnesses are entitled to give their evidence from a room outside the court, connected by closed-circuit television—ss. 8 and 43 of the Evidence (Miscellaneous Provisions) Act 1991 (ACT).
If the matter proceeds as a summary hearing in the Magistrates Court it will be finalised either by a finding of guilt (and then sentencing) or by dismissal of the charge. If the matter proceeds by way of a committal, it can be conducted on the papers (that is, the written statements of the witnesses) or by witnesses attending and giving evidence. In contrast with all other Australian jurisdictions (see Chapter 6), in the ACT there are no legislative restrictions on the attendance of prosecution witnesses at committal hearings to give evidence and be cross-examined, and prosecution witnesses, particularly victims of sexual offences, are often required to give evidence at committal proceedings.

If at the end of the prosecution case the magistrate is of the opinion that the evidence is sufficient to satisfy a jury beyond reasonable doubt that the accused committed an indictable offence, the magistrate invites the defendant to call evidence or make a statement. At the conclusion of the evidence for the defendant—which in practice is rarely called—the magistrate is required to consider whether a jury would not convict the defendant. If he or she concludes that a jury would not convict the defendant, the magistrate is required to discharge the defendant. Otherwise, the magistrate commits the defendant to the Supreme Court.

After the committal hearing, if the matter has been committed for trial, the prosecutor prepares various documents—a case statement, and witness and exhibit lists—for filing in the Supreme Court indictment. The file is transferred to the Supreme Court Section of the DPP, which then assumes responsibility for the matter. Sometimes the committal prosecutor will be allocated to conduct the trial or to instruct, but this is not the normal procedure.

The manager of the Supreme Court Section assesses whether the matter should proceed to trial. If discontinuance is being considered, the prosecutor and the victim usually discuss the situation. The prosecutor then prepares a submission to the Director, who must approve all discontinuances of criminal proceedings in the Supreme Court. If it is decided not to proceed, the trial prosecutor and the complainant hold further discussions about this decision.

If the matter is to proceed to trial, shortly after the committal the prosecutor and the legal representatives of the defence attend a pre-trial arraignment conference held by the Registrar of the Supreme Court. If all the relevant documents have been filed and the prosecution has served all the relevant material on the defence, a trial date is set. The trial prosecutor and instructing prosecutor see the victim before the trial to discuss the statement. Again, the mode of giving evidence and court procedure are discussed.

The trial prosecutor or instructing solicitor and the DPP witness assistant maintain contact with the victim before, during and after the trial. The prosecutor or witness assistant tells the victim about the outcome of the trial and about the sentencing if the prosecution is successful. If either party lodges an appeal, the instructing prosecutor on the appeal, who will generally not be the trial prosecutor or instructor, maintains contact with the complainant. The witness assistant might also be in contact with the complainant at this stage.

There has been a witness assistant position in the ACT DPP since 2000. Although their primary task is to help the Family Violence Unit with victim liaison, the witness assistant also has a pivotal role in sexual offence cases. Individual prosecutors have different

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14 Section 91 of the *Magistrates Court Act 1930* (ACT).
15 ibid., s. 94.
approaches to using the witness assistant in sexual offence cases, but the witness assistant currently does some or all of the following:

- attend the proofing of victims by prosecutors
- speak to victims who do not wish to give evidence
- speak to victims in cases where the DPP discontinues proceedings
- explain court processes to victims before the victim sees the prosecutor
- familiarise witnesses with the court—take them to view the court and the closed-circuit television and remote witness room facilities
- deal with very sensitive or upset victims
- debrief victims after court.

Guidelines are being developed to clarify the witness assistant’s role.

2.3 The Office for Children, Youth and Family Support

Until 25 May 2004 the Chief Executive of the Department of Education, Youth and Family Services was responsible for the care and protection of children and young people under the age of 18 years in the ACT, pursuant to the Children and Young People Act 1999. In response to the recommendations of the ACT Commissioner for Public Administration, Cheryl Vardon, in her report The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management, released on 25 May 2004, the ACT Government created the Office for Children, Youth and Family Support. This new office brings together in a stand-alone entity the functions of child care and protection, youth justice, family support, youth services and support, and children’s services.

Care and Protection Services, located in the Office for Children, Youth and Family Support, is responsible for the care and protection of children at risk of serious harm, for the support of their families, for coordination of government and non-government services to assist families, and for investigation of reports of child abuse and neglect. It carries out specialist family assessments to assist in decision making when children are thought to be at risk of harm and when necessary initiates legal action to protect children. There are a number of teams; of relevance to this report are the Centralised Intake Service, the Appraisal Team and the Assessment Unit. Among the other teams are the Family Work Team, the Children on Orders Team and the Case Support Team.

The Centralised Intake Service began operations on 1 May 2004; its purpose is to provide a centralised service for the public and for people required to report suspected child abuse pursuant to the Children and Young People Act. When an intake worker receives a report they assess the risk to the child and apply an urgency rating based on the information in the report. The Service’s team leader checks and confirms the decision and action. The urgency ratings are ‘immediate’, ‘same day’, ‘7 day response’, ‘21 day’ or ‘no further action’ and refer to the time within which the team leader determines that the Appraisal Team should begin the agreed response.

On receipt of a Centralised Intake Service report, the Appraisal Team attends the location of the child in question, investigates the matters reported and makes an assessment of
protection needs. If the incident involves criminality, the matter is referred to SACAT. All liaison between police and the Appraisal Team is the province of the SACAT Family Services Liaison Officer (Child Abuse Team Referrals).

The Assessment Unit conducts wide-ranging family assessments. Referrals come from Care and Protection Services case workers or by means of a court order. The Unit consists of a small number of social workers and psychologists. Their reports are often used in decision making relating to disclosures made by children and provide an assessment of the parents’ capacity to care for children.

After the initial crisis intervention and appraisal, subsequent case work is carried out by teams in one of the three regional offices of the Office for Children, Youth and Family Support—at Belconnen, Woden and Tuggeranong.

Reports of child physical and sexual abuse are often referred directly to police by family members, members of the public, and sometimes the child concerned. Pursuant to the mandatory reporting requirements, ACT Policing is to immediately report all such matters to the Office for Children, Youth and Family Support by telephone or fax. Officers from the Office can attend and observe interviews SACAT conducts with children, but in practice this rarely happens.

The police and the Office have quite separate roles but share some of the same ‘client’ base. Not all allegations of child sexual or physical abuse will raise questions about the care and protection of the child. If a stranger commits an offence against a child, concerns about care and protection might not arise at all. Many instances of sexual and physical abuse of children involve family members, however, and concerns about care and protection do arise.

Other jurisdictions have recognised the need for closer working relationships between the police and the agency responsible for care and protection. Nationally and internationally, the trend is towards joint investigative teams of police and child protection workers. This has not yet occurred in the ACT: Chapter 4 examines a number of models and makes recommendations in relation to a more collaborative approach. ACT Policing and the Office for Children, Youth and Family Support are negotiating a memorandum of understanding with a view to setting out the roles of each agency and providing formal mechanisms for greater collaboration.

### 2.4 ACT Health

As noted, ACT Health provides medical and other support services, primarily through the Child at Risk Assessment Unit and the Forensic and Medical Sexual Assault Clinic.

#### 2.4.1 The Child at Risk Assessment Unit

The Child at Risk Assessment Unit, located at The Canberra Hospital as a specialist unit of ACT Health, provides services to families when children and young people (aged up to 18 years) are believed to be at risk of abuse or neglect. The following services are offered for children in the surrounding New South Wales region as well as for those from the ACT:

- medical assessments for children referred to the Unit by the Office for Children or the police
counselling and therapy services. The Unit has limited capacity for this function because of the high number of referrals it receives and its small number of staff. Counselling needs are assessed on a priority basis.

- group work programs. Again, the Unit’s capacity is limited by workloads and resource constraints.
- education, consultation and liaison with other agencies.
- representation on various health and child protection committees.
- research.

The Unit does medical assessments to assist both SACAT and the Office for Children in the appraisal of reports of abuse. Where criminal conduct is suspected and police are involved, the Unit’s doctors provide medical assessments for the police. The doctors are often required to attend court to give evidence in criminal proceedings. The Unit works closely with SACAT, and a memorandum of understanding between the two agencies is being negotiated.

### 2.4.2 The Forensic and Medical Sexual Assault Clinic

Like the Child at Risk Assessment Unit, the Forensic and Medical Sexual Assault Clinic is part of ACT Health and is located at The Canberra Hospital. It was established in July 2001 in order to provide a comprehensive forensic and medical service for victims of sexual assault. Before that time the provision of medical care to victims of sexual assault was fragmented; establishment of the Clinic has led to a far more integrated service for victims. The Clinic’s role is as follows:

- to conduct forensic medical examinations of victims of recent sexual assault and to collect samples
- to provide medical care to victims of sexual assault
- to manage injuries
- to treat victims of sexual assault so as to prevent sexually transmissible infection and pregnancy
- to provide some counselling and emotional support.

The Clinic works closely with the Canberra Rape Crisis Centre, which provides a 24-hour on-call service and, pursuant to a memorandum of understanding between the two agencies, attends when a sexual assault victim goes to the Clinic and wants a worker from the Centre to be there too.

The Clinic and a sexual health centre operate from a stand-alone building at The Canberra Hospital. One doctor is present in the Clinic four days a week during business hours and another seven doctors work part time on a roster. All eight doctors are women\(^\text{16}\), and the roster allows services to be available 24 hours a day. A full-time nurse coordinates the

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\(^\text{16}\) One of the concerns leading to the Clinic’s establishment was the fact that there were no female doctors who could conduct forensic medical examinations.

Investigation, prosecution and services for victims
Clinic and offers specialist nursing care to victims of sexual assault, as well as some medical follow-up.

All the Clinic’s medical practitioners have completed or are completing the Diploma of Forensic Medicine though the Victorian Institute of Forensic Medicine. They attend regular updates on the legal, medical and psychological aspects of sexual assault and conduct forensic medical examinations (including the taking of samples), prepare legal reports, and attend court to give evidence as required. They have been trained in photographing injuries, although they prefer police forensic photographers to do this because the photos are better.

As well as conducting forensic medical examinations, the Clinic provides medical care to victims of sexual offences. Many victims who attend do not want to report their assault to the police. The Clinic respects that decision and does not insist that the police be contacted, although it tells victims it will contact police on their behalf if that is what they want. Samples can be taken for DNA analysis before the victim has decided whether to report the matter to police. If the victim wants the matter investigated, a kit containing notes of the doctor’s observations and the samples taken is given to police. The Clinic keeps the samples for two weeks to give the victim time to consider whether to request an investigation, then it follows up with the victim at the end of that period. If the victim does not want to report the matter to police the samples are destroyed.

2.5 The Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault

The Canberra Rape Crisis Centre was established in 1976 to provide services for female victims of sexual assault. Its services are available to any female who has experienced adult sexual assault, childhood sexual abuse, or sexual harassment, regardless of when it occurred. The Centre offers four main services:

- an immediate crisis appointment for women and girls who have been sexually assaulted in the preceding 72 hours
- counselling and practical support for women
- counselling for children and their non-offending parent or carer
- a 24-hour telephone counselling service.

The Centre also provides a call-out crisis counselling service 24 hours a day. Workers accompany victims of sexual offences at the Forensic and Medical Sexual Assault Clinic, at SACAT or wherever else the victim is. Pursuant to a protocol between ACT Policing and the Centre, the police are required to inform victims of sexual offences of the availability of a crisis counsellor. If a victim says they want to see a counsellor, the police are obliged to contact the Centre.

Although the Centre provides long-term counselling for women and girls who are victims of sexual offences, funding constraints mean there is a wait of several months before that counselling can actually begin.

The Service Assisting Male Survivors of Sexual Assault provides for male victims of sexual offences the same advocacy and support services as the Canberra Rape Crisis Centre provides for females.
Police are at the front line in dealing with victims of sexual offences, and their response is pivotal. How they treat the victim can affect the success of the investigation and prosecution and can help or hinder the victim’s recovery: if the victim feels he or she is not believed or is dealt with unsympathetically, the harm done by the offence itself can be exacerbated.\footnote{R Holder (ACT Victims of Crime Coordinator), \textit{Sexual Offences: the response of ACT Policing}, Victims of Crime Coordinator, Canberra, 2002, p. 19.}

Studies of victims’ dealings with police show that experiences vary greatly. The police response has been found to vary according to who is reporting, the type of offence, the location of the offence, the characteristics of the offender, whether there is a specialist police unit available to investigate, and the extent of training of police.\footnote{Bargen & Fishwick, \textit{Sexual Assault Law Reform}, p. 45.}

The crucial role of the police has been recognised in police services worldwide. Recent years have seen substantial reforms in the investigation of sexual offences and greater sensitivity to the needs of victims. Many services, including ACT Policing, have recognised the need to develop strong links with other agencies to provide a more holistic service for victims. Specialisation and training have been instrumental in improving police responses to sexual assault.

Within ACT Policing there has been considerable improvement. A specialist sexual offences unit was established in 1988 (now known as the Sexual Assault and Child Abuse Team), specialist training is provided to some police, SACAT has a victim liaison officer, and links have been forged with a number of agencies to ensure a coordinated approach to dealing with victims and the investigation process.

It is, however, essential to review practices from time to time, and that is the purpose of this chapter. Chapter 2 looks at how police and other agencies respond to sexual offences in the ACT. This chapter considers aspects of ACT Policing’s response, discussing the role of the police, the structure and role of SACAT, the initial response to reports of sexual offences, interagency collaboration, and specific aspects of investigation. Practice models from interstate and overseas are also examined.

Additionally, the chapter draws on the review conducted by ACT Victims of Crime Coordinator Robyn Holder in 2002.\footnote{Holder, \textit{Sexual Offences: the response of ACT Policing}.} This was a comprehensive review of SACAT, carried out with the cooperation of ACT Policing. It was based on eight cases where the Coordinator had received complaints about SACAT’s handling of investigations of sexual offences. Much of the focus of the review was SACAT’s dealings with victims who reported offences, and a number of recommendations were made with a view to improving SACAT’s effectiveness. This chapter does not revisit all the points and recommendations made in the Coordinator’s report: it is suggested that anyone interested in the matters raised here also read the Coordinator’s report, which should be essential reading for members of SACAT and others in ACT Policing with an interest in or responsibility for the investigation of sexual offences.

Having reviewed the practices of ACT Policing, the SARP team acknowledges the commitment, dedication and hard work of members of ACT Policing in general and
SACAT in particular. The team was able to stand back and look objectively at practices; it also benefited from being able to observe interstate police responses and draw on research into best-practice models overseas. The hope is that the discussion in this chapter and the recommendations put forward, if adopted, will allow ACT Policing to keep up with the best possible practices in investigating sexual offences.

3.1 The police role in the investigation of sexual offences

The role of police has traditionally been to investigate criminal offences. It is now recognised, however, that police also need to approach victims of crime—and in particular victims of sexual offences—with empathy and sensitivity. The ACT Victims of Crime Act 1994 requires that a police officer, as a person performing a function in the administration of justice, follow the principles set out in that Act. The first principle is set out in s. 4(a) of the Act: ‘A victim should be dealt with at all times in a sympathetic, constructive and reassuring manner and with due regard to his or her personal situation, rights and dignity’. (Appendix A reproduces Part 2 of the Act.)

The tension between these two roles—investigation and an empathetic, sensitive response—can affect how police do their work. Investigators might focus on investigating and finding out as much as possible when the victim is traumatised. What a victim might perceive to be a sceptical attitude on the part of the police might be seen by the police as suitably probing questioning of the victim to ascertain what occurred. Police services have dealt with this tension in various ways.

A good example of the acknowledgment of this dual role appears in the Victoria Police Code of Practice for the Investigation of Sexual Assault, which says in its introduction, ‘The first priority in sexual assault cases is to care for the victim. Every officer involved in the investigation must be sympathetic and supportive to the victim’. The Code describes for police three main functions of equal importance in sexual assault cases:

- to protect and support victims
- to establish whether a crime has been committed, and gathering evidence, including interviewing the victims and arranging an immediate medical examination where necessary
- to identify, apprehend and prosecute the offender(s).

In Victoria specialist police responding to victims of sexual offences work in partnership with the Centres Against Sexual Assault, a publicly funded organisation that provides crisis counsellors for victims.

The London Metropolitan Police Service launched Project Sapphire in 2001 to combat high attrition rates in sexual offences. One of the initiative’s features is the mandatory deployment of specially trained first-response officers, or SOIT officers, to attend to

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4 Victoria Police, Code of Practice for the Investigation of Sexual Assault, Victoria Police Publications Unit, Melbourne, 1999, p. 3.
5 Ibid.
victims of sexual assault within an hour of the incident being reported to police. The officers’ chief role is to support the victim during the early phases of the investigation.\textsuperscript{6}

As discussed in Chapter 2, ACT Policing established SACAT, the specialist unit for the investigation of sexual offences, in order to improve the investigation of sexual offences and provide a more victim oriented approach. SACAT has links with various agencies, among them the Canberra Rape Crisis Centre. A protocol\textsuperscript{7} requires that police provide to victims of sexual assault information about the availability of counselling at the Centre and contact the Centre if that is what the victim wishes. The appointment of a civilian victim liaison officer within SACAT is another measure aimed at improving the care of victims.

The dual roles of investigating and providing support for the victim can be accommodated if there is commitment to both of them. In the view of the Victims of Crime Coordinator, SACAT has been successful in managing the tension between the roles. She noted in her review that SACAT officers provide high levels of victim support—far higher than the support general duties officers offer to victims of other types of violent crimes.\textsuperscript{8} One of the challenges for ACT Policing is to maintain the high levels of victim support SACAT offers and to improve levels of such support in other areas of ACT Policing that victims of sexual offences come into contact with.

### 3.2 The Sexual Assault and Child Abuse Team

SACAT is unique in its charter in that it investigates the bulk of sexual offences in the ACT.

In other Australian police services specialist units investigate more serious types of sexual offences, such as those involving multiple offenders, multiple victims, abduction, paedophiles and serial offenders, but all other sexual assaults and offences are investigated by generalist detectives. In New South Wales many generalist detectives investigating sexual offences have received training in this work, including training in victim care. Victoria Police has a specialist Sex Crimes Unit that investigates the more serious serial or gang types of offences; it also has a number of Sexual Offences and Child Abuse Units that specialise in initial victim contact and take statements from victims. Nevertheless, the majority of sexual offences are investigated by generalist detectives.

In the SARP team’s view, having a specialist section such as SACAT is the best possible approach to the investigation of sexual offences.

### 3.2.1 Offences SACAT investigates

SACAT’s responsibilities are set out in the ‘Guidelines for the Investigation of Sexual Offences’, an internal ACT Policing document dated November 2002. According to that document, SACAT is primarily responsible for investigating the following matters:

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\textsuperscript{7} This protocol, although unsigned, is applied within ACT Policing, but it is not clear how widely it has been promulgated. Certainly SACAT officers are aware of it and apply it.

• All sexual assaults (where there has been penetration or cunnilingus) that are committed in a manner to suggest the incident is a single event.

• Serious sexual assaults that are committed in such circumstances as to suggest a serial offender.

• All child abuse, sexual or physical, offences that are committed on a child or young person (this includes all types of assault).

• All sexual offences that are committed on a child or young person that relate to incest or paedophilia matters.

• Historical sexual offences that require commitment of resources for a lengthy period.

• The investigation of offences relating to Internet crime, in particular child pornography.

SACAT is therefore responsible for investigating all sexual assaults and all physical and sexual abuse of children—ACT Policing defines ‘child’ as a person under the age of 16 years—in the ACT.

In relation to other sexual offences involving acts of indecency, the Guidelines state that police at the patrol level (that is, general duties uniformed officers) are responsible for investigating allegations of indecent exposure and acts of indecency where there is touching outside clothing. Police at the crime level (that is, investigators attached to the Territory Investigations Group) are responsible for investigating allegations of acts of indecency where there is touching under clothing.

There seems to be some uncertainty about how well the Guidelines are known throughout ACT Policing and how extensively they are applied. Further, because of time or resource constraints, there are occasions when SACAT is unable to handle all sexual assaults and cases of abuse, but the Guidelines do not say what should happen in these circumstances.

It is important that all members of ACT Policing be aware of the Guidelines and that there be clarity about who is responsible for investigations when SACAT investigators are unavailable. A number of former SACAT members who are still with ACT Policing would be well equipped to assist SACAT. There are also more than 50 ACT Policing officers who have been through the Sexual Offences Investigator Program and could assist with SACAT investigations.

Confusion about application of the Guidelines is also evident. Two examples are situations where patrol members have been advised that SACAT will not be investigating physical assaults on children over 12 years of age, when this is in fact contravenes the policy, and general duties officers being required to conduct an investigation (including interviewing a victim) in a case of an alleged act of indecency perpetrated on a child.

All ACT Policing station sergeants, Territory Investigations Group reception officers and SACAT team leaders should be familiar with what SACAT will investigate. ACT Policing should develop a policy mechanism for dealing with any situation in which SACAT is unable to conduct an investigation. Further, any investigation by officers other than SACAT officers of matters listed in the Guidelines should be allocated to investigators with SACAT experience in the first instance and then investigators who have completed the Sexual Offences Investigator Program.
ACT Policing—the Territory Investigations Group reception officers and SACAT team leaders in particular—should keep a list of such investigators and allocate matters to them as necessary, with SACAT team leaders maintaining a supervisory role. Some consideration could be given to teaming SACAT members with Territory Investigations Group members to give the latter support.

### Recommendation  Retaining a specialist response to sexual assault in ACT Policing

3.1 The ‘Guidelines for the Investigation of Sexual Offences’ should be distributed throughout ACT Policing. In particular, the Territory Investigations Group reception officers, station sergeants and SACAT team leaders should be familiar with them.

ACT Policing should develop a written policy on the investigation of matters that fall within the Guidelines, to cover situations when SACAT lacks the time or resources to conduct investigations. In these instances matters should be allocated to investigators who have had SACAT experience in the first instance and then investigators who have completed the Sexual Offences Investigator Program. SACAT team leaders should retain a supervisory role, and in busy periods consideration should be given to teaming SACAT investigators with investigators from the two supporting groups. To facilitate the allocation of investigations to members of the two groups, the SACAT team leaders and reception officers should keep a list of all relevant officers.

3.2.2 SACAT recruitment and retention

Police view sexual offences as one of the most serious crimes, after homicide, and one of the most challenging to investigate. Investigation is difficult, victims can be highly vulnerable, and the prospects of conviction are not high.

A number of factors have limited the effectiveness of SACAT operations to date:

- a lack of experienced officers investigating sexual offences
- a lack of effective training
- a poor understanding of the trauma associated with sexual assault and the needs of victims
- a lack of coordination of sexual assault investigations, with the result that too many investigators come into contact with the victim
- some officers not being suited in personality or attitude to the investigation of sexual assault.

In the past there have been difficulties with attracting and retaining SACAT members. This, coupled with the mandatory rotation policy throughout ACT Policing, which required members to leave SACAT after only two years, has led to a lack of experience in SACAT. Recent changes to SACAT—including splitting the team into two teams, an increase in investigator numbers, the addition of another sergeant’s position, and a change to the rotation policy—have led to an increase in the number of ACT Policing members wishing to join SACAT.

**Recruitment**

Because of the high workload, and the nature of the work, it has been difficult to attract ACT Policing members into SACAT. Members have been placed in a SACAT team as
part of an informal rotation policy, despite a possible lack of interest in that type of work and with little regard for competencies and aptitude.

Careful recruitment into a specialist area such as SACAT is essential. Members of the team have to deal with sexual abuse and serious physical abuse of children, sometimes culminating in death. Victims of sexual assault are often highly traumatised and have a greater need for ongoing contact than victims of other crimes. Not all members can accommodate these stresses. Further, the subject matter is such that victims, particularly children, must be protected from any officers who seek to work in the area for the wrong reasons: some kind of filtering process might help to prevent such a situation occurring.

Recruitment to the NSW Police and the Victoria Police specialist sexual crimes squads is based on a member having completed the core detective training, having been trained in conducting videotaped interviews, and ongoing successful completion of modules associated with the investigation of sexual assault. Members are also interviewed by a selection panel and are required to undergo a psychological assessment. This process ensures that team members are suited to the work. The same procedures should be adopted for recruitment to SACAT.

**Training**

The training course for SACAT members—the Sexual Offences Investigator Program—is conducted for three weeks every 18 months. It is organised by the AFP Training College, with little or no consultation with SACAT. All members of SACAT are required to attend the course, either before or after joining SACAT. Since it is not a prerequisite for members joining SACAT to have completed the training, members with no specialist training can be allocated jobs. This can present difficulties when untrained officers are required to interview young children.

Chapter 12 discusses the ACT Policing training requirements in relation to sexual offences and SACAT in particular. Here it is sufficient to observe that the Sexual Offences Investigator Program course should be reviewed, to ensure that in content and structure it offers the best possible training and reflects best practice.

There are many examples of comprehensive training programs in other police services. The New Zealand Police Service, for example, has devoted considerable effort to developing comprehensive training programs for specialist investigators. Like other police services, it has separate courses dealing with adult sexual assault and child sexual abuse. In the ACT, the merging of the two aspects of SACAT’s work in the Sexual Offences Investigator Program might have led to a course that fails to deal comprehensively with the complexities of both child and adult sexual offence investigations. Chapter 4 discusses training in the investigation of child sexual assault and interviewing child witnesses in more detail.

SACAT members should be involved in any review of the Sexual Offences Investigator Program, and the course organisers might benefit from attending courses conducted by other police services in Australia and the New Zealand Police Service.
Recommendations Recruitment to SACAT

3.2 ACT Policing members seeking to join SACAT should be interviewed by a panel consisting of the SACAT team leaders and the AFP psychologist. Suitability for the work should be a primary selection criterion.

3.3 ACT Policing management should take steps to identify members who have the relevant skills and encourage them to join SACAT.

3.4 Completion of the Sexual Offences Investigator Program should be a prerequisite for membership of SACAT.

Rotation policy in ACT Policing

It is ACT Policing policy that all members spend no more than two years in any area. The policy in relation to SACAT was recently changed to allow members to stay for three years, with an option for a fourth. The previous two-year rotation policy had given rise to concern on the part of agencies dealing with SACAT. During her review, the Victims of Crime Coordinator received from the Canberra Rape Crisis Centre, the Director of Public Prosecutions and the Child at Risk Assessment Unit submissions outlining the difficulties the policy created. The submissions argued that experience was needed in an area such as SACAT and that that experience was lacking. The Director of Public Prosecutions submitted, ‘The [attrition] rate appears to be high and the rotation policy exacerbates the difficulties … This is a specialist area which requires specialist experience, and at times the absence of that experience has been telling’. The Child at Risk Assessment Unit submitted:

… there are studies that say skilled staff are at their peak in years 2 or 3 or 5 of service. In addition the process is very problematic: it seems staff all change at once. This, in combination with the change in leadership makes for 3 to 6 months of much less than good service delivery to the public.

The two-year rotation policy did lead to a lack of experience in SACAT. The complexity of the matters SACAT deals with is such that a high proportion of investigators in the team should have substantial experience in investigating sexual offences.

Apart from the two-year rotation policy, there had been concern about the detrimental effects on police of working for long periods in an area dealing with sexual offences and child abuse. In an internal SACAT review conducted in 2002 by Detective Sergeant Lesa Gale (the then SACAT team leader), AFP psychologist Sonja Jacobs was asked her opinion of the rotation policy. She responded that there was no need for a strict and absolute rotation policy if procedures were adopted to monitor the welfare of the team. Ms Jacobs was also of the view that members should be allowed to leave the team without prejudice if they were not suited to sexual assault and child abuse investigations. As a result of that review, the rotation policy was amended to allow SACAT members to remain within the team for three years with an option of a fourth. Further, ACT Policing’s policy is that there is no prejudice if members decide they are not suited to working on a particular team.

9 Holder, Sexual Offences: the response of ACT Policing, p. 43.
10 ibid, p. 44.
11 ibid.
The rotation policies of other police services

In the Western Australian Police Service officers in the specialist sexual assault and child abuse area currently spend three years there with the option of a further two. (This is a recent change from two years with the option of a third.) Officers in the specialist sex crimes units in NSW Police are rotated every three to five years.

In contrast, Victoria Police has no limit on the time a member can spend in the specialist Sex Crimes Unit or the Sexual Offences and Child Abuse Units. Victoria Police says large amounts of time and resources are spent on training members of the units and rotation would lead to a loss of experience.

In the Queensland Police Service plain-clothes officers in the specialist teams are rotated every 12 to 18 months and detectives are rotated every three years, although members of the Juvenile Aid Bureaus, which conduct child abuse investigations in the districts, have a less stringent rotation policy. The general rotation policy was recently reviewed by the Queensland Crime and Misconduct Commission. The Queensland Police Union submitted to the review that it was concerned that the policy was impeding best practice and resulting in significant variations in expertise within Queensland Police Service units. This view was supported by agencies representing the victims of abuse. The Commission recommended that current rotation policies be reconsidered, to ensure that skilled officers and those genuinely wanting to work in the units were able to do so.

Apart from the difficulties caused by the previous ACT Policing rotation policy, in SACAT there is no succession planning process that allows officers to take a more senior role in the team. The previous policy saw a large number of people across all Territory Investigations Group teams rotating simultaneously every second year. An adequate handover or transition period to allow discussion of current practices and cases is essential. This does not occur in SACAT: one experienced member leaves; a new one begins.

The current rotation policy of three years with the option of a further year should remain, but members with a particular aptitude for the work and an interest in remaining in SACAT beyond four years should be permitted to do so. The changeover of members should be staged, and there should be a period of overlap to ensure that the handing over of investigations proceeds smoothly.

Team members’ health and safety

Concern that working in units dealing with child physical and sexual abuse can adversely affect officers has led some police services to institute policies designed to reflect investigators’ occupational health and safety needs. In New South Wales and Victoria members of specialist units dealing with sexual offences and child abuse undergo regular psychometric testing in an effort to identify members who might be suffering stress or are unsuited to the work. Both services require officers in the specialist units to see the police psychologist every three months, and both allow members who are unable to cope with the stress of the work to transfer out without prejudice. Similar provisions should apply for members of SACAT.

Police have traditionally been expected to have a ‘stiff upper lip’ and to cope with whatever comes their way. The result has been stress claims, early retirements and deleterious effects on work performance. Modern-day police services are coming to realise

that their members are in a highly stressful work environment. In recognition of the particular stresses that working in an area dealing constantly with child abuse and sexual abuse can cause, Victoria Police organises for Sexual Offences Unit and Child Abuse Unit members health and wellbeing days, where members learn meditation and other stress-reduction techniques. It is imperative that police services deal constructively with this situation—not only to protect their employees (and avoid civil and workers compensation claims) but also to ensure that the best possible service is delivered to the public. SACAT should hold health and wellbeing days for its members.

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<tr>
<th>Recommendations</th>
<th>Rotation and retention of SACAT members</th>
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<tr>
<td>3.5</td>
<td>The current policy of members joining SACAT for three years with the option of a fourth year should remain, and consideration should be given to allowing some members who are suited to the work and want to remain longer to do so. An assessment of members' continued suitability should be conducted in consultation with the AFP psychologist.</td>
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<td>3.6</td>
<td>If they are not suited to the work, members of SACAT should be permitted to leave within the three-year period without prejudice.</td>
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<td>3.7</td>
<td>Succession planning for SACAT should occur, so that there is a hand-over period of one month to assist in the smooth progress of investigations. The change of members should also be staged, to ensure the retention of substantial experience in SACAT.</td>
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<td>3.8</td>
<td>The health and wellbeing of members of the SACAT team should be secured by the following means that have been adopted in other police services:</td>
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<td>- regular psychological testing</td>
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<td>- compulsory quarterly sessions with a police psychologist</td>
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<td>- health and wellbeing days, where members can participate in stress-reduction activities such as meditation and yoga and other techniques for dealing with a stressful work environment.</td>
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3.3 The initial response to victims of sexual assault

When the victim of a sexual offence reports to police there is an initial response stage during which a number of things need to be done—taking details of the incident from the victim, securing the crime scene, collecting physical evidence, arranging for the victim to have a forensic medical examination in cases of recent sexual assault, attending to the care of the victim, and so on.

After this initial response the next phase of the investigation involves the taking of a detailed statement from the victim. Then there is the ongoing investigation, which involves further collection of physical evidence, taking witness statements, and interviewing suspects.

How the victim of a sexual offence is treated in these early stages can be vital to the success of the prosecution. If they are treated insensitively and feel that police do not
believe them, or if they are discouraged from taking the investigation further, they might not want any further police involvement.¹³

Failure to meet the victim’s needs at a time of trauma can mean that the information required for continuing the investigation is incomplete. A number of agencies the SARP team spoke with described victims’ needs as follows:

- the need to feel safe—not simply the feeling of safety while in the presence of police but also confidence that returning home poses no threat of further attack
- the need to be believed. It is important that police convey the impression that they take what the victim is saying seriously—perhaps despite their prejudices and previous dealings with the victim—in order to gain the victim’s confidence. Police must, of course, question the victim, but this can be done in a way that does not make the victim feel disbelieved. For example, they could explain that they are obliged to question the victim
- medical, legal and emotional needs
- the need for information—in order to make decisions about medical care, police action and counselling.

Chapter 2 describes the steps in the initial stages of investigating a sexual offence. Under current ACT Policing policy, general duties officers are the first point of contact between victims of sexual offences and police. What is meant to occur is that, before SACAT officers are called out, the Territory Investigations Group reception officer is contacted and fully briefed. The reception officer then decides who is to have carriage of the investigation. To fully brief the reception officer, general duties officers must first go to the victim and be in full command of the facts. Although this policy has been in operation for some time, a practice did develop whereby SACAT officers were dispatched as the first response if victims presented directly to a hospital, to the Forensic and Medical Sexual Assault Service or to a police station. SACAT would be contacted by general duties police officers and would be with the victim fairly promptly. In September 2003 there was a reinstatement of the policy of making all referrals to the Territory Investigations Group (of which SACAT is a part) through the reception officer.

Agencies such as the Canberra Rape Crisis Centre and the Forensic and Medical Sexual Assault Service are concerned that reverting to the stated policy is having an adverse effect on victims. The Rape Crisis Centre put its concerns thus:

In October 2003, the Australian Federal Police (AFP) changed the way in which alleged sexual assaults were investigated, reverting back to sending out uniformed general duties officers in the first instance who then decide whether or not to involve the AFP Sexual Assault and Child Abuse Team. The majority of these general duties officers have not had specialist training in responding to survivors of sexual assault … there have been a number of incidents where

¹³ It is not possible to say what proportion of sexual offences reported to ACT Policing fail to proceed because the victim does not want the police to investigate or lay charges. It would be useful for further policy development if ACT Policing kept figures on the number of reports of sexual offences and those that do not proceed for this reason.
survivors have been retraumatised by the investigating police officers’ initial response and this has placed further advocacy demands on workers … 14

SACAT members have training and experience in dealing sensitively with victims. General duties officers receive little training to do with sexual offences and responding to victims and often are inexperienced. Further, apart from two hours’ training they receive as recruits, they usually have no specific training in the investigation of sexual offences. This is in contrast to the three-day training on family violence that all ACT Policing members and recruits must undergo. This intensive, comprehensive training was introduced as part of the Family Violence Intervention Program; it covers the dynamics of family violence and promotes dealing with victims sensitively and working with other agencies such as the Domestic Violence Advocacy Service.

The Canberra Rape Crisis Centre worries that general duties officers have little or no knowledge of the protocol between the Centre and SACAT, which requires police to give the victim written and verbal information about the crisis counselling services the Centre offers. 15

Another concern is that no consideration is given to the gender of the general duties officers who attend victims of sexual offences. Staff from the Forensic and Medical Sexual Assault Centre reported that some of their clients have felt uncomfortable when having to relay details about the sexual assault they experienced to two male police officers. This is particularly problematic for teenage girls but would also be a problem for many women.

There is a need for further investigation of whether reversion to the policy of sending general duties officers as the first response has caused delays and other shortcomings in the response to victims of sexual offences. Potential problems arising from implementation of the policy should be canvassed with the agencies that have contact with victims.

Delays in getting SACAT members involved can lead to the loss of valuable forensic evidence, and insensitive treatment of victims at the initial stage can lead to victims giving up on the criminal justice system. If delays and instances of insensitive treatment of victims have increased, ACT Policing should perhaps reconsider its policy in relation to sexual offences. At the least, SACAT should be in continuing contact with organisations such as the Forensic and Medical Sexual Assault Clinic and the Canberra Rape Crisis Centre to monitor the matters raised here.

### 3.4 Taking the statement

Taking a detailed statement 16 from a victim of sexual assault is critical to the success of the investigation and the subsequent prosecution. Current practice in SACAT is to obtain a full statement from the victim immediately after the medical examination. When to take a detailed statement is often an operational decision based on a number of factors:

- the immediate safety of the victim
- the possibility of gathering forensic evidence based on information contained in the statement

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15 The protocol also covers the Survivors of Male Sexual Assault Service.
16 This includes an interview that is taped instead of a written statement being taken.
- the need for a collaborative plan to interview multiple victims
- the proximity of the victim to the alleged offender
- the securing of relevant evidence
- apprehending the alleged offender
- the victim’s physical and emotional needs.

There seems to be no compelling reason for the statement to be taken immediately after the medical examination. In both Victoria and London the practice is for the victim to go home after the medical examination and attend at the police station to give a statement when rested, usually the next day.

To start an investigation, collect scientific evidence from the crime scene and apprehend an offender, police need details establishing that an offence has occurred, identifying the offender or providing a description, and giving the location where the alleged offence took place. In the normal course, these details are taken by the first officers attending. Gathering of further details can wait until the next day. Studies show that—in complete contrast with most criminal investigations, where prompt interviews and statement taking increase the probability of accurate recall—sexual assault victims are more likely to recall details of the assault in stages and some time after the incident.17 The London Metropolitan Police Project Sapphire investigative guidelines specify that the full statement be taken ‘at a time appropriate to the victim’.18 Information pamphlets for victims of sexual offences suggest that this will not be on the day of the initial report.

3.4.1 Provision of support during the interview

If SACAT were to adopt the practice of delaying taking a detailed statement until the day after the incident, the victim should be given an opportunity to have a counsellor from the Canberra Rape Crisis Centre present at the interview as a support person.

3.4.2 Location

In the ACT the medical examination, victim support and the taking of the police statement usually occur in the SACAT offices in the Winchester Police Centre complex. This means the victim has to walk past a number of people before entering the office, something that has been the subject of adverse comment by workers from the Canberra Rape Crisis Centre. Inside the medical room, the conversations of police in the courtyard can be overheard. Several police had to be reprimanded recently: the doctor, and probably the victim, were able to hear them talking about matters of a sexual nature in their personal life. Such a situation could be very distressing for a victim, and the incident highlights the difficulty of having SACAT located in a large police centre. Consideration should be given to introducing some privacy measures—such as ‘interview in progress’ lights outside the office to alert police to the presence of victims and soundproofing so that victims cannot overhear other conversations.

Another difficulty associated with SACAT’s location in the Winchester Centre is that victims and their families can feel intimidated by having to attend a large police centre.


Responding to sexual assault: the challenge of change
The original specialist Sexual Assault Unit established in 1988 was specifically located away from police stations.

3.4.3 The gender of interviewers

Each SACAT investigative team has two members. The current practice is to allocate an investigating officer on the basis of their current workload. It is often the case that the investigating team pays scant attention to the interviewer’s gender. The 1999 review of the Toronto Police Service’s practices in investigating sexual offences found that the gender of the investigator is less important than his or her sensitivity, professionalism and experience. Although some women do not mind being interviewed by or dealing with a male investigator, it is important that a woman be empowered early in the process by being able to say whether or not she feels comfortable about describing to a male the details of a sexual offence. Particular sensitivity is needed for women from cultural backgrounds where talking to a man about sexual matters is taboo. Young women, too, might feel embarrassed about discussing sexual matters with a male police officer. Consideration should therefore be given to allocating an investigative team consisting of male and female officers, to allow victims to make that decision.

3.5 Other models of initial response

Other police services in Australia and elsewhere have recognised the crucial nature of the first response to victims of sexual offences. In particular, Victoria Police and the London Metropolitan Police Service have improved their practices and procedures and have forged links with other services in order to improve the first response and the overall response to sexual offences.

3.5.1 Victoria Police and the Code of Practice for the Investigation of Sexual Assault

Victoria Police participates in a multi-agency initial response to victims of sexual assault, involving the Centres Against Sexual Assault, the Health Department and the Victorian Institute of Forensic Medicine. All agencies attend a central location to which police take the victim. The location is either a centre against sexual assault or, if a forensic examination is required immediately (in recent sexual assaults), a hospital crisis care unit. The latter are purpose-built suites for victims of sexual offences; they have lounge areas, examination rooms and bathrooms and are separated from the rest of the hospital. Centres Against Sexual Assault counsellors speak with the victim before doctors from the Institute of Forensic Medicine conduct the forensic medical examination.

Police are required to comply with the Victoria Police Code of Practice for the Investigation of Sexual Assault, which is primarily for police but also provides for a coordinated approach by all relevant agencies. The Code provides guidelines for the following:

- members who receive the initial report
- procedures for no further police action
- members who are first to the scene

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19 Toronto Audit Services, *Review of the Investigation of Sexual Assaults.*
20 Victoria Police, *Code of Practice for the Investigation of Sexual Assault.*
Sexual Offences and Child Abuse Unit members

members interviewing a victim

investigators.

Under the Code, members must take victims to the nearest centre against sexual assault or hospital crisis care unit within two hours of the arrival of the first police member. The Code states that members who receive the initial report (who would usually be general duties officers) will:

- listen carefully and be supportive
- consider the victim’s physical circumstances and safety and ascertain whether they need medical attention
- if the sexual assault is historic, provide contacts for crisis counselling support
- quickly obtain brief details of what has happened
- contact the relevant police and emergency units
- inform the victim about retaining forensic evidence such as clothing.

The guidelines provide practical suggestions for making victims feel safe and assuring them that they are not to blame. Sexual Offences and Child Abuse Unit members must be contacted at the earliest opportunity. Brief details are obtained at this stage. An officer must remain with the victim until a Sexual Offences and Child Abuse Unit member or a detective from the Criminal Investigation Branch attends.

If the victim reports a sexual assault that is not recent, the Code states that providing crisis counselling and, if required, medical support is still a consideration, and victims should be referred to the nearest centre against sexual assault.

3.5.2 London Metropolitan Police Service and Project Sapphire

Project Sapphire, which started in the London Metropolitan Police Service in 2001, is described as ‘the most comprehensive reform programme on rape investigation ever undertaken by the service’. The Project has a number of key elements. The initial response to victims involves specially trained first-response officers (the Sexual Offences Investigative Techniques, or SOIT, officers), the training of all Met staff who may have contact with victims, and collaboration with sexual assault referral centres in the major hospitals. A detailed policy for the investigation of rape and serious sexual assault is also part of the Project.

A central feature of the Project are the SOIT officers, who are serving police officers with a minimum of two years’ service with the Met. They must be contacted and be with a victim within one hour of the matter being reported to police. There are enough SOIT officers in each district to provide 24-hour-a-day coverage. The Met tries to provide a SOIT officer who will suit the victim; for example a victim may ask for a male officer or a gay officer.

22 London Metropolitan Police Service, Project Sapphire.
The duties of SOIT officers are as follows:

- to tell the victim as much as possible about what is happening and what can be expected when investigators arrive
- to contact a support group for the victim
- to take the victim to the nearest sexual assault referral centre for a forensic medical examination
- to contact the victim’s family, friends or employer if the victim wishes these people to be told of their whereabouts
- to obtain details of the assault from the victim—including details of the offender(s)—so that descriptions can be conveyed by radio to patrols
- to take charge of exhibits such as clothing and samples
- to stay in contact with the victim until the matter is concluded
- to interview the victim.

The SOIT officer is not responsible for the ongoing investigation.

In addition to the SOIT officers, all officers who might come into contact with a victim of a sexual offence are equipped with and trained to use an ‘early evidence kit’. The kit is designed to enable officers to quickly and effectively recover forensic material that could be lost or affected by the lapse of time before a full medical examination. A urine sample can be collected if alcohol and drugs analysis might be required in order to obtain evidence relating to drug-facilitated sexual assault, and mouth swabs can be taken in cases where oral sex might have occurred.

The Met recognises that in the past too much reliance was placed on SOIT officers when in fact all Met staff (including civilians) might be involved in first contact with a victim. As part of Project Sapphire, civilian front-desk staff in police stations are trained in how to speak to and respond to rape victims. Other key groups—such as probationers, detectives, station reception officers, senior investigators, duty officers and front-line officers—also receive training.

3.6 **A first-response model for the ACT**

There is considerable scope for improvement in ACT Policing’s first response to victims of sexual offences. The following are the components of a best-practice model for the initial response:

- training for all members
- written guidelines
- early collection of evidence in recent sexual assaults
- the availability of counsellors
- specialist officers.
3.6.1 Training for all members

As has happened in the London Metropolitan Police Service, ACT Policing needs to acknowledge that the first response can be critical to a sexual assault victim’s decision to press a complaint and cooperate with an investigation. All members who might have contact with victims of sexual offences should be trained to do the following:

- respond appropriately and sensitively to victims during the early stages
- take initial samples (such as urine samples) for forensic analysis if there is to be any delay in a specialist officer attending
- accommodate the victim appropriately. Special rooms separated from public areas should be designated in each police station, so that victims can wait there for investigators
- preserve the crime scene if the first contact with the victim is where the offence occurred
- obtain basic information, sufficient to enable the crime scene to be secured and offenders to be located if the offence was recently committed.

This basic training could be provided to all members of ACT Policing in a one- or two-day course and could be delivered in the way the family violence training was delivered. The current two hours of training on sexual offences that is provided to police recruits is inadequate. Training for recruits should cover all the points just listed and be incorporated in the curriculum for new recruits at the earliest possible opportunity.

3.6.2 Written guidelines

SACAT and ACT Policing have few written guidelines for the investigation of sexual offences. This is discussed in more detail in Section 3.7, and it is strongly recommended that a code of practice similar to the Victorian Code be developed. The London Metropolitan Police Service’s Project Sapphire policy for the investigation of rape and serious sexual assault is also an excellent guide for police officers investigating sexual offences. Any code or written guidelines for the ACT should include guidance for the first response; this should not be limited to procedures but should also provide advice on how to deal sensitively and appropriately with victims.

3.6.3 Early collection of evidence in recent sexual assaults

Victims of recent assaults are often traumatised, so victim care is of primary importance. Collection of evidence is also vitally important in the early stages, and it is difficult to weigh these competing demands. Victoria Police’s Code of Practice provides guidelines that balance the victims’ needs with the need to collect evidence.

As noted, ACT Policing has no detailed written guidelines for the investigation of sexual offences, and they should be developed as a priority. The guidelines should list the practices to be adopted as a matter of course in all recent sexual assaults:

- Photographs should be taken of the victim to show any injuries and his or her state—that is, to show if he or she is dishevelled. This should include photographs of clothes.
Follow-up photographs should be taken 48 hours later, to show the extent of any bruising.

A forensic medical examination should be carried out and samples taken as soon as possible after reporting of the assault.

If the victim is aged less than 16 years and their age is relevant to the alleged offence, a photograph or video should be taken of the victim at the time of presenting to police, to show how he or she looks at that time.

The crime scene should be secured and all relevant evidence seized.

Enough information should be obtained from the victim to allow for the seizing of relevant forensic material and identification of the alleged offender, with the taking of a detailed statement occurring the next day, after the victim has had time to rest.

Blood and urine samples are needed in cases where the victim is in any way affected by alcohol or drugs. Blood samples should be requested from the forensic medical examiner; urine samples should be taken by the first-response police because some drugs have a short life in the body.

When cases come to the ACT Office of the Director of Public Prosecutions there is often no photographic evidence of injuries and no photographs of the state of the victim, which can be important in cases of very recent assaults. The Forensic and Medical Sexual Assault Centre doctors document injuries thoroughly, but photographs tendered in court proceedings can provide very strong evidence of lack of consent. Follow-up photographs are often not taken either. More comprehensive procedures need to be established to ensure that all injuries, no matter how small, are photographed and that follow-up photos are taken within 48 hours.

3.6.4 The availability of counsellors

The Victorian model requires that within two hours police take a victim of sexual assault to a centre against sexual assault (or a hospital crisis care unit, which the counsellor will attend). This applies whether or not the assault occurred recently, and it means that all victims of sexual offences have very early contact with counsellors, who can explain the process of reporting and medical examination, allowing victims to make informed decisions.

The protocol between the Canberra Rape Crisis Centre and SACAT requires that, at a minimum, the Centre be contacted when a victim of a sexual offence wants a worker from the Centre to attend. This protocol should be brought to the attention of all ACT Policing members, and checks should be made to ensure that it is being observed. As part of the Family Violence Intervention Program, the Domestic Violence Crisis Centre’s arrangement with ACT Policing requires police to contact the Service in all family violence matters. Victoria Police’s Code of Practice requires police to contact Centres Against Sexual Assault counsellors in all cases of reported sexual assault. Consideration should be given to introducing this practice in the ACT. The Canberra Rape Crisis Centre would need to be involved in any discussions about change to the protocol, since change will have resource implications.
For children, it would be more appropriate to have counsellors from the Child at Risk Assessment Unit on call as counsellors. This already happens when children are taken to the Unit for medical assessments.

3.6.5 **Specialist officers**

The SOIT officers of the London Metropolitan Police Service provide a specialist response at the very early stages of investigation, concentrating on victim welfare and coordinating the initial police response. This concept has merit.

A package could be developed to train members with an aptitude for sexual assault investigations in the initial response to victims, based on the SOIT officer model. These trained officers could be attached to SACAT and rostered to cover the ACT 24 hours a day. They would be identified as the officers to respond to victims when initial reports are made and would take responsibility for coordinating the initial stages of the investigation and for care of the victim before SACAT arrives. This would allow a more prompt response than occurs at present. There would need to be enough trained officers to provide a 24-hour service throughout the ACT.

<table>
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<tr>
<th>Recommendations</th>
<th>Improving the initial response</th>
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<tbody>
<tr>
<td><strong>3.9</strong></td>
<td>Police should be required to contact the Canberra Rape Crisis Centre within a specified time to attend in all cases of serious sexual offences (other than those against children). The Centre would need a funding increase in order to provide this service. For children, counsellors should be on call.</td>
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<td><strong>3.10</strong></td>
<td>All ACT police stations should have at least one room for victims of sexual offences to await the attendance of counsellors and SACAT members. The room should be away from public areas. As soon as a person comes to a police station and reports a sexual offence, they should be taken to the room: they should not be left waiting in the public waiting area. A police officer should remain with the victim at all times to provide support and take initial brief details of the incident.</td>
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<td><strong>3.11</strong></td>
<td>All ACT Policing members who might have contact with victims of sexual offences should receive training in the following:</td>
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<td>■ responding appropriately and sensitively to victims—including accepting what the victim says and calling the Canberra Rape Crisis Centre—at the initial stage</td>
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<td>■ taking initial urine samples and oral swabs</td>
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<td>■ suitably accommodating the victim at the police station—in separate rooms, away from public areas</td>
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<td>■ preserving the crime scene if first contact with the victim is where the offence occurred</td>
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<td>■ if the offence was recently committed, obtaining basic information to allow the crime scene to be preserved and secured and offenders to be located.</td>
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<td></td>
<td>The training should be delivered to members of ACT Policing through the AFP Training College in Barton, using the model of the Family Violence Intervention Program.</td>
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<td><strong>3.12</strong></td>
<td>The current two-hour training for recruits on sexual offences should be revamped at the first opportunity, to provide more extensive training on sensitively dealing with victims and on crime scene preservation. The training should cover the points listed in recommendation 3.11.</td>
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</table>
3.13 A model for first-response officers whose main concern is care of the victim should be adopted in the ACT, along the lines of the Sexual Offences Investigative Techniques, or SOIT, officers of the London Metropolitan Police Service. Enough members with appropriate skills and aptitude should be trained to provide a 24-hour response in both ACT Policing districts. These officers would be attached to SACAT. Their role would be to provide the first response to victims of sexual assault—including care of victims, arranging forensic medical examinations and taking statements—and then maintain contact with the victim. SACAT members would continue to conduct investigations.

3.14 An ‘early evidence kit’ based on the London Metropolitan Police Service kit (allowing the collection of urine samples and oral swabs from victims) should be developed, and all ACT Policing members who might be the first response to victims of sexual offences should be trained in its use.

3.15 In the case of recent sexual assaults, attending police should take sufficient details to ascertain the nature of the offence, the location and the identity of the offender, as well as any other information that will help police obtain physical evidence, and ensure the safety of the victim. Interviews should be audio-recorded.

3.16 Consideration should be given to amending the current protocol between SACAT and the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault to require that the Centre and the Service be contacted by police whenever a sexual assault is reported.

3.17 SACAT members should obtain a preliminary statement from the victim at the time the offence is reported; a more detailed statement should be obtained within 24 to 36 hours.

3.18 Where possible—and where apprehension of the offender will not be compromised—the forensic medical examination should be conducted before the detailed statement is taken.

3.19 The victim should be given the opportunity to have Canberra Rape Crisis Centre counsellors present when giving a statement to police. If they do want a counsellor present, arrangements for that need to be made before the victim attends to give the statement. Additional funding for the Canberra Rape Crisis Centre might be needed in order to allow it to provide this service.

3.20 All SACAT investigative teams should have at least one woman in them, to give victims a choice of gender when being interviewed.

3.21 Investigators should ensure that in all cases of recent sexual offences photographs are taken of any injuries to the victim. Within 48 hours the injuries should again be photographed.

3.7 **Written guidelines and protocols**

3.7.1 **Guidelines**

As noted, there are very few written guidelines for SACAT and ACT Policing members investigating sexual offences. At present the only document specific to SACAT investigations is a one-page, undated document entitled ‘Guidelines for the Investigation of Sexual Offences’. This document sets out SACAT’s responsibilities but does not go into any detail about investigation methods or victim liaison.

This is not to suggest that police receive no guidance on how to conduct investigations. SACAT investigators are all enrolled in detective training or have completed it, as well as having completed the Sexual Offences Investigator Program training. Unlike some other police services, though, there are no detailed guidelines on the best practices for investigating sexual offences. SACAT is in the process of preparing guidelines but has not yet issued them.
3.7.2 The Victoria Police Code of Practice for the Investigation of Sexual Assault

The Victoria Police Code of Practice for the Investigation of Sexual Assault, which is now in its second edition, having been issued in 1992, is a comprehensive model that could be drawn on. It was developed following a reference on rape offences to the Victorian Law Reform Commission in 1985.23 There was concern that, although Victoria Police had made considerable efforts during the early 1980s to develop a more sensitive approach to victims, there were still problems—in particular, the priority given by police to the investigation, over and above a victim’s immediate need for medical and counselling support. There was also concern about scepticism among police and insensitivity towards victims.

A working party made up of representatives from the police, counsellors from the Centres Against Sexual Assault and forensic medical officers was established to develop a set of protocols aimed at clarifying the roles and responsibilities of police and other agencies in responding to victims. The fundamental principle governing the Code of Practice is that the care of the victim is the priority; at the time, this represented a new approach to thinking about sexual assault.

Development of the Code was therefore aimed at establishing protocols for police to follow and describing how they should interact with other agencies. The aims of the Code are as follows:

- to provide a co-ordinated approach to the handling of sexual assault cases by police, Centres Against Sexual Assault and other victim assistance programs
- to increase the confidence of sexual assault victims and the public in police management of sexual assault cases in order to increase the reporting of sexual offences
- to increase the apprehension of offenders
- to maximise successful prosecutions
- to minimise the trauma experienced by sexual assault victims during the investigative process.24

The Code provides guidelines for:

- members who receive the initial report
- members who are first on the scene
- members of the Sexual Offences and Child Abuse Unit
- interviewers
- investigators.

23 This information about development of the Code and the subsequent amendments and evaluations comes from the Victorian Law Reform Commission’s Sexual Offences: interim report (pp. 117–21).
24 Victoria Police, Code of Practice for the Investigation of Sexual Assault, p. 3.
It also describes the procedures to follow when a victim decides against any further police action.

The 1999 revisions to the Code included stressing the importance of same-gender language interpreters for victims and clarifying the roles of people providing support for victims with intellectual disabilities or mental impairments.

The Code contains provisions for monitoring the application of the guidelines and a mechanism for managing breaches. Significantly, it required that police and Centres Against Sexual Assault regional liaison committees be established so that any problems with the Code’s implementation on a local level could be discussed. These committees generally meet quarterly.

The Victorian Law Reform Commission’s interim report on sexual offences notes that an evaluation of the Code in 1993 found that when the guidelines were followed victims often received a professional and sensitive response from all involved—the police, counsellors and doctors. The evaluation did, however, reveal problems stemming from lack of knowledge of the Code and lack of compliance with it.

The Victorian experience is that development of the Code has been worthwhile in terms of providing guidance for all members of the service on how best to investigate sexual offences and improving the care victims receive during the reporting and investigation phase. The interagency collaboration in the Code’s development provided a focus that might not have otherwise existed had the Code been developed by the police alone.

In a review of NSW Police practices in responding to sexual assault, the Code was favourably cited as a document the service could use as a model when developing its own guidelines for best practice.25

### 3.7.3 Project Sapphire

As part of Project Sapphire, the London Metropolitan Police Service issued a detailed document, *A Policy for the Investigation of Rape and Serious Sexual Assault*.26 It provides detailed guidance on all stages of the investigation. Three principles underpin the document:

**Principle 1**

It is the policy of the Metropolitan Police Service to accept allegations made by any victim in the first instance as being truthful. An allegation will only be considered as falling short of a substantiated allegation after a full and thorough investigation.

**Principle 2**

A SOIT trained officer should be with a victim of a serious sexual assault within an hour of an allegation being received by police.

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26 London Metropolitan Police Service, *Project Sapphire*. 
Principle 3
The victim’s wishes on whether a case should proceed may only be overridden in exceptional circumstances.27

The document then proceeds to give detailed guidance on steps in the investigation, with a particular focus on the care of the victim.

3.7.4 Other resources
The American Prosecutors Research Institute has published a very comprehensive guide to the investigation of child abuse.28 The most recent edition was issued in December 2003 and would be a useful resource for SACAT.

As noted, SACAT is drafting guidelines. The approach taken in Victoria—involving consultation with other relevant agencies and with representatives at reasonably high levels in those agencies—has much to commend it. It might also be helpful if SACAT were to take into account codes and documents from other police services. It is recommended that other agencies involved in the investigation and prosecution of sexual offences in the ACT be able to comment on the proposed guidelines. This would entail consultation with the following agencies:

- the Forensic and Medical Sexual Assault Centre
- the ACT Office of the Director of Public Prosecutions
- the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault.

3.7.5 Interagency agreements
In relation to sexual assault, ACT Policing has agreements with several other agencies:

- a memorandum of understanding between SACAT and the Forensic and Medical Sexual Assault Centre
- a draft protocol between SACAT and the Child at Risk Assessment Unit—yet to be signed
- a protocol between SACAT and the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault
- a victim liaison protocol between ACT Policing and the ACT DPP.

In addition, a protocol between SACAT and the Office for Children, Youth and Family Support is being negotiated. Part of the difficulty in drafting this protocol is that both agencies want it to cover joint interviewing of children; as discussed in Chapter 4, the issues surrounding this joint approach are complex.

27 ibid., p. 6.
The SARP team found it difficult to determine the status of some of these documents of agreement. For example, ACT Policing records show no protocol having been formally signed by the Canberra Rape Crisis Centre and SACAT, yet the Centre has said its representatives attended SACAT’s offices to sign the protocol. Further, it is not clear that the documents are widely distributed among ACT Policing members generally and SACAT members in particular. SACAT members should be familiar with the documents that govern their relationship with other agencies. In addition, any ACT Policing members who might come into contact with victims of sexual offences should be familiar with the documents, which should be readily available at all police stations.

### Recommendation: A code of practice for the ACT

#### 3.22

A code of practice modelled on the Victoria Police Code of Practice for the Investigation of Sexual Assault should be developed by SACAT and ACT Policing in consultation with the following agencies:

- the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit
- the ACT Director of Public Prosecutions
- the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault.

The code should cover all aspects of the investigation of sexual offences, including victim care, the taking of statements and the collection of physical evidence. It should guide ACT Policing’s investigation of all sexual offences.

### Recommendation: Relationship with other agencies

#### 3.23

The protocol between ACT Policing and the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault and that between ACT Policing and the Child at Risk Assessment Unit should be immediately reviewed and signed. All protocols and memorandums of understanding relating to the investigation of sexual offences should be widely distributed throughout ACT Policing and be readily available to all police who might have contact with victims of sexual offences.

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### 3.8 Protecting the victim: bail conditions and protection orders

Once a suspect has been identified and police have decided charges should be laid, the next step is getting the suspect to court. This is done by arrest or summons.

#### 3.8.1 Arrest

Section 212 of the ACT *Crimes Act 1900* provides for the power of arrest. A police officer may without warrant arrest a person for an offence if the officer suspects, on reasonable grounds, that the person has committed an offence and proceeding by summons would not achieve the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;
(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

These criteria are not relevant to any consideration whether to proceed by summons or arrest if the alleged offence is a domestic violence offence. In that case, by virtue of s. 212(2) of the Crimes Act, a police officer may arrest a person without warrant if the police officer suspects, on reasonable grounds, that the person has committed or is committing the offence. A sexual offence committed against a person who is in a familial relationship with, is married to or is in a de facto relationship with the offender would thus come under this exception, and the offender is more likely to be arrested.

Once the person is arrested, the police can grant bail under the Bail Act 1992 and impose a range of bail conditions. The police can also refuse bail, in which case the offender must go before a magistrate at the earliest possible opportunity. The court can remand the offender in custody or place him or her on bail.

3.8.2 Summons

Section 37 of the Magistrates Court Act 1930 provides for a magistrate to issue a summons on the laying of information that a person has committed or is suspected of having committed a summary or indictable offence. Because of the arrest provisions in the Crimes Act, summonses are more likely to be issued. When police proceed by way of summonses no bail conditions apply. Once the summons is issued, the matter is listed for the initial mention some weeks later.

Although magistrates have the power to impose bail conditions pursuant to the Bail Act when a defendant appears in court on a summons, they rarely do so. Magistrates have expressed the view that if bail conditions are desirable, the police should proceed by arrest rather than summonses.

A small number of urgent summonses are available to ACT Policing from the Magistrates Court on weekdays. These summonses require the person on whom they are served to appear on a specified date, usually within 72 hours of the summons’s issue, but they are rarely used. There might be scope to use them more in situations where bail conditions are not required and it is important to have the matter listed as soon as possible to reduce delay in the final disposition of the matter. However, as discussed in Section 3.8.3, it would be a rare situation where bail conditions are not required.

29 ‘Domestic violence offence’ is defined in the dictionary of the Crimes Act. It includes contravention of protection orders under the Protection Orders Act 2001 and a list of offences included in Schedule 1 to the Act. These encompass offences of personal violence, sexual offences, a number of driving offences (from the Road Transport (Safety and Traffic Management) Act 1999), possession of offensive weapons, and some property offences (from the Criminal Code).
3.8.3 The advantage of bail conditions in sexual offences

The advantage of arresting offenders is that bail conditions can be imposed. In the case of a summons, as noted, bail conditions cannot be imposed by police before the first court appearance. It is difficult to think of situations in which bail conditions protecting a victim from contact with the offender would not be warranted. However, the tendency in ACT Policing, and in SACAT in particular, is to begin by way of summons if the alleged offender poses no immediate threat to the victim. This policy fails to recognise a victim’s fear of the alleged offender once the matter has been reported to the police and the possibility that, once proceedings have been instituted, an offender might directly or indirectly approach the victim in order to influence proceedings. This is of itself a criminal offence if it is overt, but often the pressure can be subtle. Victims of sexual offences in the ACT are often expected to seek protection in the form of a protection order obtained from the Magistrates Court pursuant to the Protection Orders Act 2001. The difficulty with applying for protection orders is discussed in Section 3.9.

The Victims of Crime Coordinator’s report cited one case where a voluntary agreement to attend court\(^{30}\) was used for the alleged offender in a sexual assault, which meant that no bail conditions could be imposed. The offender was then alleged to have committed a second sexual assault on the victim within a few days.\(^{31}\) That report notes that greater emphasis has been placed on the power of arrest in relation to domestic violence offences. The reasons for this are to protect the victim from the offender and to reduce the scope for the offender to pressure the victim to ask that the matter be discontinued. The report observes that the same reasons apply in relation to sexual offences.

At the very least, in the majority of cases of serious sexual offences the police should consider a bail condition preventing the offender from contacting the victim. Only in special situations—such as where the circumstances of the offence make it improbable that further offences will be committed against the victim or others—should such a condition not be set.

A bail condition should also be set in historical cases. Among the criteria for this in s. 212(1)(b) of the Crimes Act are preventing a repetition or continuation of the offence or the commission of another offence (s. 212(1)(b)(ii)) and preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence (s. 212(1)(b)(iv)). These criteria could justify proceeding by way of arrest and charge in the majority of sexual offences. Alternatively, the exception in s. 212(2) of the Act should be amended to cover all sexual offences: this would ensure that the bail conditions set will protect the victim, thus reducing the need for victims to apply for their own protection orders.

\(^{30}\) Voluntary agreements to attend court, involving a person signing an agreement to attend court on a particular date, were used in the Magistrates Court to bring alleged offenders to court. They are no longer used.

\(^{31}\) Holder, Sexual Offences: the response of ACT Policing, p. 42.
Recommendations  

**Bail conditions**

3.24 Police should be encouraged to rely on s. 212 of the ACT Crimes Act 1900 and consider the safety of the victim when deciding whether to proceed by way of summons or arrest in relation to alleged sexual offences. Preference should be given to proceeding by way of arrest (rather than summons) in sexual offences and offences of violence upon children, applying the provisions of the Crimes Act. Unless there is no possibility of the alleged offender coming into contact with the victim, bail conditions protecting the victim from the alleged offender should generally be imposed in cases where proceedings are instituted.

3.25 Section 212 of the ACT Crimes Act 1900 should be amended so that police can arrest without warrant, and without the need to consider the requirements of s. 212(1)(b) of the Act, a person suspected of having committed a sexual offence.

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3.9 **Protection orders**

Protection orders are court orders made pursuant to the Protection Orders Act 2001 for the purpose of limiting contact between two parties. The purpose of the Act is to prevent violence between people in a domestic relationship and provide a mechanism for securing the safety and protection of people who experience domestic or personal violence.32 If police are investigating an allegation of sexual assault and have not laid charges, the victim may fear the offender and want some protection from future contact. As noted, until an arrest is made no bail conditions can be imposed. Victims can, however, obtain some protection by means of a protection order.

An application for a protection order can be made by an ‘aggrieved person’, defined in the Act to be ‘a person against whom the behaviour that may constitute domestic or personal violence has been, or is likely to be, directed’.33 Police can make an application on behalf of an aggrieved person.34 The Act also gives police specific power to apply for an emergency order outside normal sitting hours of the Magistrates Court.35 The criteria for making an emergency order are relatively restrictive: the magistrate must be satisfied that there are reasonable grounds for believing that the respondent (the person against whom the order is sought) might cause physical injury to the aggrieved person if an emergency order is not made and must be satisfied that it is not practicable to arrest the respondent. Although in non-emergency situations police have the power to apply for an order for an aggrieved person, this rarely occurs.

A victim seeking a protection order is required to attend court, make the application and represent themselves in the application. The court has developed practices to assist victims, and the ACT Legal Aid Office provides some representation. If the victim’s income and assets exceed the Legal Aid means test, however, they must arrange their own representation or represent themselves.

This is in contrast with the situation in some parts of New South Wales, where the police often make, on behalf of the person in need of protection, an application for an apprehended violence order where there are allegations of domestic violence offences and sexual offences.36 The making of the order ensures that victims are protected by court

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32 Protection Orders Act, s. 5.  
33 ibid., dictionary.  
34 ibid., s. 11(3).  
35 ibid., Part 7.  
36 Orders are made pursuant to Part 15A of the Crimes Act 1900 (NSW).
orders, even if criminal proceedings are discontinued. As well as making the application, the police represent the victim at the proceedings, thus reducing the stress for the victim. Unless the order is by consent, the victim still needs to swear the truth of the application and give evidence of the reasons for their fear.

A recent ACT government review of the Protection Orders Act discusses a proposal that police apply for orders in a wider range of situations. The report notes that the majority of the agencies concerned argued against expanding the powers of police to make applications other than in emergency situations, on the basis that this could lead to inappropriate orders that are breached and might expose the aggrieved person to being prosecuted for aiding and abetting a breach of the order if they contact the defendant. The discussion in the report assumes, however, that police would exercise their power to make applications in the absence of, and possibly against the wishes of, the aggrieved person. In some parts of New South Wales the person in need of protection participates in the process but does not have to cope with the stress of navigating an unfamiliar environment with little support.

ACT Policing should consider making applications for protection orders for victims of sexual assault in cases where bail conditions do not protect the victim. This would include cases where criminal proceedings are discontinued but the victim remains in fear of the other person.

**Recommendation Protection order applications by ACT Policing**

| 3.26 | Pursuant to s. 11(3) of the Protection Orders Act 2001, and unless the bail conditions applying adequately protect the victim, ACT Policing should apply for protection orders on behalf of victims of sexual offences where criminal proceedings have begun. |

### 3.10 Interaction with the Director of Public Prosecutions

The Director of Public Prosecutions submitted to the 2002 Victims of Crime Coordinator’s review that there was a need to continue to improve the investigative capacity of SACAT. He went on to note, however, that there is a tension in this because comment from the DPP is often seen as criticism and this can breed distrust of the DPP. The submission argued that both prosecutors and investigators would benefit from constructive feedback and suggested that SACAT and the Director hold discussions on how proper feedback could be provided to improve the system, without the respective agencies becoming defensive and territorial.

The SARP team endorses these comments. The system of investigation and prosecution would be improved if SACAT and the DPP were to adopt a spirit of accepting constructive criticism. Each agency approaches cases differently, and a flow of ideas and suggestions would benefit both. This could be achieved by a debriefing with the relevant prosecutor and investigator and their respective supervisors after the conclusion of a case or a decision to discontinue proceedings. In addition, each agency could keep a register of problems arising in the investigation and prosecution of particular cases, and trends could

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38 Holder, *Sexual Offences: the response of ACT Policing*, p. 34.
be discerned and communicated in a more general way. The relationship between the DPP and ACT Policing is discussed further in Chapter 5.

<table>
<thead>
<tr>
<th>Recommendation Feedback between the Director of Public Prosecutions and SACAT</th>
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<tr>
<td>3.27 The Director of Public Prosecutions and SACAT should establish a procedure whereby constructive feedback can be provided at the conclusion of prosecutions. Each agency should keep a register of problems arising from the investigation and prosecution of individual cases, with a view to providing feedback.</td>
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### 3.11 Over-reliance on forensic and corroborative evidence

Police have discretion whether to lay charges and, once criminal proceedings begin, responsibility for their prosecution rests with the Director of Public Prosecutions. For sexual offences, exercise of the discretion can be a difficult decision for both investigators and prosecutors. Sexual offences are usually committed in private, with no eyewitnesses. For victims aged more than 16 years, consent is the most common defence, and there is often little corroborative evidence of lack of consent. The criminal standard of proof requires that a jury be satisfied beyond reasonable doubt that an offence occurred if they are to find a person guilty. The DPP’s Prosecution Guidelines require prosecutors to be of the view that there are ‘reasonable prospects of a conviction’ in any prosecution.

Police need to take these factors into account when assessing whether criminal charges should be laid. If a victim wants charges to be laid and the police decide not to do so, the victim might understandably feel disbelieved and dissatisfied with the criminal justice system. On the other hand, to take to court a matter that offers limited prospect of a conviction is to put the victim through unnecessary stress.

Evidence corroborating the victim’s version of events is useful in any criminal prosecution. It can take various forms—evidence of fresh complaint, injuries, overheard conversations, other witnesses, mobile phone records, admissions made during a pretext call, evidence of previous violence, and so on. It is essential that investigators take a broad approach to the collection of evidence. Convictions can, however, still be obtained in the absence of corroborative evidence.

SACAT investigators have in the past relied too heavily on the lack of any obvious corroborative evidence in coming to a decision not to lay charges. This extends to over-reliance on the findings of the forensic medical examination. There has been a tendency to delay investigation of an offence until the results of forensic testing have come back, which can take months. If the tests do not reveal any semen, for example, investigators have in some cases decided not to proceed with the investigation and no charges have been laid. This ignores the fact that DNA evidence or other such physical evidence will not always be present. Further, there is often no sign of injury to the genital area of a victim of sexual assault, and this is sometimes assumed to mean that non-consensual sexual intercourse did not take place, resulting again in a decision not to lay charges. The absence of injury is quite common when sexual intercourse is not consensual.

The SARP team makes no specific recommendation in this regard. Suffice to say, however, that SACAT investigators should seek to obtain any available corroborative evidence as promptly as possible. If no corroborative evidence exists, consideration should still be given on a case-by-case basis to whether charges should be laid.
3.12 **Referrals to the Director of Public Prosecutions for adjudication**

SACAT refers some matters to the Director of Public Prosecutions for adjudication—that is, for advice on whether or not charges should be laid—in a process described in Chapter 5. This referral practice has been the subject of discussions between the DPP and SACAT in the past.

The DPP acknowledges that providing advice is an important role and one that should continue. But the referrals must be appropriate. A review of DPP files where SACAT had sought advice found that in a number of cases police were referring matters when investigations were incomplete. Further statements were often still to be obtained, including situations where the alleged offender had agreed to be interviewed by police.

It is recommended in Chapter 5 that SACAT and the DPP discuss this matter further and develop some guidelines to assist in deciding what matters should be referred for advice.

3.13 **False reports**

False reporting is a contentious subject. Reform movements in this regard have aimed to combat one of the predominant myths about sexual assault—that women are prone to make allegations if they want to cover up sex they subsequently regret or to be malicious or vengeful. Studies show that the rate of false reporting in sexual assault cases is no higher than in other types of crimes; however, the myth persists. During its research, the SARP team found that many police in other jurisdictions believed there was a high level of false reporting, particularly among teenage girls. Often these assessments seem to be based on hunches, and sometimes these hunches prove to be correct and the victim admits the allegation is false.

In the absence of detailed study, it is impossible to be accurate about the level of false reporting. A report that proves false is demoralising for the police involved in the investigation. It would, however, be worth systematically exploring the apparently high levels of perceived false reporting. Is there a significant number of complaints that are implausible or are police (and prosecutors) unduly sceptical?

False reports put additional strain on already stretched resources. If they represent a significant problem in the ACT, consideration should be given to redressing the situation. If there is not in fact a problem but the perception among police is that there is a high level of false reporting, this could affect the way police deal with victims.

In the ACT victims are generally not prosecuted for false reporting. Police who suspect a false report would still investigate the allegation but must discuss with the victim whether they want to proceed, pointing out the difficulties. It is not known whether the ACT has a problem with false reports of sexual offences. Further discussions within ACT Policing could take place, to look at ways of monitoring to determine whether false reporting is a real, as opposed to perceived, problem.

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39 Bargen & Fishwick, *Sexual Assault Law Reform*, p. 47.
3.14 **Victim preference**

One of the questions raised in the Victims of Crime Coordinator’s report concerned the weight police give to victim preference. The Coordinator’s view was that police give too much emphasis in the early stages to the wishes of the victim, rather than investigators conducting thorough investigations at that time. This manifests itself in victims feeling that the police are trying to dissuade them from having the matter further investigated. Victims who report sexual offences, especially if those offences are recent, are likely to be in an emotional state. The fact that they have reported the matter to police suggests a desire to have the matter investigated. If, after giving victims information about the difficulty of proving a sexual offence, police suggest to victims that they have a think about whether they want the matter to proceed any further—rather than police starting the investigation immediately—valuable forensic evidence could be lost and victims might opt out.

As the Coordinator noted, the philosophy of fully informing a victim of the process ahead might be sound, but her review found that some victims were left with the impression that the process was so awful and so unlikely to deliver a just result that there was little to be gained from proceeding. In the cases reviewed, police did not conduct any further investigations until the victim returned to them with an indication that they wanted to proceed. Victims felt that the decision to proceed was theirs alone and experienced heightened anxiety as a result. A number of the victims felt pressured by the responsibility of making a decision at a very early point. They experienced the dialogue with police not as information but as making it apparent that an all-or-nothing choice had to be made then and there.

The Coordinator concluded that it is appropriate that a victim’s views be sought and considered but that undue weight given to this too early, at the reporting stage, could result in no real investigation being carried out and this may not be in the victim’s best interests. The Coordinator recommended that police give the matter detailed consideration, in consultation with the ACT DPP and other relevant agencies.40

3.15 **Innovative responses to investigation—pretext conversations**

Because of the difficulty of proving cases of sexual assault—particularly historical offences where there is no physical evidence and recent assaults where consent is an issue—police have developed innovative ways of investigating. For a number of years police in the United States have conducted ‘pretext’ telephone calls. This involves the victim making a telephone call to the offender and the conversation being recorded by police, without the offender’s knowledge.

Pretext conversations have been admitted in evidence in criminal trials in various Australian states, notably Queensland, Victoria and New South Wales. The ACT DPP has examined the legality of obtaining such evidence and its admissibility and provided advice to SACAT. Some pretext conversations between victims of sexual offences and alleged offenders have been recorded in ACT investigations, but to date the DPP has not led such evidence in a criminal prosecution. The law of evidence in the ACT is governed in the main by the Commonwealth’s Evidence Act 1995.

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At present, Australian authority on pretext conversations is that if the conversation is not the result of coaching of the victim and if it takes place before the offender exercises his right of silence by declining to talk to police, the evidence will be admissible (subject to the particular circumstances of the case). This has not been tested in ACT courts. In New South Wales similar evidence laws apply and, although evidence of pretext conversations has been admitted in trials in that state, to date there have been no decisions at the appellate level. Although it is hoped that in suitable circumstances such evidence can be led in a criminal prosecution, police should not assume that a pretext call will be admitted and should pursue all other lines of inquiry. It might be necessary to pass legislation permitting the use of such evidence.

When deciding whether to ask a victim to make a pretext call, police should be mindful that the victim’s wellbeing is paramount. It is a difficult thing for a victim to do: some will be able to cope, but many will not be. A victim might feel prepared to do it but later have an intense emotional reaction. If an investigator intends to ask a victim to make a pretext call, this should be cleared by the SACAT team leader and the suitability of the victim should be very carefully considered. In all cases it should be a requirement that the victim speak to a counsellor from the Canberra Rape Crisis Centre before agreeing to make such a call, so that they are fully informed about the process and the reactions they might experience. The counsellor should also be available for debriefing immediately after the call is made.

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<tr>
<th>Recommendation</th>
<th>Pretext calls</th>
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<tr>
<td>3.28 Police should exercise caution when asking a victim to make a pretext call. They should take into account the nature and circumstances of the alleged offence, the relationship between the alleged offender and the victim, and the victim's attitude. The SACAT team leader should authorise the making of the call. All victims who agree to make a pretext call should be required to speak with a counsellor from the Canberra Rape Crisis Centre, and the counsellor should be present to offer support afterwards.</td>
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3.16 **Contact with victims during the investigation**

A complaint frequently made of police investigating sexual offences concerns the difficulty victims have in contacting police to find out the status of the investigation or court proceedings. Sections 4 and 5 of the ACT *Victims of Crime Act 1994* require that any person performing a function in the administration of justice have regard to a number of governing principles (see Appendix A), one of which is that victims be kept fully informed throughout the prosecution process.

The New South Wales Legislative Council report on child sex offences recommended that police develop a policy of contacting victims on a regular basis, rather than leaving it to victims and their families to do all the contacting.\(^\text{41}\) This was reiterated in the Victims of Crime Coordinator’s review.\(^\text{42}\) In 2002, as a result of the review, SACAT appointed a victim liaison officer. As noted, this is a civilian position and one of its main roles is contacting and liaising with victims, including providing written information.

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\(^\text{41}\) NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, p. 36.

Investigators still need to keep in touch with victims directly, and the frequency of this contact depends to some extent on the stage of the proceedings. In the early stages victims may need more frequent contact; if the investigation is complete and proceedings are under way they will need to be updated regularly but perhaps not as often.

The roles of the DPP and SACAT in relation to victims of crime are governed by the protocol between the two agencies. SACAT investigators and DPP prosecutors should be aware of their obligations under that protocol, so that victims do not miss out on regular information about the status of the prosecution.

The use of written material, such as brochures, is very worthwhile. Victims of sexual offences receive a great deal of information, and their ability to retain it is affected by stress and trauma. Giving people information they can read later is an effective way of ensuring that they are informed about the legal process. The Victims of Crime Coordinator’s report recommended that simple diagrams of the criminal justice process would help to demystify it. In Chapter 5 it is recommended that the DPP prosecutor see the victim of a sexual offence very early in the proceedings, to explain the process.

**Recommendation: Contacting victims**

| 3.29 | DPP prosecutors and SACAT investigators should ensure that they are aware of their obligation to inform victims of sexual offences of the progress of court proceedings. |

### 3.17 Forensics and SACAT

Use of DNA analysis has led to important advances in the investigation of crime, particularly sexual offences. DNA evidence can prove that sexual intercourse took place and prove the identity of the offender. In the ACT samples are analysed by Forensic Services, which is part of the Australian Federal Police and located in Canberra. Items for analysis (such as clothing and things found at the crime scene) are generally collected by investigators; the doctors conducting the forensic medical examination collect samples from the victim.

Some problems with SACAT’s use of Forensic Services have emerged, although it should be noted that the problems are not limited to SACAT. Investigators lack a thorough understanding of what is involved in DNA analysis. They sometimes ask that a large number of items be tested, without taking into consideration the appropriateness of analysis and the time and resources involved. This results in delays in individual cases, which flow on to the court proceedings and contribute to more general delays in DNA analysis for other cases. Conversely—and perhaps more importantly—items that are particularly significant might not be included in the request for analysis, even if in the opinion of Forensic Services they would be highly relevant.

These problems are the result of a lack of communication between Forensic Services and investigators—both generally and in relation to particular cases—as well as insufficient consideration being given to which items should be analysed and why. The situation could be resolved if SACAT investigators were to brief Forensic Services on what items they want to have tested and why. A consultative process would result in more targeted analysis.

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43 Protocol between the Chief Police Officer of the ACT and the Director of Public Prosecutions, signed May 2001.
of the most appropriate items, which would reduce Forensic Services’ workload and delays in analysis and produce better evidence.

It would also be beneficial if requests for analysis of samples were to go through a vetting process within SACAT before being forwarded to Forensic Services, to ensure that the most suitable items are tested. In some circumstances it might be prudent to involve a DPP prosecutor who is conversant with the case to advise on what should be tested: this would be useful if there is a large number of potential items for testing or if Forensic Services queries the request for analysis.

In addition, SACAT investigators and Forensic Services need to engage in more general discussions about what is involved in forensic analysis, to help investigators make appropriate requests. SACAT members could attend Forensic Services, meet the scientists and have the procedures explained more fully.

### Recommendation Submitting items for forensic analysis

3.30 When a SACAT investigator intends to submit items to the Australian Federal Police’s Forensic Services for analysis, the investigator should brief Forensic Services before doing so, to discuss which items would be the most suitable for analysis. The request to Forensic Services should go through the SACAT team leader. In some cases, the ACT DPP should also be consulted, to provide advice on what should be tested. SACAT team leaders and Forensic Services officers should meet regularly to discuss any problems or concerns, as well as particular cases. SACAT investigators should be encouraged to attend Forensic Services to learn more about forensic analysis.

### 3.18 The forensic medical examination

In the ACT the Forensic and Medical Sexual Assault Centre carries out forensic medical examinations for adult victims (aged 15 years or more) and the Child at Risk Assessment Unit examines children. The Canberra Rape Crisis Centre provides on-call counsellors to attend either the Forensic and Medical Sexual Assault Centre or SACAT. Chapter 2 describes the roles and structure of these agencies.

At the Forensic and Medical Sexual Assault Centre the medical examination is generally conducted before police take a detailed statement from the victim. Samples are taken from the victim, and after the examination and before the statement is taken doctors advise police of any injuries—provided the victim has authorised the release of that information. If the victim consents, the samples are given to the police, who forward them to the Australian Federal Police’s Forensics Laboratory for DNA analysis, which might help to identify the offender.

Doctors at the Child at Risk Assessment Unit carry out their medical examinations in the Unit’s premises at The Canberra Hospital. They complete a kit and forward samples to SACAT, which then forwards the samples to Forensic Services. The Unit has a colposcope, which is a magnification device that assists with the detection of injuries to the genital area. A video and still photographs of the examination are often produced. Unit staff are concerned, however, about the use to which these videos and photographs might be put, so their practice has been to retain possession of them and make them available to medical specialists who want to view them on behalf of the defence. The preference is that the videos and photos not be made available in court: drawn diagrams are favoured for this. The advantage of the colposcope is that there is independently verifiable evidence of
injuries. The device can, for example, show evidence of a torn hymen, which can provide corroborative evidence of penetration of a child.

Doctors at the Forensic and Medical Sexual Assault Centre do not use a colposcope. Their view—and this is a view shared in other medical forensic services dealing with adult victims of sexual assault—is that the information recorded by colposcope can be recorded adequately in drawn diagrams and notes. For sexually active women and girls, evidence of injury to the hymen is of no account. Often, signs of trauma to the genital area are consistent with consensual sexual activity and so do not add much to the evidence, particularly if the offender agrees that there was sexual activity but is asserting that it was consensual.

As with the Forensic and Medical Sexual Assault Centre in the ACT, the sexual assault referral centres in the United Kingdom (see Section 3.19) conduct forensic medical examinations either at the request of the police or on direct referral from the victim (or through other services). A centre takes the samples and forwards them to police if the victim wants the matter investigated. Police forward the testing results to the centre, where workers discuss them with the victim, who can then decide what to do. Victims can provide information and samples to the police anonymously through the centre; the advantage of this is that it allows the police to identify trends such as serial offenders and to rely on samples taken in the past—provided the victim wants to make their identity known. The samples can also be stored on a long-term basis, allowing victims time to make a considered decision. A victim might feel strong enough to give evidence many months after the assault.

The current policy of the Forensic and Medical Sexual Assault Centre is to destroy samples after two weeks because of limited storage space. The storage space should be increased to allow for long-term storage, and victims should be able to ask that their sample be submitted anonymously to police for DNA analysis.

### Recommendations

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<thead>
<tr>
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<th>Forensic samples</th>
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<tbody>
<tr>
<td>3.31</td>
<td>When the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit take samples from victims during forensic medical examinations, there should be provision for those samples to be submitted anonymously to ACT Policing for analysis.</td>
</tr>
<tr>
<td>3.32</td>
<td>When the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit take samples and the victim does not want the matter to be investigated by police, the samples should be retained for 12 months, after which the victim should be contacted. Further counselling should be offered before victims consent to their samples being destroyed.</td>
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### 3.19 Interagency collaboration: a one-stop shop

If agencies were co-located to create a ‘one-stop shop’, a victim of sexual assault could attend and be seen by police, counsellors and doctors. The purpose of making all these services accessible in one location is to reduce the trauma and stress associated with reporting a sexual assault to police. The concept of one-stop shops for child victims is well accepted, and there are now many centres where police, child protection workers, doctors and counsellors work in a single location (see Chapter 4).

For adult victims of sexual offences the considerations are different. Many adult victims attend the Forensic and Medical Sexual Assault Centre so that they can be tested and
receive treatment for possible pregnancy and sexually transmitted infections without reporting the matter to police. The presence of police at a centre housing medical staff and counsellors could dissuade victims from attending. This is explored in Section 3.19.4.

3.19.1 Sexual assault response teams in the United States

A number of police districts in the United States have established sexual assault response teams. These are based on child advocacy centres and allow the victim and all relevant agencies to attend a single location. The victim is seen by a doctor or sexual assault nurse examiner, who uses a pro forma sexual assault investigation kit. The victim is then interviewed by police, and the interview can be viewed through a one-way mirror by a victim advocate and the prosecutor. This means that the victim does not have to repeat details of the incident to the advocate or the prosecutor. The prosecutor becomes involved at this early stage, and viewing the interview allows him or her to assess how the victim might fare in court. The prosecutor who views the interview conducts the prosecution.

The agencies are not necessarily co-located but will attend with the victim at the central location. The victim is able to see that there is a combined response to the assault and at that location has access to all the services required—rather than being taken to a number of separate locations.

Theresa Davis noted that anecdotal evidence from the prosecutors and victims’ advocates suggested that this coordinated response led to a greater likelihood of successful prosecution and greater satisfaction on the part of victims. Victims were also more willing to stay in the criminal justice system.

3.19.2 The sexual assault referral centres and Project Sapphire in the United Kingdom

The Haven was established in a London metropolitan hospital in 2000, with the aim of providing quality forensic medical examinations by specially trained female doctors (male doctors are available on request) and thus improving the quality of evidence and victim care. The Haven also provides counselling services. A number of Havens and other centres, collectively called sexual assault referral centres, have been established throughout the United Kingdom.

The centres employ doctors, paediatricians, nurses, health advisors and counsellors. They offer forensic examinations; treatment for injuries; emergency contraception; treatment to prevent sexually transmitted infections; counselling; conveniences such as showers, toilets and food; and new clothes if a victim’s clothes are required for evidence. To avoid DNA contamination, doctors and counsellors wear surgical suits and shower between examinations and the suite is cleaned between each examination.

The centres provide crisis counselling and ongoing counselling for as long as required. These services are available for recent or historical sexual assault. Police are not on site, but staff will contact the police if the victim wants to report the offence. Victims then

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44 Theresa Davis, ‘Report to the Winston Churchill Memorial Trust of Australia’, Canberra, 2002. Ms Davis was a prosecutor with the ACT Director of Public Prosecutions in 2002, when she visited the United States and the United Kingdom as part of a Churchill scholarship study of best practice in the prosecution and investigation of sexual assault offences, with particular emphasis on integrated response models. The information in this section comes from her report.

45 See Chapter 5 for a discussion of the differences in the role of the prosecutor in Australian jurisdictions compared with the United States.
attend the police station. This is in contrast with the sexual assault response teams in the United States, where police attend the same location as the forensic medical and counselling services.

3.19.3 A one-stop shop for adult victims of sexual assault in the ACT?

After discussions with the agencies concerned, the SARP team concluded that a one-stop shop based on the US sexual assault response teams model might be feasible for the ACT, with some modification. Because of the different role of prosecutors in Australia, there is no need for or utility in having a prosecutor present. The three agencies of importance in any such model for the ACT are the police, the Forensic and Medical Sexual Assault Centre and the Canberra Rape Crisis Centre.

The Forensic and Medical Sexual Assault Centre is a one-stop shop for adult victims of sexual assault. Counselling services are provided by the Canberra Rape Crisis Centre, which has severe funding problems, despite the Select Committee on the Status of Women in the ACT recommending an increase in funding in its 2002 report *The Status of Women in the ACT*. The Centre is able to provide immediate crisis counselling, but the funding limitations mean there is a wait of some months before long-term counselling can begin.

A more comprehensive one-stop shop for the ACT could be modelled on the sexual assault referral centres in the United Kingdom. The difference between the current arrangements in the ACT and those in the United Kingdom is that the sexual assault referral centres provide crisis and long-term counselling as well as forensic medical support. If this model were to be adopted, crisis and long-term counselling services and the Forensic and Medical Sexual Assault Centre could be co-located. For such a centre to operate effectively, however, increased funding to provide adequate counselling services would be necessary.

A counter-argument to this proposition is that there is no real value in long-term counselling services being located with what is in effect a crisis service. The Forensic and Medical Sexual Assault Centre provides medical care at a time of crisis and is assisted by counsellors from the Canberra Rape Crisis Centre. There is no reason for victims to keep returning to a place of crisis; it is better if long-term therapeutic services are located elsewhere. Staff of the Forensic and Medical Sexual Assault Centre are of this view.

3.19.4 Location of police at a one-stop shop

The SARP team spoke to a number of sexual assault counselling and forensic medical services, both in the ACT and interstate, about the idea of locating the police at a one-stop shop. There was little enthusiasm for the idea, for two reasons. First, for fear of not being empowered to make their own decisions about investigation and prosecution, many victims might be reluctant to attend a centre where they believe police will immediately become involved. Many sexual assault victims do not wish police to be notified of the assault, preferring to seek the assistance of doctors for infection and pregnancy screening. It is thought that if police were in the centre victims might not attend, and this would create a health risk. Second, if the centre was directly associated with police, there could be a perception of bias when staff from the centre gave evidence in court.

46 ACT Legislative Assembly, Select Committee on the Status of Women in the ACT, *The Status of Women in the ACT*, Legislative Assembly, Canberra, November 2002.
An argument in favour of some sort of police presence is that, if a victim can meet a police officer in an informal setting away from a police station and can there have the process explained and establish some rapport with the officer, the victim might feel more inclined to report the matter. This would be a practical way of helping to resolve the problem of low reporting rates.

One option for achieving this is to provide a space at the Forensic and Medical Sexual Assault Centre for the police to talk to victims and to have a system whereby police from SACAT are asked to attend when a victim of sexual assault comes to the Centre. The Centre doctor and nurse can then tell the victim that a police officer is available to talk to them informally. Victims might feel more inclined to talk to a police officer informally if the officer is already there. Having a police officer present at this early stage might also help the victim make a decision about reporting. The officer could then make arrangements for the victim to subsequently attend a police station for an interview.

The SARP team discussed this approach with some forensic and victim advocacy agencies in Australia. The view the agencies put was that victims might feel helpless and overwhelmed by too many people responding to them in one place. They said it would be appropriate for the police to be informed of the arrival of a victim at these services, but that they should attend only if the victim asks them to. The agencies all see the benefit of having a room in the centre where police could conduct interviews but feel that if victims knew police were located in the centre they would be less inclined to attend for therapeutic medical examination because they would fear having to report to police.

The location of SACAT in the Winchester Centre has raised problems associated with a specialist unit being in a police environment. In Chapter 4 it is recommended that SACAT’s Child Abuse Team be located in a facility housing medical staff and care and protection officers. If the Child Abuse Team is relocated, it may be opportune for ACT Policing to consider the best location for the Adult Sexual Assault Team. It would be inappropriate to house it in a one-stop shop dealing with child victims, but it might be appropriate to house it in a location separate from a police station and closer to the Forensic and Medical Sexual Assault Service.

If SACAT is to remain at its present location, the best model for the ACT would be to require police to transport the victim directly to the Forensic and Medical Sexual Assault Centre, rather than to the Winchester Centre. If possible, the Forensic and Medical Sexual Assault Centre’s office should have police interview and computer facilities, including equipment for taping interviews. Police access to the Centre should be away from the public areas, to avoid an association with the police. Victims could be medically examined, see a counsellor, and have an initial interview during which police would obtain only so much information as is necessary at that time. This does not preclude victims attending the Winchester Centre for more detailed statements later on.

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**Recommendations**

A one-stop shop for adult victims of sexual assault in the ACT

3.33 Consideration should be given to police being called to the Forensic and Medical Sexual Assault Centre when a victim of sexual assault attends, in order to meet the victim on an informal basis and explain the role of the police. If the victim chooses to have the matter investigated, the police member can make arrangements for them to attend the relevant police station or police centre. A room where police can speak with victims and videotape the interviews should be available in the Forensic and Medical Sexual Assault Centre.
3.34 All forensic medical examinations should take place at the Forensic and Medical Sexual Assault Centre; preferably, none should be carried out at the Winchester Centre. Interview facilities should be located at the Forensic and Medical Sexual Assault Centre, so that police can conduct the initial interview with the victim there. Victims can attend the Winchester Centre for subsequent interviews.

3.20 Conclusion

ACT Policing is committed to providing a comprehensive response to victims of sexual offences. The SARP team hopes that the suggestions and recommendations in this chapter will help with maintaining standards and improving the ability of ACT Policing as a whole to respond to sexual assault.

This chapter is by no means exhaustive. Many more examples could have been considered. ACT Policing should endeavour to keep abreast of national and international developments in the investigation of sexual offences, so that both SACAT and ACT Policing itself can offer the best possible service at all times.

Recommendation Continuing research

3.35 One or more SACAT members should be allocated on a permanent basis to the task of keeping well informed about developments in best practice for the investigation of sexual offences, nationally and internationally. Funding should be made available to allow that member (or those members) to spend a specific number of hours each month to do this work and to travel to conferences and other meetings in order to stay up to date. The member (or members) should report their findings to the team leaders of SACAT and other senior ACT Policing members on a regular basis. In particular, they should study innovative programs such as the London Metropolitan Police Service’s Project Sapphire.
4 Collaborative approaches to investigating child sexual abuse

Although the real extent of sexual abuse of children will never be known, such abuse is acknowledged worldwide to be a major community concern. The quest to redress the problem and reduce the legal system’s impact on abused children has led to more innovative investigative practices. Nationally and internationally, more collaborative approaches between police, agencies responsible for child protection, and health agencies have been developed in order to improve the community’s response to abused children.

The movement towards greater collaboration is evident in differing ways. In the United States, for example, child advocacy centres house a range of agencies dealing with the investigation of physical and sexual abuse of children. In a number of states in Australia greater collaboration between child protection agencies and police services takes the form of joint interviewing of children and joint investigation of allegations of abuse. The ACT is beginning to look at interagency approaches but is well behind other Australian jurisdictions in this regard. There have recently been moves towards police and child protection officers working together more: a police officer from the Sexual Assault and Child Abuse Team is now located in the Office for Children, Youth and Family Support. The ACT would, however, benefit from a far more comprehensive scheme of interagency collaboration.

After examining a number of interagency models operating in Australia and overseas, the SARP team recommends that the ACT adopt a model with the following elements:

- a ‘one-stop shop’ where children who are victims of sexual and physical abuse can be attended to by police, child protection officers and health professionals
- police and child protection officers working together in teams
- regular meetings of relevant agencies to discuss individual cases and coordinate responses
- regular meetings of representatives of all relevant agencies to discuss systemic matters and problems
- a specialist unit for conducting interviews with children
- comprehensive guidelines that set out the roles and responsibilities of all agencies involved in child protection in the ACT.

Although the focus of this report is sexual offences committed on children and adults, the discussion in this chapter looks at practices associated with the investigation of physical abuse as well. Specialist services located within police forces, child protection agencies and health departments often deal with both sexual and physical abuse of children, and this is the case with ACT Policing’s Sexual Assault and Child Abuse Team. The skills needed in any specialist organisation dealing with child sexual abuse are the same as those needed for dealing with children who are victims of physical abuse. Any model adopted in the ACT should therefore encompass both physical and sexual abuse of children.
The term ‘child’ is used in this chapter in its legal sense, as defined in the ACT’s Legislation Act 2001, to mean a person under the age of 18 years. In other jurisdictions the upper age limit for the definition of a child might be different.

4.1 Interaction between child protection and police investigations in the ACT

The roles of ACT Policing and the Office for Children, Youth and Family Support are described in Chapter 2. Police are responsible for the investigation of criminal offences; the Office for Children, Youth and Family Support is responsible for broader child protection. Ultimately, the police’s role is limited to investigation and laying of charges if a criminal offence is revealed. The difficulty of proving criminal offences at the standard required—beyond reasonable doubt—and the difficulties inherent in prosecuting a matter where the main witness is a child mean that the number of matters prosecuted is relatively small and the number of resultant convictions is even smaller. The police have a very important role in the protection of children, but that role is limited. Primary responsibility for the protection of children in the ACT rests with the Office for Children by virtue of its care and protection mandate.

Child protection also comes within the ambit of the Family Court’s work. The roles of the Family Court and the Office for Children in child protection are not, however, dealt with here. A detailed review of the child protection system in the ACT was recently conducted, and it is beyond the scope of this report to broach those matters. The focus here, and in this chapter in particular, is police investigations of sexual offences against children. In many other jurisdictions the tendency is for police to work collaboratively with child protection agencies to provide a more comprehensive approach to the investigation of criminal offences and related child protection concerns.

4.2 Multi-agency approaches in Australia and elsewhere

This section looks at a variety of models involving more than one agency in Australia and elsewhere. It is by no means an exhaustive consideration of all possible structures; rather, it provides an overview of four innovative approaches:

- the Children’s Center in Huntsville, Alabama, as an example of a child advocacy centre
- Puawaitahi in Auckland—which is modelled on the US child advocacy centres
- the Joint Investigative Response Teams in New South Wales
- the Suspected Child Abuse and Neglect Teams in Queensland.

The Children’s Center in Huntsville and Puawaitahi in Auckland are examples of one-stop shops offering a number of services, such as forensic medical services, counselling, child protection and police, in a single location. The Joint Investigative Response Teams in New

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1 In the Children and Young People Act 1999 (ACT) a child is defined as a person aged less than 12 years. A person aged over 12 but less than 18 is defined as a ‘young person’.
South Wales are an example of a joint investigative model with the co-location of police and child protection workers. The Queensland Suspected Child Abuse and Neglect Teams provide an example of an interagency approach without co-location.

4.2.1 One-stop shops

The Children’s Center in Huntsville, Alabama

Throughout the United States over 400 child advocacy centres have opened since the first one opened in Huntsville, Alabama, in 1986. Although the centres are all slightly different, their basic purpose is to focus on the child and their family and to simplify the process of investigating sexual and physical abuse by bringing together under one roof the key agencies responsible for dealing with an abused child.

The Huntsville Children’s Center houses police, child protection services, prosecutors, and mental health, medical and educational agencies, all working as a multi-disciplinary team to respond in a coordinated way to an abused child. Children attend one location and are interviewed once. The interview is recorded and can be looked at by a number of agencies that deal with the child. The Center’s philosophy is that in a safe, child-friendly environment children are more likely to report details of abuse. Ongoing services such as counselling are also provided, to deal with the consequences of the abuse and minimise the risk of further abuse.

When reports alleging physical or sexual abuse are received by police or child protection workers, preliminary inquiries are made and the child attends the Center for an interview. Interviews are conducted by trained police officers or child protection officers, and a number of people observe the interview from outside the room, via a one-way mirror or on a monitor elsewhere in the building. The observers are officers from the police, the child protection agency, and medical and mental health professionals; they can pass notes to the interviewer to ask them to cover specific subjects during the interview.

If the child is identified as having a developmental problem or, as a result of perceptions or past experiences, is concerned about speaking to police or child protection workers, a clinical psychologist conducts the interview.

All interviews are videotaped. A clinical psychologist either watches the interview as it takes place or reviews it later, providing to police and child protection officers feedback about the emotional cues the child evinces during the interview. In a team meeting, the prosecutor from the District Attorney’s Office, the clinical psychologist and the interviewer review all tapes that disclose a criminal offence. The theory is that prosecutors can attend all interviews conducted at the Center, but time constraints make this a rare occurrence. In practice, the prosecutors review the tapes of interviews in order to decide whether a matter should result in criminal charges and whether a tape should be played in court. They receive the same training as the interviewers.

A paediatrician and nurse carry out the forensic medical examination either before or after the interview. The child is asked questions during the examination, which often results in further disclosures as the child connects the questions with body parts.

3 Theresa Davis, ‘Report to the Winston Churchill Memorial Trust’. Ms Davis visited the Children’s Center at Huntsville as part of her Churchill scholarship study of best practice in the prosecution and investigation of sexual offences. Much of the information in this section comes from her report and from the National Children’s Advocacy Center <http://www.nationalcac.org/give/history.html>, viewed 2 June 2004.
A multi-disciplinary team regularly reviews each child’s case, and any problems and needs that arise—such as difficulties for the child at school, the need for parenting education or counselling, the need for further medical evaluations or services, or the need for more crisis oriented action—are monitored and responded to by referral to the relevant services. At weekly meetings the District Attorney, child protection officers, police, medical staff and family advocates discuss all new cases and follow up cases already in the system.

For non-offending parents, assistance is provided through individual counselling, advocacy throughout the legal and court process, and group sessions with other parents, where they receive support and information to help them return their family to a more stable footing. When a child first attends the Center a family advocate sees family members or caregivers while the child is being interviewed; he or she provides an information package and follows up with further contact within 48 hours.

Some of the child advocacy centres in the United States are privately funded; some are government funded; most receive mixed funding. Some are based at hospitals; others are in the community, in houses or office buildings. Co-location of the various agencies affords the workers continuing contact with each other, thus ensuring that the children’s various needs are met.

A 1999 US Department of Justice report on ways of improving the criminal justice system’s response to child victims and witnesses reviewed a number of interdisciplinary responses. The report noted that the child advocacy centres provide one of the best examples of a team approach to handling child victim cases. A 1993 US report on child sexual abuse noted, ‘Sexual abuse cases, perhaps even more than other types of maltreatment, require multi-disciplinary, multi-agency collaboration in order for professionals to effectively act in the victim’s and family’s best interest’.

**Puawaitahi in Auckland**

Puawaitahi, Australasia’s first multi-disciplinary centre for children who have been sexually or physically abused, opened in June 2003 in Auckland, New Zealand. It is based on the US child advocacy centres and offers three types of service under one roof—medical services provided by the Health Department, police, and some specialist counselling services provided by the Department of Child, Youth and Family Services, the agency responsible for child protection. The centre does not house child protection services dealing with immediate care: these services are located in regional offices of the Department of Child, Youth and Family Services.

The Puawaitahi building is near the city’s main children’s hospital, so that children requiring acute medical care can be admitted immediately and children admitted to hospital can easily be visited by police or counsellors from the centre. Being near the hospital also allows doctors from the hospital to provide back-up medical services.

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6 Members of the SARP team visited the centre in March 2004, and it was during this visit that the information in this section was obtained.
There are various mechanisms for referral to the centre. Most referrals come through three Auckland offices of the Department of Child, Youth and Family Services. If abuse is suspected the child is taken to Puawaitahi for an interview. Interviews are conducted by specialist interviewers from the Evidential Video Unit and are videotaped for later use as the child’s evidence-in-chief in criminal proceedings⁷ and as the child’s evidence in child protection proceedings.

When necessary, medical and nursing staff from the centre perform forensic medical examinations. Before such an examination the interviewer relays to the doctor what the child has said, saving the child from having to relate the events to another person. After the interview and medical examination, officers from the three agencies—Health, the police, and Child, Youth and Family Services—and the interviewer meet to discuss the disclosures made by the child and what action is to be taken. The videotape of the interview is forwarded to the police’s specialist Child Abuse Team. Criminal investigation and child protection investigations then begin. Officers from the three agencies hold weekly meetings to keep each other up to date with the progress of the investigation and the welfare of the child.

Puawaitahi’s location was a prime consideration when the centre was being planned. The fact that the building does not look like a police station or hospital breaks the association with, and the consequent fear children can have about attending, those places. It is also neutral territory, which allows for more effective and equal collaboration by the agencies concerned. The layout, décor, and so on, have been well thought through, the emphasis being on making the centre an attractive, pleasant place for children to visit.

The interagency approach in Puawaitahi works well in many respects. Staff of the three agencies are very enthusiastic about the benefits of a one-stop shop. There are, however, some things that could be improved if such a centre were established in the ACT. One obvious deficiency is the absence from the centre of child protection officers. Any similar model for the ACT should include staff of the Office for Children, Youth and Family Support, to deal with immediate and short-term child protection matters.

There are advantages in having specialised long-term counselling services located in the building. Staff of these counselling services are experienced in child development and can therefore help police with assessing children by viewing videotapes and providing some informal advice about how a child might perform in court. Sometimes they also appear in court to give expert evidence on aspects of the child’s interview.⁸ In addition, being in the building allows counsellors to learn, directly from police and health workers, about more serious cases that might not have been referred to them in other circumstances.

Although Puawaitahi is still in its infancy, it provides an inspirational model on which to base an interagency approach in the ACT. A centre based on the model recently opened in Perth: if such a centre were planned for the ACT, it would be useful to study the establishment and operation of the Perth centre.

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⁷ Section 23E of the New Zealand Evidence Act 1908 and the Evidence (Videotaping of Child Complainants) Regulations 1990.

⁸ Section 23G of the Evidence Act 1908 (NZ) permits the admission of expert evidence in prosecutions involving child sex offences. This is discussed in Chapter 7.
Joint interviewing and investigation: the Joint Investigative Response Teams in New South Wales

Since 1997 in New South Wales Joint Investigative Response Teams, consisting of members of NSW Police and case workers from the Department of Community Services, have been investigating allegations of child physical and sexual abuse where a criminal offence is involved. The aims of the JIRT model are as follows:

- Ensure the safety and protection of children
- Provide a timely and appropriate response
- Improve the effectiveness of the investigation and prosecution process
- Reduce the stress on children and their non-abusive carers arising from the investigation and prosecution process.

A joint investigative model was first piloted in New South Wales in 1994. A review of the pilot found that it had resulted in a reduction in emotional trauma for children, improved interagency collaboration and working relationships, more effective investigation, and better quality briefs of evidence.

In 1996 the findings of the Wood Royal Commission into the New South Wales Police Service highlighted the need for greater collaboration and training in the investigation of child abuse. As a result, the Commissioner of Police, the Director General of the Department of Community Services, and the Director General of Health signed a memorandum of understanding dealing with joint interviewing and the JIRT model was expanded to cover the entire state in 1997. Today there are 21 JIRTS statewide, in nine of which NSW Police and the Department of Community Services are co-located. Because the state is so large and because the boundaries of NSW Police local area commands do not coincide with where Department of Community Services offices are, the remaining teams are not co-located.

Although NSW Health is a partner in the JIRT model, Health personnel are not located with police and the Department of Community Services. Children requiring a forensic medical examination are taken to the nearest hospital. In Sydney they are taken to one of the three child protection units operating in the main children’s hospitals. Placing a health professional in a JIRT to assist with referrals for victims and their families is being trialled on a part-time basis in metropolitan Sydney.

Each JIRT has four to five police—although busier teams can have up to nine—and the same number of Department of Community Services officers; the JIRT is headed by two team leaders, one from each agency. Referrals to a JIRT come via the Department of Community Services helpline, which receives calls from agencies with mandatory reporting duties, the police and the public. Helpline staff electronically notify the nearest

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9 Much of the information in this section was obtained when the SARP team spent time with a JIRT in metropolitan Sydney in December 2003.
JIRT within two hours and follow this up with a telephone call. (JIRTs have a separate database to ensure that the information is not accessible to the general police force or Department of Community Services officers.) If the matter is urgent, the referral is immediately phoned through to the relevant JIRT.

On receipt of the notification, the JIRT team leaders assess the referral. If they conclude that no criminal conduct is involved, the referral is rejected and sent back to the Department of Community Services for allocation to a regional office; the reason for rejection is entered on the JIRT database. If the referral is accepted, a meeting is held between the team leaders and investigating officers from the Department and NSW Police and an interview plan is formulated. During the planning meeting things such as building rapport between the interviewer and the child before the interview, ways of helping the child to feel comfortable in telling their story, strategies for dealing with an uncommunicative child, and the course of the interview if there is no disclosure are canvassed. Interviews are conducted with a view to obtaining all the information needed to deal with child protection and the criminal investigation in a single session.

Usually it is the police officer who conducts the interview. The other officer sits in a monitoring room next door, observing and operating the equipment. New South Wales legislation allows videotapes to be used as evidence-in-chief in court proceedings, including criminal trials, so the interview is taped.13 This, of course, has implications for how the interview is conducted and the training required for interviewers. The interviewer must not only try to elicit as much information as possible but must also try to make sure that the form of the questioning will be admissible in a criminal trial.

After the interview the team leaders and investigating officers have another meeting to discuss the criminal investigation and care and protection matters. If emergency child protection action is necessary at this stage, the Department of Community Services officer initiates the response. Later, when the care and protection plans come into operation through court orders, the matter is referred back to the local office of the Department for continuing management and contact.

The guidelines also allow for matters to be investigated by two police officers or two departmental officers if the matter is urgent and the team’s resources do not permit one officer from each agency to work together.

As noted, forensic medical examinations are carried out at the child protection units at the main children’s hospitals; these units are similar in function to ACT Health’s Child at Risk Assessment Unit. Interviews conducted in the JIRT offices are not viewed by the doctors before the medical examination, so the doctors must ask the child to again relate details of the incident.

In addition to forensic medical services, NSW Health provides a number of long-term psychological and counselling services to child victims of sexual and physical abuse. Referrals to the relevant Health services should be made by the JIRT, but a 2002 evaluation of the JIRT model noted that a significant percentage of children were not referred from the JIRTs to NSW Health, either because families did not want referrals or because of the lack of available services.14 The JIRT manual now requires that families and children be given information about NSW Health services in all cases and that the reason for a referral to these services not being made by the JIRT be recorded on the child’s file.

13 Section 11 of the Evidence (Children) Act 1997 (NSW).
The evaluation of the JIRTs found that prosecutors rated briefs prepared by the JIRTs to be of higher quality than police briefs prepared outside the JIRT model. The majority of prosecutors questioned said the success rate of prosecutions had improved. Conviction rates for some of the JIRTs included in the evaluation were as high as 100 per cent for one year (40 cases coming out of three offices) and remained very high for other years. Of 86 matters from two offices over three years, only 14 per cent resulted in an acquittal.\textsuperscript{15}

4.2.3 Another interagency approach: the Queensland Suspected Child Abuse and Neglect Teams

Suspected Child Abuse and Neglect Teams were formed in Queensland in 1980. The approach involves neither co-location of agencies nor joint investigation. Rather, a collaborative approach is achieved through regular meetings of officers from the relevant agencies, where individual cases are discussed and management plans in relation to particular children are developed.

There are 39 SCAN teams throughout Queensland. The core members of the teams are from the police, Queensland Health and the Department of Families, Youth and Community Care, the agency responsible for child protection in the state. Other agencies and individuals—such as Education Queensland, community welfare agencies, Aboriginal and Torres Strait Islander agencies, and people who might be able to contribute—can be asked to participate in team meetings as co-opted members.

Participating agencies must make referrals when particular criteria are met. For example, all allegations of sexual abuse must be referred to a SCAN team. A matter is referred to the SCAN team coordinator (a rotating position held by a team member) and listed for the next SCAN meeting. Emergency meetings can be called if necessary. A SCAN team does not have authority to make decisions about individual cases; instead, it recommends responses on the basis of consensus in the team. Individual agencies are then responsible for implementing the recommendations. The SCAN team reviews each case as often as necessary, until a stable case management plan is in operation.

In addition to the work of the SCAN teams, the police and the Department of Families, Youth and Community Care conduct joint interviews and investigations. When police receive notification of a case involving abuse, a team from the police Child Abuse Unit investigates. The Department of Families, Youth and Community Care is notified of the Unit’s report, if it is not already aware, and arrangements are made to interview the child. Interviews are conducted jointly and can be used as evidence-in-chief in criminal proceedings.\textsuperscript{16} Officers conducting interviews are required to have completed the Interviewing Children and Recording Evidence course (see Chapter 12).

Interviews are conducted in the local police station, in a child-friendly interview room if possible. After the interview the matter is referred to a SCAN team to discuss the relevant history of the child and family, investigations in relation to the notification, a proposed management plan, and a time-line for action or intervention. Police continue with the criminal investigation. All associated information is collated by all the agencies represented in the SCAN team, and regular meetings are held to discuss the child’s progress and the case management plan.

\textsuperscript{15} ibid., p. 25.
\textsuperscript{16} Section 93A of the Evidence Act 1977.
A Queensland Crime Commission and Queensland Police Service report on child sexual abuse in the state found that this multi-disciplinary approach to child protection was clearly an advantage and noted that the approach had allowed the two lead agencies involved in child protection to collaborate in their responses and involve a range of other agencies.17

4.3 **A comprehensive interagency model for the ACT**

Morgan Disney & Associates identified the need for a comprehensive interagency model for the ACT in its report on sexual assault services for children and young people in the ACT.18 The report strongly recommended that a collaborative interagency approach be developed and that consideration be given to establishing a one-stop-shop type of service for children and young people who have been victims of sexual abuse.

In developing a model for interagency collaboration in the investigation of child physical and sexual abuse in the ACT, the SARP team selected aspects of the models reviewed and adapted them to the local environment. The proposed model has four elements:

- a one-stop shop modelled on Puawaitahi in Auckland
- joint interviewing and investigation by police and child protection services, along the lines of the New South Wales Joint Investigative Response Teams model
- regular meetings of all relevant agencies to discuss cases and coordinate responses, as occurs in the Suspected Child Abuse and Neglect Teams in Queensland
- regular meetings of all relevant agencies to discuss systemic matters and problems.

4.3.1 **A one-stop shop**

The SARP team urges that a one-stop shop be established in the ACT as an ideal way of dealing with children who have been sexually or physically abused. The research for this report revealed broad support for such a model for ACT children. The ACT is sufficiently small, both in population and geographically, to make the model’s introduction feasible.

**Location**

It is essential that the centre be housed in neutral premises. The experience of models such as Puawaitahi and the JIRTs is that the success of an interagency model depends on the neutrality of the physical environment and the sense that the centre is ‘owned’ by all agencies working in it.

As a result, the centre should not be in police premises. One of the aims of such a centre is to provide a friendly, non-intimidating environment. New South Wales recognised this, and the JIRTs are housed away from police stations, in shopping centres or office buildings. Chapter 3 discusses some of the problems with the current location of the Sexual Assault and Child Abuse Team in the AFP Winchester Centre in Belconnen. The

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SACAT suite itself is relatively child friendly, but its location in police premises intimidates many children.

As Puawaitahi demonstrates, there are advantages in having a centre located near a hospital—to allow for urgent medical attention for children coming to the centre and to allow children admitted to the hospital to quickly be seen by the teams in the centre. The ideal location in the ACT would therefore be near The Canberra Hospital. Further, any such centre should be in a building that is jointly leased and managed by the agencies concerned.

**Services**

The approach in the US child advocacy centres is to house a number of agencies, including long-term counselling services. In consequence, children might visit a centre on numerous occasions over some time. Puawaitahi has some long-term services, but not all children attending for the initial response require these services.

There is debate about whether such a centre should be a crisis centre or should offer more extensive long-term services. A crisis centre approach would see children attend for the initial phases—such as the initial interview, a medical examination, and initial counselling or psychological intervention. They would then be referred elsewhere for continuing counselling and other services. The justification for this limited approach is that a child might want to move on and not return to the place associated with the stress and trauma of the initial interview, medical examination, and so on. It can also be argued that there are many services available that a child and their family might want to make use of and, providing they are appropriately referred, they can choose the service they want to use.

Under this proposed approach, the centre would house the following services:

- the SACAT Child Abuse Team
- child protection officers from the Office for Children, Youth and Family Support
- forensic medical services from the Child at Risk Assessment Unit
- crisis psychologists and counsellors from ACT Health.

The SACAT Child Abuse Team—as that part of ACT Policing with responsibility for investigating child sexual and physical abuse—would be the specialist unit most suited to being located at any proposed centre. At present it interacts and shares resources with the Adult Sexual Assault Team. If the Child Abuse Team were to be located in a new one-stop shop, resourcing for ACT Policing would need to reflect that change.

Although Puawaitahi does not house child protection officers from Child, Youth and Family Services—these officers are located in regional offices—the JIRT model in New South Wales provides an example of the advantages of co-locating specialist police and child protection officers. The extensive collaboration afforded by this mechanism is seen as a key to the JIRT model’s success. The SARP team considers that the JIRT model should be the building block on which a more integrated multi-agency centre in the ACT is based. Which officers from the Office for Children, Youth and Family Support are co-located with the police would need to be determined by the Office in consultation with the other relevant agencies.
The third agency involved would be ACT Health. The Child at Risk Assessment Unit conducts forensic medical examinations and provides some limited counselling services for children who are victims of physical or sexual abuse. Its current services are broader than this, so only some of them would be directly relevant to the investigation of criminal offences. Some of its services—such as forensic medical services and some counselling services—could be located in the centre in case, for example, children require urgent medical attention. The relevant services could be located at the centre or they could remain where they are at present (The Canberra Hospital) and be on call. Another approach is to locate all the Child at Risk Assessment Unit services at a centre built on or near the hospital grounds; this could then also house the relevant parts of ACT Policing and the Office for Children. This model is similar in some respects to that of Puawaitahi, which houses services directly relevant to investigating child sexual and physical abuse but at the same time houses long-term counselling and psychological services. Thus some children attending the centre would not need to interact with the other agencies.

The Child at Risk Assessment Unit’s capacity to provide counselling services is limited. Various reviews have found the provision of long-term counselling services to child victims of sexual assault in the ACT to be inadequate. In establishing any centre, consideration should be given to the provision of more comprehensive long-term counselling services to child victims of sexual abuse.

If the centre were to cater for children aged up to 18 years, medical examinations for adolescents aged 15 years or more could be conducted by doctors from the Forensic and Medical Sexual Assault Service, which is within The Canberra Hospital’s grounds. The centre could also have rooms available for other services and agencies; for example, providers of services for Indigenous children and young people could attend when necessary. Other services dealing with specific groups could also attend, and crisis counselling services provided by agencies other than ACT Health—such as the Canberra Rape Crisis Centre—could be accommodated on a needs basis.

An alternative to the crisis centre approach is to additionally provide long-term services such as counselling and therapeutic services in the centre. This would mean that children and their families could come to one central location to make use of a range of services. Such an approach might, however, become complicated because of the large number of services dealing with abused children.

Which services should be located in such a centre was a controversial question during the establishment of Puawaitahi. The security of information held by police and child protection services was a major concern. It was ultimately decided to limit the number of agencies in the centre to the three main government agencies dealing with abused children.

**Facilities**

In creating such a centre, consideration must be given to the needs of particular children and young people. A range of age groups with differing needs—from very young children to older teenagers—would use the centre. Facilities for conducting and recording interviews would also need to be included.

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Cooperation between agencies

Puwaitahi was established as a result of the commitment of a number of people at the local level in each of the agencies, and it took some years of discussion before the centre opened in 2003. Centres of this kind must be properly funded. A commitment by government generally, and the relevant agencies in particular, to the success of such a centre and to intensive, continuing collaboration is also vital.

To facilitate the establishment of a centre, and to ensure that collaboration and cooperation between agencies is maximised, a working group should be established, with representation, at both the management and operational levels, from ACT Policing, the Office for Children, Youth and Family Support, and ACT Health. It is essential that there be involvement from both the management and operational levels; lack of commitment from either level will make it difficult to establish a multi-agency centre.

Clientele

The centre would cater for children and young people who have suffered physical or sexual abuse and who need access to at least one of the services located there. The age of the children seen at the centre depends in some respects on the clientele of the agencies involved. This is something that would have to be discussed.

Exchange of information

Their respective Acts provide that ACT Policing and the Office for Children, Youth and Family Support can exchange information. At present s. 28 of the Children and Young People Act 1999 allows the Chief Executive of the relevant department to request that a Territory authority or statutory office holder provide to him or her information, advice and documents relating to the physical welfare of children and young people. Section 29 of the Act allows the Chief Executive to give information relating to the safety, welfare and wellbeing of children and young people to a defined entity or person, in accordance with Regulations, if any. Section 60A of the Commonwealth’s Australian Federal Police Act 1979 provides that the police can divulge information for the purposes of the Act or associated Regulations or for the exercise of any duties, functions or powers under the Act or Regulations.

If there were any difficulties with the exchange of information between agencies located at the centre, these could be resolved by legislative amendment. It appears the current legislation does in fact allow for the exchange of information.

4.3.2 Joint interviewing and investigation

The one-stop-shop model outlined in the preceding section should incorporate joint interviewing and joint investigating between child protection services and police. If such a model is considered unworkable for the ACT, the SARP team strongly recommends that a JIRT-type model, with co-location of police and child protection workers, be adopted as an alternative. Police and child protection workers should work from neutral premises and should collaborate on matters involving criminality. Training should be offered so that both groups can conduct interviews.

It would be necessary to clarify the procedures for referral to the joint investigation or multi-agency centre. The ACT’s Central Intake Service for Care and Protection Services began operations in March 2004. The Service provides a centralised intake point for
allegations of child abuse, including physical and sexual assault. A SACAT officer is located at the Service and decides which matters are referred through to SACAT.

Under the proposed model, referrals would come to the one-stop shop (or the co-located joint investigative team) from the Central Intake Service. Officers in the Central Intake Service should receive adequate training to ensure that appropriate matters are referred to the team.

4.3.3 Regular meetings of all relevant agencies to discuss cases and coordinate responses

Locating the key agencies under one roof and having joint interviewing and investigation will lead to greater collaboration. The Queensland SCAN model is appealing, however, in that it provides a mechanism for incorporating other relevant agencies in the process and ensuring continuing monitoring of cases once they are beyond the crisis stage. As noted, in the ACT the three primary agencies are the police, the Office for Children, Youth and Family Support, and ACT Health. Among other agencies that would play a role from time to time are the Department of Education and Training and the Office of the Community Advocate. Responsibility for coordinating meetings could rest with the Office for Children, Youth and Family Support, as the agency with responsibility for child protection. The Office is more likely to be aware of the different agencies that are involved with a child and their family and would thus be able to identify which agencies need to participate in formulating a case plan for the child.

4.3.4 Regular meetings of all relevant agencies to discuss systemic matters and problems

The fourth element of the proposed model is put forward as a way of ensuring the viability of the entire model and maintaining relationships between the agencies concerned. Regular meetings are essential in the interests of clear lines of communication and a fully coordinated response.

Recommendation A one-stop shop for child victims in the ACT

4.1 A one-stop shop (or multi-agency centre) modelled on Puawaitahi in Auckland should be established in the ACT. The principle calling for the centre’s establishment is that children and young people who are victims of abuse, as well as their families, should need to attend only one location to gain access to the following officers and agencies:

- the Child Abuse Team of ACT Policing’s SACAT
- child protection officers from the Office for Children, Youth and Family Support
- relevant services of ACT Health’s Child at Risk Assessment Unit.

The centre should be established near The Canberra Hospital, in premises that are neutral for all participating agencies.

A working group, with representatives from the management and operational levels of the three agencies that will be located at the centre, should be established. The SARP team could attend meetings of this group in a consultative capacity, to provide information about the models it examined.
4.2 Joint interviewing and joint investigation by police and the Office for Children, Youth and Family Support, along the lines of the New South Wales Joint Investigative Response Teams model, should be instituted, with the following features:

- One member of the police and one child protection officer should work together on the initial response and when interviewing the child.
- Police and child protection officers should be trained in interviewing, and the most appropriate person should conduct the interview.
- The two interviewing officers should pre-plan the interview, so that the maximum amount of information is elicited in one interview.
- The New South Wales Joint Investigative Response Teams policy and procedures on debriefing and developing action plans after an interview should be adopted.

4.3 Regular meetings of all the agencies involved should be held to discuss ongoing cases and ensure a coordinated response, as occurs with the Suspected Child Abuse and Neglect Teams in Queensland. Systemic matters and problems should also be discussed regularly.

4.4 Specialist interviewers

Eliciting information from a child in an interview is one of the challenges for police working in child abuse. Apart from knowing something about the different stages of child development and communication, interviewers must ask questions in a way that is not leading or suggestive of an answer. In the ACT child witnesses are interviewed and the transcript of the interview, which is taped, is akin to a witness statement. The tape is generally not admissible in court, but a transcript is available to the prosecution and the defence and so it is subject to scrutiny.

SACAT officers interview child witnesses. They receive some training in interviewing children as part of the Sexual Offences Investigator Program, a three-week course all SACAT members are required to complete either before joining SACAT or during their first year with SACAT. The part of the course dealing with interviewing children is a two-day component conducted by Dr Martine Powell from the School of Psychology at Deakin University. Members are trained in how to encourage free narrative—that is, allowing the child to tell the story in their own words. The first day of the training deals with theory; the second morning involves a practical exercise interviewing children, and the afternoon is spent reviewing the interviews.

In a number of jurisdictions—notably New South Wales, Victoria, Queensland and New Zealand—legislation provides for the admission of pre-recorded evidence in the form of a videotape of the interview between police and a child witness. The tape is admitted as the child’s evidence-in-chief in criminal proceedings involving child sex offences. The detail of these provisions, their history, and some practical aspects of their implementation are discussed in Chapter 6, where it is recommended that similar provisions be adopted in the ACT.
The main concern when a recording of an interview takes the place of live evidence in court is the quality of the interview. Whether the interview can be used depends on the absence of leading questions in relation to important points. What use can be made of the interview depends on the interviewer being able to cover the criminal elements of each alleged offence. The prosecution is required to provide particulars, such as the date and location of offences, with as much precision as possible. A child who has experienced repeated sexual abuse over time might speak of a number of incidents in the course of an interview, but the interviewer might not be able to confirm dates or other relevant details. The rationale for allowing tapes to be admitted as evidence is that the child needs to be interviewed once only and, although they must attend court for cross-examination, most of the evidence on which the prosecution relies will have been obtained during the interview.

Admission into evidence of an interview tape has implications for the conduct of such interviews and the training of interviewers. Some jurisdictions—most notably New Zealand, which has had legislation permitting the admission of interviews as evidence for almost 20 years—use specialist interviewers to conduct interviews with children. In Victoria one of the main roles of members of the specialist Sexual Offences and Child Abuse Units is to interview child victims and child witnesses of serious crime. A different approach is taken in New South Wales and Queensland, where specialist police dealing with child victims investigate as well as interview children. Whatever approach is taken, in jurisdictions where a tape is admissible as evidence substantial effort and resources have gone into the training of interviewers, and all are trained more comprehensively than the SACAT investigators.

4.4.1 New Zealand: the Evidential Video Units

In New Zealand children are interviewed by members of an Evidential Video Unit. The interviewers have no role in investigation, their primary responsibility being to conduct interviews. The interview is videotaped for use as the child’s evidence-in-chief in criminal proceedings and as the child’s evidence in care proceedings.

Members of the Units come from the police and the Department of Child, Youth and Family Services. There are 45 Evidential Video Units located throughout the country. Each interviewer does about 200 interviews a year, thus constantly building on their skills. They receive two weeks’ initial training, followed by annual training and peer review of videotapes. The training course is recognised internationally as comprehensive and far exceeds the two days SACAT investigators spend learning how to interview children.

The interviewers are skilled at establishing rapport with children and young people, and time is made available to them so that they can keep up to date with the latest developments in our understanding of children’s communication, development and responses to trauma. The benefits of a well-conducted interview are that the process is less traumatic for the child, the best evidence possible is obtained from the child, and the videotape can be used as the child’s evidence-in-chief in court proceedings.

Unit members the SARP team spoke with said their lack of involvement in ongoing investigations allows them to withstand suggestions in court that they have coached the child and to remain at a distance from particular cases. The fact that the interviewers have no involvement in the investigation and are not given any substantial background briefing does, however, raise the question of how all the relevant material can be covered. If the aim is to interview the child once only and use that evidence in court, there could be some advantage if the interviewer was aware of the evidence already collected.
4.4.2 New Zealand: diagnostic interviews

Diagnostic interviews are another important element in New Zealand. These interviews are conducted by members of the Evidential Video Units or child psychologists attached to the long-term services provided by the Department of Child, Youth and Family Services. They are conducted with children who have not made a clear disclosure but in relation to whom there are suspicions of abuse or in cases where a child has clearly disclosed an offence but does not repeat that disclosure during an evidential interview. Children are seen for up to six sessions. The interviewers are trained not to lead a child but to provide opportunities for the child to discuss anything that might have happened to him or her. Notes are taken but the interviews are not taped. If the child discloses some abuse, a taped evidential interview is then conducted.

This system of diagnostic interviews recognises that many children will not immediately disclose abuse and that it may take some time for them to do so. It is a far more comprehensive way of approaching possible abuse of children. It does, of course, require greater resources, but this is seen as worthwhile in New Zealand.

Some years ago the Child at Risk Assessment Unit performed this role in the ACT. If a child did not immediately disclose but there were suspicions of abuse, the Unit would see the child for a number of sessions, and if a disclosure resulted the matter was referred to police. Lack of resources has led to this practice being discontinued, but a properly resourced specialist interviewer service or a better resourced Child at Risk Assessment Unit might be able to resume the service.

4.4.3 Victoria: the Sexual Offences and Child Abuse Units

Victoria Police’s Sexual Offences and Child Abuse Units are units of specialist interviewers that developed out of what were known as community policing squads, which consisted entirely of police officers and were called on to provide support for victims of violence by comforting them during questioning.20 The community policing squad’s role developed into a more proactive one, and in the 1990s the squads became the Sexual Offences and Child Abuse Units. There are now a number of these units throughout the state, in the larger police stations.

The main function of the Units is to offer a specialised response to adult sexual assault and child physical and sexual assault by providing the initial response to victims, including interviewing them. Members of the Units are responsible for attending to the welfare of the victim, interviewing the victim (on tape or by obtaining a written statement), and submitting the tape or statement to investigators in the Criminal Investigation Unit, who then carry out the investigation.

When a Unit receives a report, arrangements are made for the child in question to attend for an interview. When the child arrives there is an initial discussion, and notes are taken either at the time or shortly after. In contrast with Queensland and New South Wales, there is no video or audio taping of the child until a disclosure is made to the police. If a disclosure is made to the interviewer a ‘video audio taped evidence interview’ is conducted with the child. The resultant tapes are admissible as the evidence-in-chief of the

20 The SARP team visited the SOCA (Sexual Offences and Child Abuse) Coordination Office at Victoria Police headquarters in Melbourne in February 2004; the information in this section was obtained during the visit.
child in criminal proceedings\textsuperscript{21}, so it is extremely important that the interviewers be adequately trained. Tapes of interviews can be admitted as evidence in criminal proceedings only if the interviewer is an officer prescribed by the Regulations, which require such officers to have completed training that covers the legislative and evidentiary aspects and skills for interviewing children.

At the conclusion of the interview the audio and video tapes are passed to detectives in the local Criminal Investigation Unit and the Sexual Offences and Child Abuse Unit has no further involvement in the case (unless the interviewer is required to give evidence in court proceedings).

This division between interviewing and investigation is not universally accepted in Victoria as a preferred model. The Victorian Law Reform Commission noted criticisms of the current system in its report on sexual offences, the main one being that the victim builds up a relationship with the interviewer and then the matter is forwarded to another police officer for investigation.\textsuperscript{22} There may be some move towards the Units conducting investigations in the future.

\subsection*{4.4.4 South Australia}

In South Australia children aged less than 7 years are interviewed by psychologists from the Child Protection Service. South Australia does not have legislation permitting the use of tapes of the interviews as evidence.

\subsection*{4.4.5 New South Wales and Queensland: joint investigation and joint training}

In New South Wales Joint Investigative Response Team members interview and investigate, and there can be some advantage in this. One view is that interviews, particularly with children, are most effective if the interviewer has as much background information as possible. This allows the interviewer to ask all the relevant questions in a single sitting and minimises the need for further interviews. Police in Queensland also interview and investigate.

In both states police and child protection officers participate in joint training. In Queensland, Interviewing Children and Recording Evidence is a comprehensive three-week course; in New South Wales, JIRT members complete a three-week course in interviewing children.

\subsection*{4.4.6 Specialist interviewers for the ACT}

Having reviewed the various approaches—ranging from specialist interviewers in New Zealand to interviewers who also investigate in New South Wales—the SARP team concluded that full-time specialist interviewers for children and young people are the preferred option. Both the New Zealand approach and the New South Wales approach have their flaws. The New Zealand approach, for example, where interviewers are completely removed from and unaware of any background information, raises the concern that not all the relevant information might be obtained in a single interview. The flaw in the New Zealand, New South Wales, Queensland and Victorian models, however, is that interviews are conducted by police or child protection workers who, although they receive

\footnotesize{\textsuperscript{21} Section 37B of the \textit{Evidence Act 1958} (Vic).}
\footnotesize{\textsuperscript{22} Victorian Law Reform Commission, \textit{Sexual Offences: interim report}, p. 137.}
training in how to interview children, have no qualifications in the field of child development and psychology. Further, although they have experience in the legal system (particularly if they are police), they do not necessarily have a firm grasp of evidentiary matters, which can lead to tapes of interviews being ruled inadmissible in court.

Although this report focuses on the investigation of criminal offences, there is a role for specialist interviewers in child protection more generally. The Office for Children, Youth and Family Support has serious problems with staff turnover and inexperience; this was emphasised in the Vardon report on child protection in the ACT. Children are being interviewed by staff who are relatively inexperienced. The situation in the Office is not the subject of this report, but the principles underlying the need for expertise and experience when interviewing children for police investigations apply just as forcefully in relation to interviewing children to ascertain risk or whether abuse has occurred.

The SARP team considers that the best approach would be to have a specialist interviewing unit that conducts interviews but does not investigate. Ideally, people with qualifications and experience in child psychology and with some awareness of the legal system should be appointed. Interviewers should receive comprehensive training in the rules of evidence. Alternatively, people with an understanding of the legal framework (such as police) who receive comprehensive training in aspects of interviewing children would be suitable.

Were the ACT to establish a specialist interviewing unit staffed by people with such qualifications, it would be the first model of this kind in Australia. If the unit were to conduct all interviews of children on behalf of the police and the Office of Children, Youth and Family Support, there is no doubt this would provide a considerable amount of work and the unit would need a number of full-time interviewers. Further, if diagnostic interviewing were also included—which could involve a number of sessions with an individual child—the workload would be greater. The figures for 2002 show that SACAT was involved in 208 child abuse incidents. This entailed either allegations of offences against a child or interviewing child witnesses on behalf of other investigators. The number of interviews conducted by the Office far exceeds this.

The specialist interviewers could also be used more broadly, to interview on behalf of the police all child witnesses to serious crimes, as occurs in Victoria. The unit could conduct diagnostic interviews in cases of suspected abuse where no disclosures have been made, as in New Zealand. There might also be some role it could play in interviewing children on behalf of the Office for Children, in matters where there is no criminality involved but care proceedings are likely.

The South Australian model, where child psychologists interview very young children, has merit. Very young children can be difficult to interview, and a thorough grasp of child development and communication would be very beneficial.

If the SARP team’s recommendations in relation to taped interviews with police being admitted as child witnesses’ evidence-in-chief are adopted, more extensive training in evidentiary matters would be required for the specialist interviewers, whoever they might be. The two days’ training provided to SACAT members is far short of the training provided in places such as New South Wales, Queensland, Victoria and New Zealand. Even if the recommendations are not accepted, the training provided to SACAT members is plainly inadequate and in need of review. This is discussed in Chapter 12.

23 Vardon, The Territory as Parent.
4.4 A specialist interviewing unit should be established to conduct interviews with children on behalf of ACT Policing and the Office for Children, Youth and Family Support. Interviewers should have qualifications and experience in child psychology and should receive training in legal aspects. Alternatively, people with an understanding of the legal framework (such as police) could receive comprehensive training in interviewing children. The unit should be located in ACT Policing or in the Office for Children, Youth and Family Support.

4.5 All police and child protection interviews with child victims under the age of 7 years should be conducted by specialists in child development or child psychology who have also received training in relation to admissible evidence.

4.6 Diagnostic interviews should be conducted with children who do not disclose but in relation to whom there are suspicions of abuse, as occurs in New Zealand.

4.5 **Guidelines for interagency approaches to child protection**

Whatever approach is adopted for the ACT, there is a need for a formal, written document that clarifies the roles and responsibilities of the various agencies involved with children who are victims of sexual and physical abuse. At present there is no such document for use by ACT Policing, ACT Health and the Office for Children, Youth and Family Support. A memorandum of understanding between SACAT and the Forensic and Medical Sexual Assault Clinic has been under negotiation for some time and is yet to be finalised. A protocol between SACAT and the Child at Risk Assessment Unit is yet to be signed.

New South Wales has comprehensive guidelines—the 184-page *Interagency Guidelines for Child Protection Intervention*[^24]—that should be used as a blueprint for developing a similar document for the ACT. The New South Wales guidelines are in their third edition and cover the following:

- principles for child protection intervention
- expectations for interagency work
- the roles and responsibilities of agencies—covering 19 agencies or groups of agencies[^25]
- key concepts for interagency work
- the practice framework
- criminal proceedings.

[^25]: Those agencies are the Department of Community Services, NSW Police, NSW Health, the Office of the DPP, the Department of Education and Training, the Department of Corrective Services, the Department of Juvenile Justice, the Department of Sport and Recreation, the Department of Ageing and Disability, the Department of Housing, the NSW Ombudsman, courts and tribunals, the Commission for Children and Young People, the Children’s Guardian, the Community Services Commission, the Health Care Complaints Commission, local government authorities, non-government organisations and the non-government schools sector.
The benefits of guidelines are that they provide clear direction for all agencies involved in the protection of children in our community, demonstrate a commitment to child protection, and guarantee interagency collaboration.

To prepare such a document requires resources, the commitment of the agencies involved, and collaboration at reasonably high levels in those agencies, but comprehensive interagency guidelines for child protection intervention in the ACT should nevertheless be developed.

<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Interagency guidelines for child protection intervention</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.7</td>
<td>Comprehensive interagency guidelines for child protection intervention should be developed, with involvement on the part of all the relevant agencies—among them ACT Policing, ACT Health, the Chief Minister’s Department, the Department of Justice and Community Safety, the Office of the Director of Public Prosecutions, the Department of Education and Training and the Office of the Community Advocate.</td>
</tr>
</tbody>
</table>

**4.6 Support for family members of the victim**

Support for non-offending family members of child victims of sexual offences is an essential part of any best-practice model. The non-offending parent often feels guilt about not having been able to protect their child and might have their own abuse in childhood to deal with. Siblings can be directly affected, too—especially when disclosure of the abuse leads to family breakdown. Families in which abuse has taken place might be reunited if no criminal charges are laid or after the finalisation of criminal proceedings. In those situations, extensive support is needed to ensure the continued protection of the children. This can involve the offender in ongoing counselling and therapy. ACT Corrections has comprehensive programs for sex offenders who have been released from prison or are dealt with by way of non-custodial penalty. States such as Western Australia have services for sex offenders who are not dealt with in the criminal courts. This report does not canvass any of these matters in detail since they are beyond its scope; rather, they are noted here as warranting further consideration.

**4.7 Conclusion**

No one working in the area doubts the need for greater coordination and collaboration between agencies with a role in child protection in the ACT. But ideas will come to nought without commitment, at the highest levels and on the ground in each organisation, as well as a strategic vision and process for implementation. There is potential to greatly improve the situation in the ACT—to catch up to what other places have been doing for some years and to build on experiences elsewhere and come up with a best-practice model for collaboration on child abuse.
The Director of Public Prosecutions and the prosecution of sexual offences in the ACT

Two questions need to be asked in relation to the prosecutorial role in the context of sexual offences. First, how can prosecutors improve the experience of victims of sexual assault who are involved in the prosecution process? Second, is there a way of improving how these matters are prosecuted? This chapter discusses the preparation for and conduct of the prosecution of sexual offences and dealing with the victims of these offences during the process.

Chapter 2 provides an overview of the history, structure and practices of the ACT Director of Public Prosecutions; here we look at current practices in more detail. In order to do this, the SARP team reviewed a number of the ACT DPP’s files on sexual offence matters prosecuted in the Supreme Court and the Magistrates Court and on matters for which the police had sought DPP advice. The team also discussed with a number of DPP prosecutors current practices and potential areas for improvement. In addition, approaches in some other Australian offices of directors of public prosecutions are reviewed, and the following specific aspects of the prosecutorial process are examined:

- specialisation within the DPP
- interaction between police and prosecutors
- continuity of prosecutor
- accountability for and transparency of decision making
- the victim’s role in the prosecutorial process
- protecting witnesses from inappropriate cross-examination
- the mode of giving evidence
- facilities for interviewing evidence
- methods of interviewing.

5.1 Conviction rates in sexual offences

In Australia and elsewhere conviction rates for sexual offences are lower than for all other offences. Levels of reporting of sexual offences have risen nationally and internationally, but conviction rates have fallen in the past 20 years. Table 1.2 compares the ACT rates of conviction for sexual offences with those for other offences from 1995–96 to 2003–04.

The low conviction rates reflect the difficulty of prosecuting sexual offences. Usually the offences are committed in private, and there is little or no corroborating evidence. If there is a delay in reporting to police, physical corroborating evidence is often absent. DNA

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1 The equivalent offices in the states and the Northern Territory have various titles; when discussed collectively here, they are referred to as DPPs.
evidence can often pinpoint the offender and confirm that sexual activity took place, but for people over 16 years of age the issue at trial is frequently that of consent.

5.2 The review of DPP files

The ACT DPP’s files the SARP team reviewed fall into the following categories:

- Supreme Court files— all sexual offence matters (including acts of indecency) completed in the Supreme Court between 1 July 2002 and 30 June 2003
- Magistrates Court files—a sample of matters that were before the Magistrates Court between 1 July 2002 and 30 June 2003. All files in the sample had a charge of sexual intercourse without consent as the most serious charge; the sample did not include any cases involving child victims or charges of acts of indecency
- advice files—advice dealing with sexual offences (including acts of indecency) created in 2003.

5.2.1 The Supreme Court files

Twenty sexual offence matters were completed in the Supreme Court between 1 July 2002 and 30 June 2003. Tables 5.1 and 5.2 summarise the outcomes of the trials.

Table 5.1 Sexual offence matters completed in the Supreme Court, 2002–03

<table>
<thead>
<tr>
<th>Matter</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trials</td>
<td>11</td>
</tr>
<tr>
<td>Matters discontinued prior to trial</td>
<td>6</td>
</tr>
<tr>
<td>Pleas of guilty entered</td>
<td>3</td>
</tr>
<tr>
<td>Total matters</td>
<td>20</td>
</tr>
</tbody>
</table>

Table 5.2 Trials of sexual offences, by verdict, type of victim, and judge-alone or jury trial, 2002–03

<table>
<thead>
<tr>
<th>Verdict, victim and trial type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verdict</td>
<td></td>
</tr>
<tr>
<td>Acquittal</td>
<td>4</td>
</tr>
<tr>
<td>Guilty on at least one count on the indictment</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
</tr>
<tr>
<td>Victim</td>
<td></td>
</tr>
<tr>
<td>Child</td>
<td>6</td>
</tr>
<tr>
<td>Adult</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
</tr>
<tr>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>Judge alone</td>
<td>7a</td>
</tr>
<tr>
<td>Jury</td>
<td>4b</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
</tr>
</tbody>
</table>

a. Four guilty verdicts; three not guilty.
b. Three guilty; one not guilty by direction.

Of the seven judge-alone trials, the accused was found guilty of some or all of the counts on the indictment in four trials; for the remaining three the verdict was not guilty to all

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3 Each file or matter refers to one offender. There may be multiple charges.
4 Section 68B of the Supreme Court Act 1933 provides for an accused to elect to be tried by judge alone.
counts. In the four matters where the accused was found guilty of some or all of the charges, there was corroborative evidence in three and in the fourth the issue was identification. For the three trials where a not guilty verdict was returned, one involved an issue of intent in a special hearing where the accused was not fit to plead. The other two acquittals involved children and were corroborated only by evidence of complaint. In one of the cases the court made adverse findings about the victim’s credibility.

The accused was found guilty of some or all of the counts on the indictment in three of the four jury trials. In the remaining jury trial, a not guilty verdict was directed by the trial judge with the acquiescence of the DPP after the victim gave evidence. Two of the three jury trials where guilty verdicts were returned involved children. The third involved an adult victim and the issue was consent; in that case there were injuries to the victim consistent with her version of events. The two cases involving children rested mainly on the account given by the child. In one of the cases there was some corroboration for one of the three counts.

**Discontinuance of proceedings**

Six Supreme Court matters were discontinued in 2002–03 for the reasons shown in Table 5.3.

<table>
<thead>
<tr>
<th>Matter</th>
<th>When discontinued</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case 1</td>
<td>On day of trial</td>
<td>The victim said on the day of the trial she was unable to proceed and was in danger of self-harm. There had been contact between the prosecutor and the victim prior to the trial and the victim had access to support services. The victim gave evidence at the committal. [Because the victim was aged 14 years at the time of the alleged offence, this is a case where using a tape of her interview with police as evidence-in-chief and not requiring her to attend the committal would probably have led to the case proceeding at trial—see Chapter 6.]</td>
</tr>
<tr>
<td>Case 2</td>
<td>At Criminal Listing Conference</td>
<td>The allegations were from 10 years ago. The victim was aged less than 10 years at the time of the alleged offence. There was no corroboration. Police had decided not to proceed when the matter was first reported some years ago. There was some concern that an application to the Court to stay the proceedings indefinitely would be successful. The victim gave evidence at committal.</td>
</tr>
<tr>
<td>Case 3</td>
<td>At Criminal Listing Conference</td>
<td>The victim was intoxicated at the time of the alleged offence, and the prosecution would have had to rely on s. 67 of the ACT Crimes Act 1900 (intoxication negating consent). There was prior flirtatious behaviour from the victim towards the accused. The victim gave evidence at committal.</td>
</tr>
<tr>
<td>Case 4</td>
<td>At Criminal Listing Conference</td>
<td>The victim was aged 7 years at time of the alleged offence. There were inconsistencies between her initial statement and the committal evidence, and there was no corroboration apart from some complaint evidence. The victim gave evidence at committal. [This is a case that would have been greatly facilitated by using a tape as evidence-in-chief and not requiring the child to attend at committal.]</td>
</tr>
<tr>
<td>Case 5</td>
<td>At Criminal Listing Conference</td>
<td>The victim was aged 12 years at the time of the alleged offence. The committal was held in 1998. The victim was described by the committal prosecutor as a very good witness. The accused did not appear for the trial in 1999. There were other allegations against the accused in respect of another victim. When the accused was apprehended in 2001 he pleaded guilty to these other charges and was sentenced to periodic detention. In 2003 the victim was located. She told the DPP witness assistant she was willing to give evidence. The matter was discontinued by the DPP. The victim gave evidence at committal.</td>
</tr>
<tr>
<td>Case 6</td>
<td>At Criminal Listing Conference</td>
<td>The victim was aged 13 years and had a significant learning disability. The allegation was uncorroborated and there were major inconsistencies in her accounts to police and other witnesses; she could not explain this. The victim did not give evidence at the committal hearing.</td>
</tr>
</tbody>
</table>
As can be seen in Table 5.3, in five of the cases the victim gave evidence at committal. Committals are discussed in Chapter 6. Suffice to say here that it could be argued that committals are performing a useful function in identifying weaker cases. Conversely, it could be argued that committals serve to intimidate witnesses (as occurred in case 1 in Table 5.3). Are victims being put through stressful committal proceedings unnecessarily and could more effort go into the pre-committal inquiries and proofing, so that cases that are unlikely to go to trial are discontinued before the committal? Committals are sometimes used by the prosecution (and the defence) to see how the victim performs as a witness. In many cases this might be able to be ascertained if the prosecutor were to thoroughly proof (that is, discuss the evidence with) the victim. This would allow the victim to avoid the trauma of giving evidence and being cross-examined.

In the Supreme Court over 60 per cent of accused who pleaded not guilty to one or more sexual offences and went to trial in 2002–03 were found guilty of one or more counts on the indictment. If we look at the conviction rate for all sexual offence matters committed to the Supreme Court in the same period, 50 per cent of accused who were committed to the Supreme Court from the Magistrates Court were convicted of one or more counts on the indictment. The remaining 50 per cent is accounted for by the matters that were discontinued prior to trial and matters where the accused was acquitted of all counts on the indictment at trial.

These reasonably strong conviction rates reflect the preparation, commitment and professionalism of prosecutors and the result of properly applying the Prosecution Guidelines in assessing the prospects of a conviction. It may, however, be useful to ask whether cases where corroboration is lacking are not being prosecuted—the ‘oath on oath’ cases. Should more of these cases be brought to trial and the matter be left to the jury (or judge alone)? The question of the application of the ‘reasonable prospects of conviction’ test in sexual offence cases is problematic and is discussed in Section 5.2.4.

5.2.2 The Magistrates Court files

The SARP team analysed a sample of DPP files in 11 matters that were before the Magistrates Court between 1 July 2002 and 30 June 2003. All the matters involved adult victims and at least one charge of sexual assault without consent.

Two of the matters were committed for trial to the Supreme Court. In seven matters no evidence was offered: for four of these no evidence was offered at the committal; for the remaining three no evidence was offered at some stage—at the case management hearing or earlier—before the committal hearing. In the remaining two matters a plea of guilty to a lesser charge was accepted.

Of the two matters that were committed for trial to the Supreme Court, in one a plea of guilty to a lesser charge was accepted and in the other the victim did not attend on the day of the trial and a Notice of Discontinuance of Proceedings was filed.

Discontinuance of proceedings

The reasons for offering no evidence in the seven matters were as follows:

- The victim did not attend court on the day of the committal to give evidence—two cases.

A Notice of Discontinuance of Proceedings is a formal document signed by the Director and filed in the Supreme Court. It brings the proceedings to an end.
• The victim was mentally ill and could not cope with giving evidence—one case.

• There was no reasonable prospect of success—four cases. In three of these cases, because of intoxication the victim did not recall the sexual intercourse.⁶

In some cases it is apparent from the file that the decision to offer no evidence had been cleared with the Assistant Director of the Magistrates Court.⁷ In other cases it is not apparent. On the basis of discussions with prosecutors and notes on files, the SARP team found that decisions to offer no evidence are often discussed with more senior prosecutors. But notes of those discussions are often not made and there is a lack of clarity in the DPP about the level at which such decisions should be made.

The decision to offer no evidence is not taken lightly. This process should be properly documented and the decision not to proceed should be authorised at a sufficiently high level. This is discussed in greater detail in Section 5.5.6.

5.2.3 Written advice

Members of the AFP’s Sexual Assault and Child Abuse Team often refer sexual offence matters to the DPP for written advice about whether to lay charges. Sometimes SACAT members obtain oral advice on an ad hoc basis from prosecutors.

There have been some concerns about whether SACAT has been referring appropriate matters to the DPP. Previous discussions between the DPP and SACAT led to an agreement that the DPP would provide formal written advice only on matters where there was some sensitivity or matters that were complex. It would be beneficial for both SACAT and the DPP if there were broad written guidelines on the sorts of matters where written advice should be sought and on what information needs to be provided.

In reviewing the DPP’s role in providing advice to SACAT before the instigation of proceedings, the SARP team examined the advice given by the DPP in 2003. There were 18 such files, all of them concerned with possible offences of sexual intercourse and acts of indecency. In five of the 18 matters it was recommended that charges be laid⁸; in one matter there were requests for further information; and in 12 matters it was recommended that no charges be laid.

All written advice provided is signed by the prosecutor allocated to prepare it. There is no formal mechanism for advice to be checked by a more senior prosecutor. Not all prosecutors have conducted or instructed in trials involving sexual offences, so it can be

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⁶ Section 67(1)(e) of the Crimes Act 1900 (ACT) provides that consent is negated if it is caused ‘by the effect of intoxicating liquor, a drug or an anaesthetic’. Section 67(3) deems a person to know that another person is not consenting to sexual intercourse if it is established that the person knows the consent of the other person has been caused by the effect of intoxicating liquor. It may be worth testing this provision at some stage in cases where it is clear that the victim was very intoxicated (and in all three cases discussed here there were witnesses to the victim’s state of sobriety). The reason cited for not pursuing these cases is that the victim cannot recall not giving consent; in addition, there is often some degree of flirtation during the period leading to the offence. However, the crucial factor should be the level of intoxication: there is often evidence from other witnesses of the level of intoxication, and ‘flirtatious’ behaviour might also be the result of the intoxication.

⁷ The Assistant Director of the Magistrates Court practice has primary responsibility for determining whether or not to prosecute matters referred by the AFP and other ACT government agencies in the Magistrates Court.

⁸ Of those, one offender has been arrested and charged, there have been summonses issued to three further offenders, and it is intended to summons the fifth person.
difficult for prosecutors who are not trial lawyers to give advice about the prospects of success of a sexual offence matter.

Some matters SACAT refers to the DPP for advice are not appropriate—for example, if SACAT is having difficulty locating a victim to obtain a full statement and seeks advice about whether charges should be laid. Referrals have also been received from the police in matters where the investigation is incomplete and all relevant witness statements have not yet been obtained. Sometimes the suspect has not yet been spoken to by police. Sometimes only part of the brief of evidence is forwarded to the DPP. Generally speaking, the DPP will not be able to provide advice on the basis of incomplete investigations or incomplete briefs. All relevant statements should be provided with any request for advice. SACAT team leaders should monitor (or filter) the matters referred to the DPP.

Given the seriousness of the decision not to prosecute—and the impact on the victim of such a decision—it is desirable that prosecutors with trial experience review any written advice. Ideally, a panel of two or three senior prosecutors would examine and review written advice and all matters where it is intended to offer no evidence in sexual offence matters.

5.2.4 Issues arising from the file review

The ‘reasonable prospects of a conviction’ test

In providing advice to the police or making a decision whether to discontinue a prosecution, prosecutors must consider whether there are ‘reasonable prospects of a conviction’, in line with the DPP’s Prosecution Policy.9 The file review revealed considerable variation in the prosecutors’ application of this criterion to sexual offences and consequently variable outcomes in decision making. This manifests itself in three main ways, as follows.

Corroboration

As noted, sexual offences are usually committed in private, and it is often the word of the victim against the word of the alleged offender. If the incident is recent, there may be physical evidence such as injuries to the victim and forensic evidence such as DNA evidence linking the alleged offender. In many cases, however, by the time sexual offences are reported to police there simply is no physical evidence to support the victim’s allegation. The absence of corroborative evidence—when the prosecution case relies solely on the evidence of the victim—can present challenges, but it is not a unique situation and such prosecutions can lead to conviction.

In the DPP people have differing views about the importance of corroborative evidence. On one hand, there is a view that in the absence of any corroborating evidence there would be no reasonable prospect of success. On the other, it is argued that corroboration is not an essential element for a case to be prosecuted and that such cases, provided there are no inherent weaknesses, should be left to a jury (or a judge in a judge-alone trial). Section 76F of the ACT’s Evidence Act 1971, enacted in 1985, used to provide that in the prosecution of sexual offences the judge must not give a warning that it is unsafe to convict on the uncorroborated evidence of the victim. That section was recently repealed, although the effect of the provision continues in s. 164 of the Commonwealth’s Evidence Act 1995, which abolishes corroboration requirements for all cases.

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9 The Policy is discussed in Chapter 2. It is available online <http://www.dpp.act.gov.au> and in the annual reports of the Office of the DPP.
The prosecutors’ differing views could result in inconsistent decisions to discontinue proceedings.

*Inconsistencies in the evidence*

Inconsistencies in a witness’s statement are often considered indicative of a victim who lacks credibility. There seems to be variation among the prosecutors in the significance attached to fairly minor inconsistencies when deciding whether to continue with a prosecution.

*Credibility*

When deciding whether to continue with the prosecution of a sexual offence matter or whether to advise the police to lay charges, a prosecutor often assesses the victim’s credibility. It is difficult to make that assessment without speaking with the victim. What might seem to be serious problems with a witness’s credibility on paper—such as inconsistency with other witnesses’ statements—can be clarified by speaking directly to the victim.

The files dealing with police requests for advice on whether to lay charges show that in the majority of these matters the prosecutor did not speak to the victim in the course of preparing the advice. The prosecutor is assessing the credibility of the victim on the basis of a statement or statements. This is in contrast with when court proceedings begin; the prosecutor tends to discuss the matter with the victim before coming to a decision. Where credibility is at issue, prosecutors should be encouraged to make a first-hand assessment by speaking with the victim.

*Promoting consistency*

It would be useful if the DPP were to tackle the question of the ‘reasonable prospects of a conviction’ criterion in relation to the prosecution of sexual offence cases. Making decisions about the prosecution of criminal offences is not an exact science, and no definitive rules or guidelines can be set. Nevertheless, it would be helpful if prosecutors discussed some of the issues raised here. This could be done by means of prosecutors involved in the prosecution of sexual offences meeting to discuss a number of case scenarios. A more consistent approach might be the outcome. In Section 5.5.1 a specialist sexual offences unit is recommended for the DPP: the existence of such a unit might also promote greater consistency.

*Prosecutors’ contact with victims*

In Magistrates Court matters prosecutors with conduct of a particular case deal directly with the victim. For Supreme Court matters early contact between the DPP and the victim is the responsibility of the prosecutor who will be instructing at the trial; the trial prosecutor tends to meet the victim closer to the trial date, when the witness’s statement is discussed. When matters are discontinued, trial prosecutors sometimes ask the instructors to advise the victim. This can lead to dissatisfaction on the victim’s part because the person who made the decision—the trial lawyer, who makes a recommendation to the Director of Public Prosecutions—is not available to explain the decision.

In relation to advice files, when SACAT is advised not to lay charges the SACAT member relays this decision to the victim. Victims often want to discuss such a decision with the prosecutor, so prosecutors should take some responsibility for explaining the advice and the consequent decision to the victim. This is discussed in more detail in Section 5.5.3.
**Recommendation Promoting consistency in the ACT DPP**

5.1 DPP managers and senior prosecutors should discuss trends in the prosecution of sexual offences with a view to developing a consistent approach. In particular, the following should be dealt with:

- the ‘reasonable prospects of a conviction’ test and how it applies to sexual offence prosecutions
- the importance or otherwise of corroborative evidence
- factors considered important in assessing credibility
- intoxicated victims and the provisions of s. 67 of the ACT Crimes Act 1900.

5.3 **Discussions with prosecutors**

The SARP team consulted a number of prosecutors in the ACT DPP\(^{10}\), seeking their views on various aspects of the conduct of prosecutions of sexual offences. Some common themes emerged.

5.3.1 **Continuity**

The current practice of matters being handed from one prosecutor to another at the end of the committal process was seen as not being in the interests of the victim. Prosecutors also found it professionally frustrating to have no further involvement in a case about which they had gained considerable knowledge and where they had developed a good working relationship with the victim, the informant and other witnesses. A number of the prosecutors suggested that continuity of prosecutor should be maintained throughout the trial process, with the committal prosecutor conducting the trial if they are sufficiently experienced or otherwise instructing a trial lawyer. The SARP team supports this view and recommends to that effect. Having the opportunity to instruct experienced prosecutors in trials will improve the skills of less experienced prosecutors and provide a training ground for experienced Magistrates Court prosecutors to make the transition to trial work.

5.3.2 **Gender**

Some prosecutors expressed the view that having two male prosecutors speaking to a victim in Supreme Court sexual offence matters was not appropriate and could be intimidating and embarrassing for the victim—especially for child victims. In other agencies dealing with sexual offence victims, gender considerations are taken into account: for example, the doctors who work for the Forensic and Medical Sexual Assault Clinic are all women. This is in no way to suggest that male prosecutors should not prosecute. A recurrent theme in discussions with people involved with victims of sexual offences is that, when it comes to police and prosecutors, empathy with the victim is more important than gender. There does, however, need to be an acknowledgment that a victim could be intimidated by having to attend an appointment with two men they have not met before. Some prosecutors suggested that there be at least one woman on the team of prosecutor and instructor. In committal matters, if two people are proofing the victim the gender balance should be considered. In making these comments, the SARP team notes

\(^{10}\) Time did not allow for all prosecutors to be consulted and the selection was across levels and experience.
that most of the male DPP prosecutors dealing with sexual offence matters are viewed by outside agencies and internally as being very sensitive in their dealings with victims.

5.3.3 Sensitivity and understanding the dynamics of sexual assault

Among the prosecutors a high level of empathy with victims of sexual offences was apparent. Some views expressed about sexual offences and victims of sexual offences did, however, suggest both a lack of understanding of the dynamics of sexual offences and rather antiquated views about gender. These were evident in comments about what the victim was wearing at the time of the offence, how intoxicated she was, and her behaviour in the lead-up to the incident being perceived as flirtatious and therefore somehow contributing to the commission of the offence. These attitudes can be inadvertently conveyed to victims and other agencies, as well as to other prosecutors. Victims might not feel positive about their contact with the prosecutor if such views are conveyed to them. These views can also affect whether cases proceed if it is assumed that a jury would hold similar views.

Views and values of this nature cause concern among other prosecutors and among representatives of external agencies. Training for prosecutors on the dynamics of rape and the associated psychological aspects might redress the situation.

5.3.4 Victims who are reluctant to give evidence

The prosecutors expressed concern that there is insufficient support for victims who are reluctant to give evidence. Some prosecutors were concerned that, in cases where the victim has doubts about giving evidence, the DPP discontinues proceedings too readily. It was suggested that the DPP witness assistant could play an important role in these situations. The witness assistant could see the victim, talk about the process of giving evidence, and try to find out what exactly is worrying the victim. When it is thought a victim might ‘go to water’ as the trial approaches, it was suggested that the prosecutor and witness assistant develop a strategy for dealing with the victim’s anxiety. If a victim failed to appear on the day of the trial the prosecutor could be proactive in seeking adjournments and ensuring that the witness assistant makes contact with the victim.

5.3.5 Closed-circuit television

The prosecutors felt that victims are sometimes being encouraged by some trial prosecutors to give evidence in court and not by closed-circuit television, as they are entitled to do. Some prosecutors argued that it is better for a witness to give evidence in court because it has a greater impact on the jury. ACT DPP prosecutors are not unique in holding such views. The literature on the use of closed-circuit television in sexual offence trials and hearings is discussed in Chapter 6.

5.3.6 Rapport with victims

A common theme was that rapport with victims is very important. It was thought that the prosecutors generally did have this rapport but that there was room for improvement. Rapport is very important with child witnesses: some prosecutors were perceived to be very good with children and these skills should be acknowledged and nurtured.
5.3.7 Consultation with victims

The prosecutors thought that sometimes victims are not fully informed of all aspects relating to the prosecution of the matter. An example is the failure to inform victims of exactly which matters are being proceeded with on an indictment. It is not unusual to put representative counts on an indictment, rather than a separate count for each particular offence. An accused might have been committed on a range of offences but not all are included on an indictment. If victims are not informed of this and the reasons for it they could feel confused and disappointed when they discover the reality. This highlights the need to take action to keep victims informed about these things, as required by the ACT Victims of Crime Act 1994.

5.3.8 Magistrates Court matters

Some prosecutors commented on the fact that there is no formal supervision of prosecutors conducting prosecutions of sexual offences in the Magistrates Court. Assistance from more senior prosecutors and managers is available if it is sought, but less experienced prosecutors are able to decide to discontinue sexual offence prosecutions without formal consultation or approval. Some of the prosecutors argued that there should be a more formalised process for discontinuing matters and more general supervision when they prosecute sexual offences.

5.3.9 Cognitively impaired victims

Some of the prosecutors expressed concern that the DPP does not always deal adequately with victims with disabilities.

5.3.10 Child witnesses

Prosecutors are expected to conduct prosecutions of sexual offences involving child witnesses (from the age of 5 years) without having had any training in how to interview children and lead evidence from them. One prosecutor had received training in interviewing children at the AFP Training College, but there was no in-house training and a number of the prosecutors thought this was an area in urgent need of attention.

5.3.11 Committals

There were varying views about the merits of retaining full committal hearings. (The advantages and disadvantages are discussed in detail in Chapter 6.) Some prosecutors thought that when victims, particularly children, give evidence at committal hearings this leads to a loss of spontaneity in their evidence at trial. Many prosecutors would, however, like committals to remain.

5.3.12 Training

It was generally thought that training was an area in which the DPP could improve. Chapter 12 discusses training.
5.3.13 **Contact with victims when matters are discontinued**

The prosecutors thought there was too little contact with victims when the DPP decides to discontinue proceedings. It is traumatic for a victim when a criminal prosecution in which they are the main witness is discontinued. They might need further contact with the prosecutor in order to understand the decision and come to terms with it. When told of the decision in the first instance, the victim might not absorb all the information or might fail to understand the prosecution’s justification for the decision. It was argued that as a matter of course a follow-up interview should be offered.

5.3.14 **Feedback from victims**

Some prosecutors suggested that if the DPP witness assistant sought feedback from victims after court proceedings have come to a conclusion this would allow the DPP to improve contact with victims generally and would provide an opportunity to pinpoint particular areas of concern.

5.3.15 **The relationship with SACAT**

It was felt that relations between the DPP and SACAT could be improved if SACAT members were invited to relevant Continuing Legal Education sessions conducted by the DPP; conversely, DPP prosecutors could attend SACAT courses. The prosecutors had varying opinions about the utility of having a DPP prosecutor attend SACAT on a regular basis: this is discussed in Section 5.5.2.

5.4 **Other jurisdictions**

The SARP team visited the New South Wales, Victorian and Western Australian Offices of the Director of Public Prosecutions and prosecutors from the New Zealand Crown Law Office and a private firm in New Zealand. It also studied a number of recent reports from various Australian states that have examined the operation of DPPs in relation to the prosecution of sexual offences and child sexual offences.

In all the states visited there were two important factors dictating practices that do not affect the ACT: the sheer number of sexual offence prosecutions and the size of the jurisdiction, both geographically and in population terms. The fact that the ACT DPP does not have to contend with these factors means that it is able to offer a best-practice model. Nevertheless, the ACT DPP does have its own pressures in that it prosecutes summary as well as indictable matters (unlike all other DPPs) and this makes it difficult to manage workloads and allocate work within the Office.

5.4.1 **New South Wales**

The New South Wales Office of the Director of Public Prosecutions has carriage of all indictable matters before the District Court and the Supreme Court and committal matters in the Local Court.

For sexual assault cases, police are required to fax to the DPP within 48 hours a copy of the charges, facts, antecedents and bail forms and any statements. Police must also provide briefs to the Office within 14 days, and a managing lawyer allocates the matter to a prosecutor after receipt of the brief. The matter is also referred to the witness assistant at
this stage, and victims are sent a letter and a pamphlet, *Your Rights as a Victim*, and details of the witness assistant.

There is a policy of continuity of prosecutor and an expectation that the prosecutor who conducted the committal will instruct in the trial, particularly if the trial is complex. Crown prosecutors generally conduct the trials.

There is no formal specialisation of prosecutors, although some tend to prosecute more sexual offences than others. A specialist unit existed until 1994, when it was disbanded along with all other specialist units within the Office. There is a senior prosecutor in a full-time sexual assault policy position. The DPP also participates in a number of consultative committees relating to sexual assault and child sexual assault.

For some years in New South Wales there has been a focus on child sexual assault victims, and a number of reports dealing with the subject have been published. The DPP has also made changes. All prosecutors are provided with a comprehensive manual, the *Child Sexual Assault Manual*, which covers policy, evidence, procedure, modes of evidence and background psychological material and provides interagency guidelines on working with children.

Training for prosecutors is encouraged and is provided by means of workshops, mandatory Continuing Legal Education lectures, attendance at conferences and seminars arranged by outside agencies, and advocacy workshops.

The report of New South Wales Legislative Council’s inquiry into child sexual assault prosecutions discussed some aspects of the New South Wales Office of the DPP’s practices and procedures, and some of those are pertinent to this review.12

**Communication with victims and families**

A number of submissions from sexual assault counsellors and community legal centres informed the inquiry that the information police officers and prosecutors gave to victims and their families about the criminal justice process was often unduly pessimistic, focusing on the probability of distress and the small chance of conviction. As a result, some victims and their carers decide against pursuing a prosecution. This was despite the fact that at the highest levels of both police and the DPP the view was that any information about a child victim’s participation in the criminal justice system should be presented impartially and without bias.

The report acknowledged that the decision whether a child witness should participate in a criminal prosecution is a difficult one for the child’s family or carers and that in some cases the child’s interests would not reflect the broader community’s interest in convicting child sex offenders. It stressed, however, that painting an overly negative picture of the process should be avoided and recommended that the DPP and the Commissioner of Police use internal communication to remind staff of the need for impartiality when presenting to victims and their carers information about the consequences of pursuing a prosecution for a child sexual assault. The report noted, though, that this was a superficial

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11 All matters that will involve the Witness Assistance Service are entered into a database before being allocated to a prosecutor.
12 NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*. 

*Responding to sexual assault: the challenge of change*
measure and that eliminating the sources of stress would remove the motivation to
discourage victims and their carers from proceeding.\textsuperscript{13}

Failure to provide progress reports to victims throughout the prosecution process was also
seen as an area of concern for police and prosecutors.\textsuperscript{14} Carers had difficulty finding out
what was going on, and it was left to them to initiate contact with the police and the DPP.
The New South Wales Charter of Victims’ Rights establishes a right for a victim to be
advised of the progress of their case when they request that information. The report
recommended that both the police and the DPP institute policies for contacting victims.\textsuperscript{15}

\textit{Sensitivity to children}

In her submission to the Legislative Council inquiry, the New South Wales Commissioner
for Children, Gillian Calvert, recommended that specialist training in the effects of child
sexual assault and the stress a criminal prosecution can cause to children—with a
particular focus on appropriate language and techniques for interviewing children—be
mandatory for all prosecutors. The inquiry adopted this recommendation as part of its
proposal for a new specialist Child Sexual Assault court.\textsuperscript{16}

\textit{Familiarity with the prosecutor}

The report identified familiarity with the prosecutor as a major concern.\textsuperscript{17} Heavy
workloads meant that often DPP prosecutors were not meeting child victims until a few
days before the trial, and this was insufficient for establishing rapport with the child.
Quoting the 2002 Eastwood and Patton report, which found that one-third of child victims
of sexual offences interviewed for the study did not meet the prosecutor until the day of
the trial, the report noted, ‘The importance of maintaining continuity of representation by
prosecutors and developing familiarity appears to be well established among experts’.\textsuperscript{18}

5.4.2 Victoria

The Victorian Office of Public Prosecutions has a specialist sexual offences section that
deals with sexual offences that are complex, where there are multiple victims or offenders,
and historic offences.\textsuperscript{19} The section conducts some of the committals and others are
allocated within the Office or to the private bar.\textsuperscript{20} After the committal hearing the victim is
sent the transcript of their evidence at the committal hearing, as well as any statements or
transcripts of interviews with the police. The victim attends the Office to meet the witness
assistant, who shows them the tape of their interview if a child (which in Victoria can be
played as the child’s evidence-in-chief) or their statement if an adult. The DPP solicitor
also meets the victim, but the role of discussing the previous statements and evidence
seems to fall to the witness assistant.

The lawyers in the specialist section instruct in trials, although they instruct in a number
each week and so cannot be consistently present during trials. The trials are usually briefed

\textsuperscript{13} ibid., p. 29.
\textsuperscript{14} ibid., pp. 31–6.
\textsuperscript{15} ibid., p. 36.
\textsuperscript{16} ibid., p. 38.
\textsuperscript{17} ibid., pp. 46–9.
\textsuperscript{18} ibid., p. 48.
\textsuperscript{19} In Victoria the offences are rape and sexual penetration: for ease of reference the term ‘sexual
assault’ is used here when discussing interstate offences.
\textsuperscript{20} In this respect Victorian practice differs from that in the ACT, where the private bar prosecutes
matters only in exceptional circumstances.
to the private bar. The barrister meets the victim on the day of court and does not proof the victim.

The Victorian Law Reform Commission’s *Sexual Offences: interim report* argues that any changes to procedure and evidence laws are unlikely to meet the Commission’s objectives if they are not accompanied by changes to the culture of the criminal justice system. To support such systemic changes—and ultimately to ensure that victims (as well as the accused) are treated fairly and with dignity—the Commission considers that education of prosecutors is essential.

The Commission noted the considerable variation in the approach prosecutors take to the prosecution of sexual assault cases. There was variation in their knowledge of the consent provisions, the rape shield provisions preventing the raising of a victim’s past sexual experience, and the extent of objection to irrelevant or offensive cross-examination.

As a result of the Commission’s consultations with the Office of Public Prosecutions, the Office has implemented a training program for prosecutors, to help them when they appear in sexual offence cases. The program covers technical aspects of sexual assault trials, such as relationship and propensity evidence. The Commission’s recommendation was that the Office also train prosecutors in how victims are affected by sexual assault and the ways prosecutors could minimise the court system’s impact on victims.

The Office is also developing a strategy for promoting discussion and information sharing among prosecutors about best-practice approaches and strategies for dealing with difficulties that commonly arise in sexual offence cases.

### 5.4.3 Queensland

In 2003 the Queensland Crime and Misconduct Commission conducted an inquiry into the criminal justice system’s handling of sexual offences. The inquiry arose from a previous Commission inquiry into the handling of allegations of sexual offences on children by a prominent swimming coach in 2002. The 2002 inquiry dealt with a specific case and led to the more general 2003 inquiry, which covered offences against children and adults.

The Commission identified a number of concerns in relation to the DPP, including the following:

- the need for specialist expertise
- concerns about case management (including preparation) and continuity of prosecutor
- the transparency of the decision-making process

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23 This training was under way when the SARP team consulted the Office in November 2003. The Office had had a day’s training with Dr Martine Powell, a child development specialist who provides training to SACAT in the ACT.


• communication between the police and the prosecution and the victim and the prosecution
• coordination of communication between the police, the prosecution and victim
• communication with the defence—including disclosure and charge bargaining
• workloads within the Office of the DPP
• victims’ rights (including the role of the victim liaison officer) and the absence of a complaints process for victims.

The Commission made detailed recommendations in relation to the DPP, among them the following:

• Senior managers of the police and the Office of the DPP should hold regular meetings to discuss the progress of sexual assault matters under investigation and before the courts.
• A Prosecution Review Committee should review all sexual offences that fail at committal, are discontinued by the Office of the DPP or fail before the higher courts, including the Court of Appeal.
• All legal staff and victim liaison officers should receive training in the nature and extent of abuse, child development, disclosure and reporting of abuse, interviewing techniques and historical cases.
• All decision-making processes in the Office of the DPP should be fully documented.
• Written policies should be developed for formal communication with police investigators and their supervisors about all sexual assault matters. This should include written reasons for decisions made by the Office of the DPP.
• Written policies should also be developed for formal communication with victims, with written summaries of reasons for decisions to be prepared.
• The police and the Office of the DPP should prepare formal protocols dealing with who is to communicate with victims in relation to decisions made in sexual assault cases.
• The Office of the DPP should provide to police and victims written reasons for decisions.

5.4.4 Tasmania

Since 1991 the DPP in Tasmania has had a specialist unit dealing with sexual assault matters.26 The police advise the unit when someone is charged with a sexual assault; they fax the charges and facts to the DPP within 48 hours and the matter is allocated to a prosecutor, who contacts the victim within a week and maintains that contact throughout the process. The DPP also sends victims information about the usual course of proceedings.

26 Discussion with Michael Stoddart, Tasmanian DPP Office, November 2003.
5.5 Specific aspects of the prosecutorial process

Taking into account the SARP team’s review of the ACT DPP’s files, its discussions with prosecutors and the foregoing overview of prosecution offices elsewhere, we now turn to specific aspects of the prosecutorial process that are of relevance to the work of the ACT DPP.

5.5.1 Specialisation within the ACT DPP

In the ACT DPP at present there is no one who specialises in sexual offences. Similarly, in DPP offices in Western Australia, New South Wales and New Zealand the use of specialist prosecutors for sexual offences is not formally embraced. In Tasmania, however, there is a specialist unit, in New South Wales there is a senior legal officer dealing with sexual assault policy, in Victoria there is a sexual offences section, and in all three organisations there are senior practitioners whose main practice is in sexual assault matters. There is thus a degree of concentration of knowledge and experience that other prosecutors can draw on.

A number of the recent reports on sexual assault prosecutions promote some form of specialisation as essential to the conduct of the prosecution of sexual offences. One of the main recommendations of the New South Wales Legislative Council’s report concerned the establishment of a specialist court for child sex offences, with prosecutors specifically trained in child development and other matters pertaining to sexual offences on children.

The Queensland Crime and Misconduct Commission’s report also discussed specialisation. There had been a specialist unit in the Queensland Office of the DPP in the 1980s, but it was disbanded. The Commission heard evidence that the Tasmanian Office of the DPP had a specialist unit that worked well in collaboration with specialist police. The Commission considered that the formation of a specialist unit was not necessary in the Queensland Office for two reasons: first, the volume of work was too great for a single unit; second, there were workplace health and safety concerns and the Office, unlike the Queensland Police Service, did not have access to the support (such as counselling and psychologists) that might be needed.

As discussed in Chapter 2, a Sexual Offences Unit was established in the ACT DPP in 1991; it liaised with ACT Policing’s Sexual Assault Unit and provided advice. The DPP Unit’s senior prosecutor managed all sexual assault matters in the Magistrates Court, conducted most of the committals, kept up to date with case law and legislation, and provided written advice to the police; other prosecutors conducted sexual assault trials. In the SARP team’s discussions with some former prosecutors, it emerged that, although there had been problems with burn-out and workloads, the Sexual Offences Unit was thought to have worked well. It was also suggested that such a unit would function more effectively if it consisted of a cell or unit, rather than one prosecutor only, with rotation out of the position after a reasonable period.

At present in the ACT DPP there is specialisation with the Family Violence Intervention Program. That team consists of one senior prosecutor, two prosecutors and an administrative assistant. The DPP witness assistant is also part of the team, although her work extends into other areas as well. The team deals with the prosecution of all family
violence offences\textsuperscript{27}, allowing prosecutors to develop expertise in the relevant law and in dealing with victims of family violence. The team has been part of the development of an interagency approach that is unique in the ACT criminal justice system. Its establishment was one of a number of important changes made in order to better deal with family violence. The Magistrates Court developed a separate Family Violence List; the police developed new policies and embarked on a comprehensive family violence training schedule for all ACT police; the Department of Corrective Services developed specific programs for family violence offenders; and a case-tracking process, involving weekly meetings with all agencies involved, was developed.

Although the number of sexual offences is smaller than the number of family violence cases, the complexity of sexual assault cases is such that specialisation is warranted and would improve the ACT DPP’s response to victims. SACAT has expressed an interest in a specialist unit. At present its requests for advice go to any one of a number of prosecutors, but its preference is to have a specific prosecutor to whom it can go for advice.

A possible model for a specialist unit would entail a senior prosecutor and a junior prosecutor. The unit would have responsibility for monitoring the progress of all sexual offence matters through the Office, including SACAT requests for advice, and all matters before the Magistrates and Supreme Courts. The unit would not conduct all prosecutions of sexual offences, but it would have responsibility for allocation of the matters in consultation with the DPP management team. It would maintain a library of relevant case law and legislation and produce for prosecutors a manual on the prosecution of sexual offences, along the lines of the New South Wales Office of the DPP’s \textit{Child Sexual Assault Manual}.

The unit would also arrange training (delivered both to and by the Office) and liaise with outside agencies in relation to anything that arises in specific cases and more generally. If a system of interagency case tracking were implemented, a prosecutor from the unit would attend those meetings. The unit could also develop and maintain a database of all sexual offence matters; this would allow it to track matters through both courts (including qualitative information), which might be useful for policy development. The provision of written advice to SACAT would be coordinated to ensure consistency.

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\textbf{Recommendation} & \textbf{A specialist sexual offences unit in the ACT DPP} \\
\hline
5.2 & A specialist sexual offences unit comprising a senior prosecutor and a junior prosecutor should be established within the ACT DPP. The unit would be responsible for the following: \\
& \begin{itemize}
\item conducting committals and summary hearings, conducting or instructing in trials, and instructing in appeals
\item monitoring all sexual offence matters dealt with in the DPP
\item maintaining an up-to-date library of case law and legislation
\item providing policy advice
\item liaison between SACAT, other relevant areas of ACT Policing, and the DPP
\item liaison between the DPP and outside agencies
\item coordinating training for prosecutors
\end{itemize} \\
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\textsuperscript{27} The definition of ‘family violence’, adopted from the \textit{Domestic Violence Act 1986} (now repealed), covers violence occurring in the following familial relationships: spouses, ex-spouses.
5.5.2 Interaction between police and prosecutors

SACAT has said it would like greater involvement from the DPP at an earlier stage and suggested that a prosecutor might be located at SACAT part time. This would have resource implications for the DPP. The prosecutor’s role would need to be clarified—for example, whether the prosecutor would provide advice on investigations in progress and, if so, how that would sit with the independence of the DPP and the conduct of matters in court. If the prosecutor were to provide advice in the way it is currently provided, the question that arises is whether there is any value in having a prosecutor at SACAT as opposed to at the DPP.

The idea of locating a prosecutor at SACAT has its roots in the child advocacy centres in the United States, where prosecutors from the District Attorney’s Office are able to become involved at the early stages of investigations. There is, however, an important difference between the role of prosecutors in the United States and those in Australia: in the United States they have an investigatory role, whereas in Australia there is a very definite separation between the investigatory and prosecutorial functions. Independent offices of directors of public prosecutions were established in all Australian jurisdictions in the 1980s to ensure independence in the conduct of criminal prosecutions. Essential to this independence is the separation of the investigation and prosecution functions in the criminal justice system.28

The power of the ACT Director of Public Prosecutions is limited by the statute under which the position is created. The Director of Public Prosecutions Act 1990 provides that the Director’s functions are the institution and conduct of prosecutions on indictment or summarily29 and the doing of anything incidental or conducive to the performance of such a function.30

Placing a prosecutor at SACAT might offer some benefits, but the role would have to be clearly defined. If a prosecutor became involved in the investigation by directing it in the early stages, that prosecutor could become a witness and be precluded from conducting the prosecution of the case. In cases where police wish to discuss with a prosecutor whether or

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28 Queensland Crimes and Misconduct Commission, Seeking Justice, p. 38.
29 Section 6(1)(a)–(c).
30 Section 6(1)(k).
not to lay charges, this advice can be properly given only after all statements are made available to the prosecutor. It could be pre-emptive to give advice at an earlier stage, before all the evidence is obtained. What might look like a weak case can strengthen considerably once all relevant statements and other evidence are obtained.

There are undoubtedly cases where a prosecutor’s early consideration of the evidence will be beneficial. The prosecutor can help investigators identify items for forensic analysis, other witnesses or lines of investigation. This could, however, be done just as effectively by a prosecutor in a dedicated unit at the DPP and available to speak to SACAT when necessary.

Early contact with victims is put forward as a reason for having a prosecutor at SACAT, but this argument is flawed since the matter could ultimately be allocated to any one of a number of prosecutors. It is not essential to the prosecutor’s job to meet the victim shortly after they have made a complaint. It is, of course, beneficial if a victim feels their case is being looked after as soon as proceedings have begun: this can be accommodated if the DPP makes early contact with the victim, either through the allocated prosecutor or through the witness assistant.

Nevertheless, there could be some benefit in having a part-time DPP presence at SACAT to give advice on legal and evidentiary aspects. Because of the previous ACT Policing rotation policy, police were with SACAT for only two years, so corporate and individual understanding of the legal and evidentiary complexities of child and adult sexual assault is restricted. A prosecutor could attend for half to one day a week and provide advice about things such as consent, hearsay and evidence of uncharged acts, as well as the submission of items for forensic analysis.

The current system of seeking formal written advice should be retained. A prosecutor attending for a brief period each week could not deal with complex advice in that time, and there is no reason for having a prosecutor at SACAT to do this when it is already done in the DPP. Instead, the prosecutor’s task would be to help investigators obtain as much relevant and potentially admissible evidence as possible at the earliest point in the investigation.

Benefits would ensue for both SACAT and the DPP if regular meetings were held to discuss general matters arising and the progress of specific cases. The senior prosecutor from the proposed sexual offences unit could attend, having been briefed by prosecutors on the progress of particular cases. This would facilitate communication about individual cases and the identification of systemic problems.

Joint training, and training for SACAT by DPP prosecutors on legal and evidentiary issues that arise in sexual offence cases, would assist police in carrying out their investigations. This is discussed in Chapter 12.

### Recommendations

| 5.3 | A senior prosecutor should attend SACAT for half to one day each week to discuss with investigating officers legal and evidentiary matters arising in particular investigations. Initially, this could be done for a trial period of three months. Consultation with the prosecutor should be approved by the relevant SACAT team leader. |
5.4 Regular meetings between the SACAT team leaders and the senior prosecutor from the proposed sexual offences unit (or another senior prosecutor if there is no such unit) should be held to discuss current prosecutions and systemic problems. The senior prosecutor should be briefed by other prosecutors on the current status of all sexual offence prosecutions; the SACAT team leaders should also be briefed by the investigators. These briefings should include non-SACAT sexual offence prosecutions.

5.5.3 Advising ACT Policing about whether to lay charges

Prosecutors prepare written advice to the police and sign it on behalf of the Director of Public Prosecutions. As noted, there is no formal process whereby this advice is checked by a manager or senior prosecutor in the Office, and there is considerable variation in the consistency of the advice provided. Additionally, police requests for advice are sometimes inappropriate or premature, requiring more investigation before being referred to the DPP. In some cases there appears to be insufficient monitoring or filtering of these requests before they are sent to the DPP.

Many requests for advice involve prosecutors assessing the credibility of a victim and their account. The SARP team’s review of advice files shows that, in the majority of cases where assessing the victim’s credibility is an essential part of the provision of the advice, prosecutors are making these assessments without having contact with the victim and other relevant witnesses. In one matter the DPP advised the police not to lay charges on the basis of the victim’s statement to police being inconsistent with the statement of another witness, who was a close friend of the accused. Rather than questioning the witness’s recollection or discussing the matter further with the victim to explore the inconsistency, the DPP advised the police not to lay charges.

SACAT and the DPP should discuss the sorts of matters SACAT will refer for advice, the material to be provided by SACAT, and the time frame for the provision of advice. As a guide, unless the advice sought relates to specific threshold issues, such as whether the conduct complained of amounts to an offence, matters should not be referred to the DPP while any statements are outstanding or before the suspect has been interviewed or offered an interview. Requests for advice should be accompanied by all relevant witness statements and should not be forwarded until all statements have been obtained. And DPP prosecutors should have a set time within which to provide the advice.

In the absence of unusual circumstances that have been discussed with a manager, prosecutors should meet with victims, and other witnesses as necessary, in the course of preparing an advice. This will serve several purposes: allow the prosecutor to assess how the witness will perform in court should they be required to give evidence, give the victim a chance to provide any further relevant information, and afford the victim a greater degree of involvement in the process.

In the interest of quality and consistency, all written advice should be authorised by the Deputy Director or the Assistant Directors of the Magistrates Court and Supreme Court practices and should be kept in a central register in the Office of the DPP. If a specialist sexual offences unit is established, the unit could prepare all written advice on sexual offence matters—or at least oversee it.

If the prosecutor advises that no charges be laid, the victim should be offered the opportunity to meet and discuss this. Written reasons for the advice, approved by a manager, should be provided to the victim or be sent to the police to send to the victim.
Because of the serious nature of sexual offences, the police should not seek telephone advice from the DPP. All requests for advice should be in writing. Urgent advice should be sought by email, directed to the Deputy Director for allocation. This will ensure that all advice is recorded in writing.

<table>
<thead>
<tr>
<th>Recommendations</th>
<th>ACT Policing's requests for advice</th>
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<tr>
<td>5.5</td>
<td>Guidelines should be developed for ACT Policing's requests for advice from the DPP. The guidelines should cover the types of matters to be referred, the material to be provided by SACAT, time lines, and procedures for communication between the two agencies. All requests for advice should be in writing, with urgent requests made by email to the Deputy Director. Prosecutors should record their responses, which should be kept in a central location.</td>
</tr>
<tr>
<td>5.6</td>
<td>Unless in unusual circumstances it is deemed unnecessary, prosecutors preparing an advice should meet the victim and other relevant witnesses. If a prosecutor proposes to write an advice without discussing the matter with the victim or other relevant witnesses, this should be discussed with a manager and noted on the file.</td>
</tr>
<tr>
<td>5.7</td>
<td>All written advice should be authorised by either the Deputy Director or the Assistant Directors of the Magistrates Court and Supreme Court practices.</td>
</tr>
<tr>
<td>5.8</td>
<td>Where the DPP recommends to SACAT that charges not be laid, the prosecutor providing that advice should meet the victim—as well as the informant, separately—to explain the decision. The prosecutor should also provide to the victim written reasons that have been approved by a manager.</td>
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5.5.4 **Continuity of prosecutor**

Continuity of prosecutor—whereby one prosecutor has carriage of a matter throughout its course as it proceeds through the Magistrates Court, the Supreme Court and to appellate level—was raised as a significant concern by a number of prosecutors in the ACT DPP. As noted, in the ACT the usual course of events is that a prosecutor has carriage of a matter during the committal process, then the matter is handed over to another prosecutor and the committal prosecutor has no further involvement.

A number of prosecutors in the ACT DPP pointed out that continuity offers several benefits. The rapport established between the committal prosecutor and the victim can continue, reducing the stress to the victim during their involvement with the criminal justice system. From a resource point of view, having the same prosecutor throughout the proceedings would prevent duplication within the DPP and obviate the need for several prosecutors to become familiar with the material in question. Under the current system the experience of seeing a witness give evidence in the committal hearing is generally not taken advantage of: if there were continuity of prosecutor into the Supreme Court the criminal prosecutor’s first-hand observations would be of great benefit. Less experienced prosecutors do not usually conduct trials, but they are able to instruct the trial prosecutor. Their knowledge of the case and their previous contact with the victim could be useful for the trial prosecutor, and the opportunity to instruct would add to their experience and skills.

Other DPP offices the SARP team visited saw continuity of prosecutor as desirable but not always achievable as a result of listing arrangements and workloads. The listing arrangements in the ACT Magistrates Court and Supreme Court present their own challenges, but some attempt at achieving continuity of prosecutor should be made.
5.9 There should be a policy of promoting continuity of prosecutor between the Magistrates Court and the Supreme Court in all sexual offence matters. Depending on their degree of experience and the complexity of the matter, prosecutors appearing in committal proceedings should either instruct or appear as counsel in the Supreme Court.

5.5.5 Discontinuation of sexual offence prosecutions

The decision to institute criminal proceedings is generally made by the police. The ACT Director of Public Prosecutions Act 1990 provides that, once proceedings are instituted, the Director of Public Prosecutions should take over the conduct of prosecutions. The Act also gives the Director the power to take over private prosecutions and to decide whether to continue with a prosecution. The process of discontinuing a prosecution in the Supreme Court, by means of filing a Notice of Discontinuance of Proceedings, is authorised by the Director or the Deputy Director; for matters before the Magistrates Court, this decision-making process is devolved to individual prosecutors.

Discontinuation of prosecutions in sexual offences is an important question for both individual victims and the community at large. Some recent high-profile cases in Australia—where allegations of sexual assault were made but charges were not laid as a result of DPP advice or charges were laid then discontinued by the DPP—have attracted much media attention and comment. Sexual offences have a notoriously high attrition rate throughout the criminal justice process.

There are many reasons for cases not proceeding to trial. The prosecutor might take the view that there are no reasonable prospects of a conviction, for example, or the victim might be reluctant to give evidence or be unable to give evidence as a result of age or disability.

Why prosecutors discontinue cases

Some interesting work on why prosecutors discontinue cases has been done in the United States. One study examined ‘case screenings’ in two District Attorney’s Offices over nine months. It noted that prosecutors tend to favour the ‘when in doubt, reject’ rule. Their behaviour was oriented towards avoiding the error of filing cases that were not likely to result in a conviction, rather than avoiding the error of rejecting cases that will probably end in conviction. Thus prosecutors actively looked for ‘holes’ or problems that would make the victim’s version of what happened unbelievable or not convincing beyond reasonable doubt—and hence unconvictable.

A central feature of the prosecutors’ accounts of case rejection was discrediting the victim’s allegations of sexual assault, and the study found that two techniques were being used to do this. The first technique was referred to as the ‘discrepant account’. This involves the prosecutor questioning the credibility of the victim’s allegation by finding inconsistencies between the victim’s account given to police and that given to the prosecutor. The prosecutor sees the inconsistencies as discrepancies in an account of a major event—that is, an event so significant that no one would ever confuse details, forget them or get them wrong. Such discrepancies are distinguished from ‘normal

inconsistencies’, which are those that are expected and explicable because the victim is confused or upset after the assault.

The second technique for discrediting the victim’s account involves using ‘official typifications’ of ‘rape-relevant behaviour’. This is the knowledge that prosecutors develop about how particular kinds of rape are committed, the typical post-incident interaction between the parties, and the typical emotional and psychological reactions to rape. If the description given by the victim does not accord with a prosecutor’s assumptions about typical rape-relevant behaviour, the credibility of the victim is diminished in the eyes of the prosecutor. The study raises questions about how much the prosecutors’ own value systems and assumptions colour their judgment of the credibility of victims and consequently whether matters should be prosecuted or not.32

Discussions among managers and senior prosecutors of the ACT DPP, as proposed in recommendation 5.1 here, would provide a forum for canvassing these broader questions in the ACT context.

**Discontinuation practices in the ACT**

As noted, decisions to discontinue proceedings are important decisions that should be made at a suitably senior level and be properly recorded. At present, in Magistrates Court matters there is no formal requirement to put such a decision before a manager. There is often informal consultation, but decisions to discontinue can be made by reasonably junior prosecutors on the basis that there are no reasonable prospects of success at trial.

Any decision to discontinue proceedings in the Magistrates Court should be made by either the Deputy Director or the Assistant Director of the Magistrates Court practice after receiving advice from the prosecutor responsible for the matter. In all but very rare cases a recommendation to discontinue should be made only after the proofing of all relevant witnesses, and once it has been decided to discontinue the victim should be advised in person. The informant should also be advised. The reasons for the decision, as authorised by the Assistant Director or Deputy Director, should be sent to the victim and the informant: these may well be differently drafted letters.

As noted, in the Supreme Court matters are discontinued by the filing of a Notice of Discontinuance of Proceedings, which must be authorised by the Director or the Deputy Director. There is thus a more complete recording of reasons. The trial prosecutor should nevertheless advise the victim in person of the decision and the reasons for it. Written reasons should also be provided to the victim and the informant.

The victim should be contacted within a week and offered a follow-up appointment with the prosecutor or DPP witness assistant to debrief and discuss the discontinuance.

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Recommendations  Discontinuation of prosecutions

5.10 Decisions to discontinue sexual offence proceedings in the Magistrates Court should be authorised by the Assistant Director of the Magistrates Court practice or the Deputy Director after receiving advice from the allocated prosecutor. For matters before the Supreme Court, the current procedure for discontinuance of prosecutions, involving authorisation by the Director or Deputy Director, should continue. Consideration should be given to having all sexual offence matters to be discontinued in the Magistrates Court and all advice matters recommending that no charges be laid considered by a panel of two or three senior prosecutors, including at least one of the Deputy Director or Assistant Director, to ensure that there is consistency and that the decisions are in keeping with the DPP Prosecution Guidelines.

5.11 All decisions to discontinue proceedings should be supported by written reasons, prepared by the allocated prosecutor. The reasons should be conveyed to both the victim and the informant in writing. Because of the sensitivity of such matters, the written reasons should be authorised by the Assistant Director of the Magistrates Court practice or the Deputy Director. For Supreme Court matters, the reasons should be authorised by either the Deputy Director or the Assistant Director of the Supreme Court practice.

5.5.6 The victim's role in the prosecutorial process

The victim’s role in the prosecutorial process has traditionally been seen as minimal, with victims being typified as mere witnesses. Grass-roots victims’ movements in the 1970s and 1980s—sparked by concern that the balance in the criminal justice system was too heavily skewed in favour of the accused—have led to greater awareness of the role of victims in the criminal justice system.

In 1985 the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which sets out standards for the treatment of victims. The Declaration states that victims should be treated with compassion and respect for their dignity. The responsiveness of judicial and administrative processes to victims’ needs should be facilitated by informing victims of their role, the scope, timing and progress of the proceedings, and the disposition of their cases. Victims’ views and concerns should be allowed to be presented and considered at stages of the proceedings where their personal interests are affected. Victims should receive the assistance they need through governmental or other means. Finally, police, justice and other relevant personnel should receive training to make them aware of the needs of victims.

In a number of Australian jurisdictions legislation now provides for compensation to victims of crime, allowing the admission of victim impact statements in sentencing proceedings and enshrining victims’ rights. In the ACT the Victims of Crime (Financial Assistance) Act 1983 provides for financial assistance for victims of crime, the Crimes Act 1900 provides for victim impact statements to be tendered in sentencing proceedings, and the Victims of Crime Act 1994 sets out governing principles for the treatment of victims of crime and establishes a Victims of Crime Co-ordinator and Victims’ Services Scheme. Section 4 of the Victims of Crime Act provides that victims should be dealt with in a sympathetic, constructive and reassuring way. They are also to be given relevant

33 G Flatman & M Bagaric, ‘The victim and the prosecutor: the relevance of victims in prosecution decision making’, Deakin Law Review, vol. 6, 2001, p. 238. The authors are the Honourable Justice Geoffrey Flatman, Justice of the Supreme Court of Victoria and Adjunct Professor, School of Law, Deakin University, and Dr Mirko Bugaric, Senior Lecturer, Faculty of Law, Monash University.
34 ibid.
35 These services are examined in Chapter 10.
information—such as information about the charges, any change to the charges, any
decision concerning the acceptance of a plea of guilty to a lesser charge, decisions to not
proceed with a charge, the trial process, and the outcome of any criminal proceedings.
Under s. 5 of the Act a person who performs a function in the administration of justice
shall, in addition to any other relevant matter, have regard to the governing principles
referred to in s. 4. Prosecutors must have regard to the governing principles when dealing
with victims of crime.

It is not easy to precisely define the victim’s role in the prosecutorial process. Unlike other
legal practitioners, whose duty is to the court and to the client, prosecutors occupy a
unique position, which is encapsulated in the ACT DPP’s Guidelines for Prosecutors: ‘The
barrister appearing for the Crown in the criminal case is the representative of the State and
his function is to assist the court in arriving at the truth’. In R v Richardson, the High
Court stated, ‘[The prosecutor] has the responsibility of ensuring that the Crown case is
presented with fairness to the accused’. 36

The prosecutor’s duty of fairness is well defined in relation to an accused person. Flatman
and Bagaric argue that, although it is difficult to place precise parameters on the breadth
and depth of the prosecutor’s overarching duty of fairness, there is no reason in principle
that it ought to start and end with the interests of the accused and should not extend to
parties such as victims:

The reason that the prosecutor has an overriding duty of fairness to the accused
stems from the central role of the accused in the criminal justice process and from
the important interests which they have at stake. Similar considerations apply in
relation to victims. While their liberty is not at peril, they have other recognisable
interests which are affected by the criminal justice process.37

The ACT DPP’s Prosecution Policy and Guidelines for Prosecutors recognise the rights of
victims, particularly victims of sexual assault. Although the victim’s wishes are not a
criterion for consideration in making a decision to prosecute, the Guidelines state that in
prosecuting charges of assault, especially sexual assault, there should be particular concern
for the position of the victim:

11. In prosecuting charges of assault, especially sexual assault, there should
be particular concern for the position of the victim. Many such people have
suffered severe emotional and physical distress as a result of the offence and may
be confused and apprehensive at the prospect of having to give evidence.
Prosecutors should carefully explain to victims of such offences the role which
they play in the prosecution process and, if appropriate, the steps that can be
taken to ensure their protection. Where a decision is made not to proceed further
with a particular prosecution or to accept a plea of guilty to a lesser charge the
victim is entitled to be informed and given reasons for the decision in question.
Conversely, where a victim does not wish the prosecution to proceed because, for
example, the resultant trial would cause further humiliation and/or trauma, those
wishes should receive due consideration. However, in some instances, the
interests of the wider community may demand that the prosecution proceed.38

People not involved in the criminal justice system often misunderstand the role of
prosecutor. Prosecutors represent the state; they do not ‘represent’ particular witnesses,

38 Available at <http://www.dpp.act.gov.au> and in the annual reports of the Office of the DPP.
including victims of crime. This can be confusing for victims, who see the offender represented in court proceedings but find themselves not similarly represented. It is often assumed that the prosecutor represents the victim, and disappointment, even anger, on the part of the victim can arise when the prosecutor does something against their wishes. The prosecutor’s role should therefore be carefully and sensitively explained as early as possible in the course of proceedings.

There are three particular areas that arise in the prosecution of sexual offences where the question of the role of the victim vis-à-vis the prosecutor comes into focus:

- where charge negotiations take place
- where charges are discontinued against the wishes of the victim
- where the victim is reluctant to proceed.

**Charge negotiations**

Negotiation of charges, or charge bargaining, has always played an important role in the prosecutorial process. It involves the DPP and the defence reaching agreement on which charges the offender will plead guilty to. Without negotiation on which charges are to proceed, the criminal justice system would come under intense pressure. Such negotiation often results in pleas of guilty and the consequent saving of court time, public money and, most importantly, stress for a victim who must give evidence. In Australia negotiation is limited to which charges might proceed and the agreed facts to go before the court. Unlike in the United States, there is no role for bargaining on the penalty: that is solely the domain of the judiciary, although the prosecution can make submissions in that regard.

The Samuels Inquiry in New South Wales recently examined the role of victims in the charge negotiation process. The Inquiry was commissioned by the New South Wales Attorney-General in 2001 as a result of media criticism of the handling of the negotiation process in two cases. One of the cases involved two 16-year-old girls who were victims of a gang rape. Five men were charged. Eventually three pleaded guilty in the District Court on two counts each of aggravated sexual assault. The Crown tendered a statement of agreed facts and made further concessions in relation to the facts. The three co-accused received what the media perceived to be lenient sentences, which were later increased on appeal. There was considerable media reaction to the initial sentencing, and it emerged that the victims had not been informed about the charge bargaining. In particular, they had not been shown the agreed statement of facts; nor had the facts conceded by the prosecutor been discussed with them. One conceded fact the victims disputed was that the victims initially went with the offenders voluntarily. It was clear from the victims’ statements to police that this was not the case. The Samuels Inquiry concluded that the New South Wales DPP’s policy and guidelines ensured that adequate consultation with victims would take place and that the charges and facts reflected the criminality of the offences, although it did find some inadequacies in how the cases were dealt with.

As a result of the Inquiry’s report, the New South Wales DPP undertook to overhaul and update the Office’s policy and guidelines, paying particular attention to consultation with

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39 Separate representation for victims of sexual offences is available in a number of European jurisdictions: see Chapter 10.

victims when negotiating charges.\textsuperscript{41} The term ‘charge bargaining’ is to be replaced by the term ‘charge negotiation’ leading to a ‘charge agreement’. As soon as charge negotiations begin or are contemplated the victim must be told the rationale behind, and the basic principles governing, charge negotiation and agreement, as well as why a charge agreement is being considered.\textsuperscript{42} Since the statement of facts is an integral part of any charge agreement, the victim must also be kept informed of all aspects of the negotiation relating to the proposed statement of facts. They must be told why some facts will be excluded, and if they have no objection to the proposed statement of facts they should, if possible, sign a copy of the document and note that there is no objection. If they do object, they should be asked to sign a copy of the document and a notation should be made of the fact of the objection.

New South Wales DPP policy also requires that there be consultation with the informant. The DPP stated that police should be contacted in writing and their views sought. They should also be asked to sign the statement of agreed facts by way of acknowledgment.

The ACT DPP’s Prosecution Guidelines provide that, when a decision is made to accept a plea of guilty to a lesser charge, the victim is entitled to be informed and given reasons for the decision. It is not current policy to require victims and informants to sign and acknowledge an agreed statement of facts, so it is possible the prosecutors are not discussing agreements on the facts with interested parties.

DPPs Australia-wide are coming under increasing scrutiny in relation to their decisions, and it is not uncommon for that scrutiny to be prompted by cases dealing with sexual offences; such was the situation with the Queensland Crime and Misconduct Commission’s inquiry into the prosecution and investigation of sexual offences and the Samuels Inquiry in New South Wales. The ACT \textit{Victims of Crime Act 1994} specifically requires the following:

- A victim should be informed of the charges laid against the accused and of any modification of the charges—s. 4(c).
- A victim should be informed of any decision to accept a plea of guilty to a lesser charge or a guilty plea in return for a recommendation of leniency in sentencing—s. 4(d).
- A victim should be informed of any decision not to proceed with a charge against the accused—s. 4(e).

It would be prudent to record all such contact with victims by means of a file note. The ACT DPP should adopt the New South Wales DPP’s approach to dealing with charge negotiations and negotiating on an agreed statement of facts and should require victims and informants to sign and acknowledge an agreed statement of facts.

\textit{Charges discontinued against the wishes of the victim}

In some sexual offence cases a decision to discontinue the prosecution will be made against the wishes of the victim. Telling the victim of this decision is not easy. As noted, a decision to discontinue proceedings before the Supreme Court is ultimately made by the


\textsuperscript{42} ibid., p. 9.
Director, although he or she will have taken into account the trial prosecutor’s views. If a victim were to see the prosecutor who made the recommendation to discontinue proceedings (usually the prosecutor who is going to conduct the trial, rather than the instructing prosecutor) and have the decision explained patiently and with sensitivity, some of the distress caused by the discontinuance could be alleviated.

When a victim has made the decision to report a sexual offence to police, has spent considerable time giving a statement, and perhaps spent months thinking about the incident and expecting to give evidence, to be told that the matter is not going to proceed can be devastating. Prosecutors should assume that the victim is probably not absorbing a great deal during their first meeting, when they are advised of procedures. In all cases, the victim should be offered a further meeting. If they do not take up the offer, the DPP witness assistant could contact them a few weeks later to see if they would like to come and see the prosecutor or the witness assistant.

The SARP team’s review of DPP files revealed a practice of instructing prosecutors in Supreme Court matters sometimes informing victims of the discontinuance of the proceedings. This practice might be appropriate in some situations—for example, if the instructing prosecutor has developed a rapport with the victim—but in other cases it might be more appropriate for the trial prosecutor to tell the victim of the decision.

Victims who are reluctant to proceed

It often occurs that there is a strong prosecution case but the victim is reluctant to give evidence and wants the matter to be discontinued. It is difficult to determine how much weight to attach to the victim’s views in these circumstances. If it is a relatively simple matter of the victim having last-minute nerves about giving evidence, this can often be resolved through the intervention of an empathetic prosecutor or the DPP witness assistant. But the victim might be frightened of the offender and their fear might be justified. As Flatman and Bagaric note, in all other contexts people are not required to risk their lives or physical integrity in order to promote the community good. When it comes to giving evidence against potentially violent offenders, though, we have an expectation that people will do so even if there is a risk to their lives or a risk of harm. Flatman and Bagaric acknowledge that in this situation a decision not to proceed can be criticised on the basis that it means the accused, through violence and intimidation, has succeeded in ‘beating the system’ and it is precisely these sorts of people that the community wants dealt with by the criminal justice system. Ultimately, in such a situation the decision whether to testify should be left to the victim. Where the reluctance to testify stems from other less pressing reasons, however, Flatman and Bagaric suggest that there is scope for far greater persuasion by the prosecutor, and victims should be strongly encouraged to give evidence.

Recommendations involving victims of sexual assault in the prosecution process

5.12 The ACT DPP’s procedures for prosecutors’ contact with victims in relation to charge negotiations and negotiations on the facts to be tendered for sentence should be clarified. The following guidelines should be included:

- Victims in sexual assault matters should be informed when any charge negotiations are initiated.

44 ibid., p. 254.
Victims should be informed of the rationale for and the principles governing charge negotiation and agreement, as well as being told why a charge agreement is being considered in their case.

The victim’s views should be obtained before any formal decision about a charge agreement is made.

Prosecutors should discuss with victims the statement of facts and the reasons why that version is to be tendered.

Victims should be asked to sign any proposed statement of facts and should sign a copy of the indictment, asserting that they are aware of the charges to which pleas will be entered. If they have no objection, they should sign the statement of facts to indicate they have seen them and agree with them. If they do object, they should be invited to sign a copy of the document and make a notation that they do not agree to the statement of facts. This procedure should also be applied to police informants.

5.13 The ACT DPP’s procedures for prosecutors’ contact with victims when it is intended to discontinue sexual offence proceedings should be clarified. The following guidelines should be included:

- Unless circumstances obviate the need for it, decisions to discontinue proceedings should be made after interviewing the victim and other relevant witnesses.
- When proceedings are discontinued against the victim’s wishes, the reasons should be carefully and sensitively explained to the victim by the prosecutor with conduct of the trial or the prosecutor with conduct of the matter in the Magistrates Court or Children’s Court. If it is thought that the victim will find this a distressing experience, the DPP witness assistant could be involved. A follow-up appointment should also be offered.

5.14 In the case of victims who are reluctant to testify, every effort should be made to encourage them to attend court and give evidence. This can be achieved through the encouragement and support of the witness assistant and the prosecutor conducting the case. If the victim fears harm from the offender, every effort should be made to ensure that they are protected from the offender.

5.5.7 Victim preference and decisions to discontinue proceedings

Victim preference is a difficult matter when it comes to sexual offences. Recent policy changes in relation to family violence have seen cases involving physical assault in the context of family violence prosecuted when the victim does not wish to give evidence. People involved with victims of sexual offences generally see this approach as problematic. On one hand, forcing victims to give evidence against their will seems to disempower them further. On the other, giving victims responsibility for the decision to prosecute places a heavy burden on them.

Within the ACT DPP a practice has developed whereby some prosecutors effectively leave it to the victim to decide whether or not a matter should proceed. This occurs with cases that are perceived to be not particularly ‘strong’. The prosecutor discusses with the victim the difficulty of proving the offence, the process of giving evidence and being cross-examined and the likelihood of a conviction and then suggests that the victim ‘think about what they want to do’.

Although some prosecutors see this practice as giving victims choice, it is in effect abrogating the prosecutor’s responsibility to make a decision. If the case is weak and the prosecutor considers there are no reasonable prospects of a conviction, the prosecutor should make the decision to discontinue. In coming to that decision, it is proper for the prosecutor to discuss the case with the victim, to stress that there are problems with the
case, and to seek clarification or further information. But ultimately the decision to discontinue the case should be made by the prosecutor.

If a case has reasonable, but not very strong, prospects of a conviction and the prosecutor decides the matter should nevertheless proceed, the prosecutor should discuss with the victim the problems that might be encountered. The victim should be told that, although the prosecutor thinks there are reasonable prospects of a conviction, those prospects might not be strong. It is appropriate for the victim to then offer their opinion about proceeding with the matter—but only after the prosecutor has decided the matter should proceed.

Prosecutors should also avoid painting an excessively negative picture of the process, although it is of course entirely appropriate that victims be fully aware of what is involved. The witness assistant could assist in providing to the victim the necessary information about what is involved.

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**Recommendation Giving victims choice**

5.15 Prosecutors should decide whether or not to discontinue a case before asking the victim for their opinion. In cases where there is some doubt about reasonable prospects of a conviction, the practice of suggesting that victims decide whether to proceed with the prosecution should be discontinued.

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**5.5.8 Improving the court experience for victims**

For child and adult victims of sexual offences, the stressful experience of giving evidence in court has been diminished to some extent by the use of closed-circuit television. It can be further diminished by such measures as using tapes of the interview with police as the witness’s evidence-in-chief (see Chapter 6) and pre-recording evidence.

**Cross-examination**

Giving evidence in sexual offence proceedings is the most difficult part of the prosecution. In the case of child victims, Eastwood and Patton have described cross-examination as akin to child abuse. When one sees children being aggressively chided in court for simply not understanding the complexities of lawyers’ questions, it is not surprising that people studying the operation of the criminal justice system come to that view.

Cross-examination is a fundamental part of our adversarial system. It allows the party who is not calling the witness to test the evidence of that witness. The way cross-examination is conducted in sexual offence cases has been the focus of numerous studies, including the Eastwood and Patton study. The studies reveal aggressive, lengthy and harassing cross-examination, and the result has been a push to reform the law so as to protect victims from the worst excesses of cross-examination. Among the reforms introduced are provisions protecting complainants from being questioned about their sexual history, which were introduced in many jurisdictions (including the ACT) in the 1980s; provisions permitting the giving of evidence from a remote room via closed-circuit television; and, more recently, provisions that move to limit or abolish the attendance of victims at committals, which all Australian states and the Northern Territory have embraced but await introduction in the ACT.

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45 Eastwood & Patton, *The Experiences of Child Complainants*.
46 ibid.; also NSW Department of Women, *Heroines of Fortitude*. 

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112 \*Responding to sexual assault: the challenge of change*
Section 41 of the Commonwealth’s Evidence Act 1995 provides that a court may disallow a question put to a witness in cross-examination if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Prosecutors are often reluctant to object to cross-examination under this provision. The court or the jury might see it as unfair to the accused if a prosecutor objects vigorously to defence counsel’s cross-examination of the primary witness. Most prosecutors are aware that an aggressive, intimidating cross-examination can work to gain the jury’s sympathy for the Crown case. But this can be at the expense of the victim.

Prosecutors should be encouraged to rely on s. 41 of the Evidence Act to endeavour to protect the victim from overbearing, offensive cross-examination.

The mode of giving evidence

In the ACT s. 6 of the Evidence (Miscellaneous Provisions) Act 1991 provides that children (other than defendants) and victims of sexual offences may give evidence by means of closed-circuit television. They are also entitled to waive that right. Legislation to protect victims has been introduced in every jurisdiction in Australia, as well as in New Zealand and the United Kingdom. The ACT provisions are generous to victims: in other jurisdictions an application to give evidence by closed-circuit television must be made to the court and it is not guaranteed that it will be granted.

The SARP team’s discussions in the ACT and interstate revealed a widely held view among prosecutors that it is better for witnesses give evidence in court. Chapter 6 reviews the extensive literature relating to this. The assumption behind encouraging a victim to give evidence in court rather than via CCTV is that the jury will more readily be influenced if the witness is present. But, again, is the prosecutor putting the wish to secure a conviction ahead of the interests of the victim? If the question is approached from the perspective of the victim’s interests, more often than not the result is going to be that giving evidence from a remote location is preferable. The SARP team found that ACT DPP prosecutors had varying views about this.

The Director should issue a policy on the use of closed-circuit television—that CCTV is to be preferred unless the victim evinces (under no active encouragement) a willingness to give evidence in court. Prosecutors should not encourage victims to give evidence in court. Of course, victims should be made aware that they can give evidence in court, but the prosecutor should not try to influence the decision by saying it is better for the victim to do so. For complainants under the age of 18 years, there would rarely be a situation where evidence is not given from a remote location by closed-circuit television.

If a witness indicates a preference for giving evidence in court the witness assistant should discuss with them all that is involved. For victims aged less than 18 years, the prosecutor should discuss the matter with the Deputy Director.

<table>
<thead>
<tr>
<th>Recommendations</th>
<th>Improving the court experience for victims</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.16</td>
<td>Prosecutors should be encouraged to consider ways of making the court process less stressful for victims. In particular, prosecutors should receive training in s. 41 of the Commonwealth Evidence Act 1995 and be encouraged to rely on that provision when necessary.</td>
</tr>
<tr>
<td>5.17</td>
<td>Before any victim gives evidence in court without the use of closed-circuit television, the victim should be seen by the DPP witness assistant, who should fully explain the victim’s right to give evidence via closed-circuit television. If a victim aged less than 18 years wishes to give evidence in court, the prosecutor should discuss this with the Deputy Director, providing reasons for the victim’s decision.</td>
</tr>
</tbody>
</table>
Facilities for interviewing children and adults

The facilities for interviewing victims at the ACT DPP are poor. For children, they are non-existent.

Children

At the head office of the New South Wales DPP the room for interviewing children is located in the Witness Assistance Service. It is a large room divided by a soundproof glass wall. This allows a child to be interviewed while their parents or carers are visible but cannot hear—a very good arrangement for young children. Taking a child into an office with one or, more often, two prosecutors the child has never met before and then closing the door and not allowing the child to know their parents are nearby is insensitive and will hamper communication.

In the New South Wales DPP’s head office children are not interviewed sitting at a desk or table. There are beanbags for the child and the person talking to them. In this way the adult can more easily establish rapport by being at the child’s level. Even if prosecutors do not sit on the floor with children, they should avoid interviewing a child across a desk. A couch would be a suitable compromise if sitting on the floor is not an option. Older children and teenagers might prefer to sit at a table on the other side of the glass wall.

In the Victorian Office of the DPP children are seen in the witness assistant’s area, which is in the same building as the Office but on a separate floor. The space is decorated with bright artwork, and the room for younger children has a number of toys and games—as does the New South Wales DPP interviewing room. In Western Australia prosecutors interview child witnesses at the offices of the Child Witness Service. Again, the décor is colourful and there are toys, videos and games to entertain waiting children.

Adults

In the Victorian Office of the DPP and the New South Wales DPP’s head office the witness assistant facilities are also available for interviewing adult victims. In Victoria the room for older children and adults is brightly decorated, and couches are used instead of tables and chairs. In New South Wales one of the rooms has a small round table with chairs and a couple of armchairs.

In the ACT DPP many prosecutors whose officers are on the first floor use the room off the witness assistant’s room for interviewing victims in sexual assault matters. Although this means interviewing across a desk is avoided, the room does have limitations: first, the only way the witness assistant can go into her office is through that room; and, second, it is not soundproof and is very near the toilets and kitchen, so a victim might find it difficult to avoid being distracted. It does, however, offer the advantage that there are two couches rather than a table, so it is a more comfortable, less intimidating environment than an office.

The interview room on the ground floor is also available. Although adequate, it is rather austere and would be less intimidating if it were more colourfully decorated and had couches rather than chairs around a table. It is better soundproofed and in a quieter place than the room adjoining the witness assistant’s office and is in that way preferable. A video player should be installed in this room, so that witnesses can watch videos of interviews and court preparation videos. The room could also be used for interviewing victims of domestic violence.
There are no private waiting areas for family members, and this needs to be considered in any refurbishment.

A booking system for both interview rooms should be introduced, so that there are no problems with availability.

### Recommendations

#### Interviewing facilities

5.18 The DPP should set aside a purpose-made room for interviewing children. The room should be large enough to be divided in two by a soundproof glass wall, so that young children can see their carers while a prosecutor or the witness assistant is speaking with them. The room should be furnished with a couch, an armchair and beanbags. Toys, games and a video recorder—to allow children to watch their interviews and to entertain them while their carers are speaking with the prosecutor—should also be provided.

5.19 The interview room on the ground floor of the DPP should become the designated interview room for victims in sexual offence matters. It could be used as a more general witness interviewing room, but priority should be given to victims of sexual offences. Priority could also be given to victims of family violence. The room should be furnished with couches and be decorated in such a way as to make it a friendlier, more comfortable environment.

5.20 A booking system for both interview rooms should be introduced.

#### Methods of interviewing

Workers in the field can provide much information about the best ways of interviewing children. For example, casual dress will make a child feel more at ease than a tie. A cheery environment with bright artwork is helpful. Activities such as games and drawing help the child establish rapport with the prosecutor. And spending time having a friendly conversation with the child’s parents or carers will build the child’s trust and confidence. Prosecutors would greatly benefit if they received training from experts in child psychology or counselling. Chapter 12 makes further recommendations in this regard.

#### Interviewing children

5.21 Prosecutors should receive from a child psychologist or a counsellor who works with children training in how best to establish rapport with children of different ages, appropriate ways of dressing, and the most suitable environment for interviewing children. The prosecutors should be encouraged to dress casually when interviewing children.

#### Contact with victims in general

Victims of sexual offences—or indeed of any crime—do not usually have experience of the criminal justice system. It can be very intimidating. Anxiety about the court proceedings can hamper recovery, and prosecutors need to be aware of this and take steps to allay a victim’s fears. They should make contact with the victim as early as possible. A meeting with the DPP witness assistant or prosecutor will do much to reassure a victim. Other DPPs, such as in Victoria and New South Wales, send out a package of brochures and written information to victims of crime at an early stage in the proceedings. It is recommended that this practice be adopted in the ACT DPP.
5.22 Victims—or their carers in the case of children—should be kept well informed throughout the prosecution process:

- Within 14 days of the DPP’s receipt of the file, the victim should be contacted and an appointment should be arranged for them to see either the allocated prosecutor or the witness assistant to explain the court process, the prosecutor’s role and the victim’s role.

- After the first mention date in court, the victim should be sent an information package informing them of the court process and providing contacts for relevant services, the name of the allocated prosecutor and details of the next court date.

- After each mention in court, the victim should be advised by letter or phone of the next court date.

5.5.12 Proofing of medical experts

During the SARP team’s consultations a doctor who is often required to appear in the Magistrates Court and the Supreme Court to give evidence for the prosecution in cases involving child victims said the prosecutor with conduct of the particular case rarely speaks to her before she attends court to give evidence. Only a handful of DPP prosecutors arrange to see her in the days or weeks preceding a hearing or trial to go through her evidence. The normal practice is for her to meet the prosecutor for a few minutes before going over to court. In her opinion, this practice means that the evidence led from her or that comes out in cross-examination does not necessarily accurately reflect the complexities and extent of the medical findings.

5.23 Whenever a doctor is to be called to give evidence in a matter involving a child victim of physical or sexual abuse, and in all cases involving adult sexual offences, the prosecutor with carriage of the matter should confer with the doctor and comprehensively cover the evidence that will be given. Such a conference should not occur on the day of the hearing or trial.

5.6 Conclusion

Prosecuting sexual offences is one of the most challenging aspects of a prosecutor’s job, and prosecutors approach their task with diligence and commitment. If taken up, the proposals in this chapter will improve the prosecution of sexual offences in the ACT by giving prosecutors greater resources, clearer lines of decision making, better facilities and additional skills. Nevertheless, although the role prosecutors play is important, it is not the whole picture. The following chapters move on to processes in the court room and what changes could be made to allow for more effective prosecution of sexual offences in the ACT.
6 Giving evidence

At the best of times, people find attending court and giving evidence daunting. For children, the world of court is particularly alien; for all victims of sexual assault, recounting details of their experience in court can be challenging. Cross-examination provokes particular anxiety. In the report of their 2002 study of child sexual assault prosecutions in three states Eastwood and Patton put it this way:

For the child, the adversarial nature of lengthy cross-examination in a hostile and intimidating courtroom environment in the presence of their abuser, appears impeccably designed to reinforce feelings of powerlessness and blame. Indeed, in terms of child psychology and development, it would be difficult to come up with circumstances more inappropriate for the child who has been sexually abused.1

The Heroines of Fortitude report, which examined the transcripts of all recorded sexual assault trials involving adult victims held in New South Wales over a year, found that the court experience is often re-victimising and abusive for women.2 Added to the stress of giving evidence is the subject matter: the report found that women were asked a large number of questions about their sexual organs and those of the accused. This might well be necessary given the reason for the proceedings, but the intimate nature of the evidence distinguishes the court experience of sexual assault victims from the court experience of other victims of crime.

The Australian states and territories, as well as other countries, have been trying to find ways of making it less stressful and traumatic for victims of sexual offences when giving evidence—without infringing the right of the accused to a fair trial—and in the past two decades a variety of special measures have been introduced.

For example, since 1991 the ACT has allowed children and victims of sexual offences to give evidence from a room outside the courtroom via closed-circuit television.3 Other Australian and overseas jurisdictions have introduced special measures for particular classes of witnesses—well beyond the special measures that exist in the ACT. New South Wales, Victoria, Queensland and New Zealand allow a videotape of the initial interview between a child complainant and the police or child protection workers to be used as the child’s evidence-in-chief. Western Australia and Queensland allow the pre-recording of all a child’s evidence, so that the child does not have to attend the trial. All Australian states place limits, and in some cases a complete prohibition, on complainants attending committal hearings. In South Africa and the United Kingdom legislation provides for intermediaries to reframe in child-appropriate language questions that counsel put to child complainants of sexual offences. Most jurisdictions in Australia now prohibit an unrepresented accused from directly cross-examining the complainant.

In addition to allowing victims of sexual offences to give evidence by means of closed-circuit television, a number of special measures or protections for complainants have been adopted in the ACT in the past two decades. Several provisions were introduced in 1985 as part of a package of reforms of sexual assault legislation:

2 NSW Department of Women, Heroines of Fortitude, p. v.
Evidence by the complainant can be given in a closed court.\(^4\)

Publication of a complainant’s name is prohibited.\(^5\)

Evidence of the complainant’s sexual reputation is prohibited and evidence of other sexual activities is limited.\(^6\)

The tendering of or reference to counselling communications is prohibited.\(^7\)

Compared with other jurisdictions, the ACT is fairly progressive in relation to the use of closed-circuit television for complainants. Adult complainants and all child witnesses can give their evidence this way. In many other jurisdictions use of CCTV is limited to children and other vulnerable witnesses. Courts often retain a broad discretion to allow its use and, depending on the jurisdiction, the application to have evidence taken via CCTV can be refused—and often is. In the ACT, however, there is a presumption in the legislation that a complainant will give evidence by CCTV, unless the complainant does not want to do so, the proceedings might be delayed or there is a substantial risk that the court will not be able to ensure that the proceeding is conducted fairly.

In relation to other special measures, some states and other countries have implemented many more reforms than the ACT. The advantage in looking at those reforms is that the ACT can consider special measures that have been in operation in a number of jurisdictions for a number of years, choose the best practice, and avoid some of the teething problems other jurisdictions have had. In jurisdictions where there have been significant reforms the reform process continues. Western Australia, which has been the leading jurisdiction in the area of children giving evidence, has recently put forward a Bill introducing further reforms. This chapter considers the following measures:

- limitations on witnesses attending committal hearings
- evidence-in-chief given via videotape of the initial police interview
- pre-recording of evidence at a pre-trial hearing
- giving evidence from a remote location via closed-circuit television
- use of intermediaries
- restrictions on cross-examination of the complainant by the accused.

The term ‘complainant’ is sometimes used here instead of victim. This reflects the terminology used in ACT legislation governing court procedures when discussing a person against whom a sexual offence is alleged to have occurred. Since this chapter discusses what happens in court, the technical term is used where appropriate.

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\(^4\) Section 39 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) provides that any evidence given by the complainant in prescribed sexual offence proceedings, including cross-examination, shall, if the court directs, be given in a closed court. The ACT Law Reform Commission’s 1997 discussion paper on sexual assault notes that, while the court retains a discretion not to close the court during the complainant’s evidence, the request would rarely, if ever, be refused (ACT Law Reform Commission, *Sexual Assault*, Discussion paper no. 4, ACT Law Reform Commission, Canberra, 1997, p. 116).


\(^6\) ibid., Division 4.4.

\(^7\) ibid., Division 4.5.
6.1 Committals

Every state in Australia has legislated to impose restrictions on the calling and cross-examination of complainants in committal proceedings for sexual offences. In the ACT and the Northern Territory there are no such restrictions. In the ACT complainants in sexual offences are often required to give evidence at committal; there have been proposals for reform of the committal process in recent years, but no legislation has ensued. There are no ACT statistics on which to base an analysis of how many complainants attend committal hearings to give evidence, although there is anecdotal evidence that the rate of sexual offence complainants doing so is higher than the rates for other sorts of proceedings.

6.1.1 The function of committal proceedings

The committal process in the ACT is governed by the *Magistrates Court Act 1930*. A committal—or what is more accurately referred to in the ACT as a ‘preliminary examination’—is a preliminary hearing in which the magistrate is required to determine, after hearing the prosecution evidence, if there is evidence capable of satisfying a jury beyond reasonable doubt that the defendant has committed an indictable offence. If the magistrate is not so satisfied, the charge is dismissed. If he or she is satisfied, the case continues and the defence is invited to call evidence. In practice, the defence rarely does so. The magistrate then considers whether, having regard to all the evidence, a jury would ‘not convict the defendant of an indictable offence’. If the magistrate concludes that a jury would not, the defendant is discharged; otherwise, the defendant is committed to the Supreme Court for trial if the matter is a purely indictable charge. Alternatively, the matter may be finalised in the Magistrates Court if it is a less serious charge and the defendant consents. The Magistrates Court Act permits a process of committal on the papers, which often occurs. This allows the magistrate to receive as evidence the written statement of a witness, without requiring the witness to attend to give evidence. It can be done only when both the prosecution and the defence agree to this course.

Much has been written about the function of committal proceedings, and there has in the past been considerable debate about their future in Australia. Committal proceedings do

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8 A discussion paper was circulated in 2001 by the then Attorney-General Bill Stefaniak (*Reform of the Committal Process*, <http://www.jes.act.gov.au/eLibrary/papers/committal_process_reform.doc>). The issue was considered in relation to sexual assault matters in the ACT Law Reform Commission’s *Sexual Assault report*.

9 A file review of all Supreme Court sexual matters completed between 1 July 2002 and 30 June 2003 shows that in the majority of matters committed for trial complainants gave evidence at the committal. Of the 17 matters in the sample that were committed for trial, complainants gave evidence in 13 committals. Of these 13 matters, nine involved child witnesses.

10 *Magistrates Court Act 1930* (ACT), s. 91(b).

11 ibid., s. 94(a).

12 That is, a charge with a maximum penalty of 10 years or less—s. 477 of the *Crimes Act 1900* (ACT). In the ACT charges of sexual intercourse without consent and charges of sexual intercourse with a person aged less than 16 years can be dealt with only in the Supreme Court. The same applies to acts of indecency committed on people aged under 12 years. Acts of indecency without consent committed on people over 16 years and acts of indecency committed on people over 12 years can be dealt with by the Magistrates Court if the defendant consents.

play an important role in the criminal justice system in Australia\textsuperscript{14}, but the majority of jurisdictions have implemented significant changes to the committal process in the past decade. To date, the ACT is one of only two jurisdictions not to have implemented reforms in this area.

Preliminary hearings evolved historically in an age before pre-trial disclosure and the establishment of independent directors of public prosecutions to perform the vetting role once performed by magistrates. This section does not canvass the virtues and shortcomings of committals in detail; instead, it focuses on committal proceedings’ impact on complainants in sexual offence proceedings and arguments for and against modifying the proceedings as they apply to those complainants.

6.1.2 Committal hearings and complainants in sexual offences

The legislative activity of other Australian jurisdictions to limit the calling of complainants in sexual offence committals suggests a high degree of concern about the impact of court proceedings generally, and committals in particular, on witnesses who are made especially vulnerable by virtue of the nature of the offence committed on them. So what is wrong with committal proceedings and why has it been felt necessary to modify them?

The following are the main criticisms of committal proceedings as they relate to complainants in sexual offences:

- The victim is required to give evidence not once but twice and be subject to cross-examination at both committal and trial, exacerbating the stress of the court proceedings.
- Cross-examination of complainants at committal is often more rigorous and intimidating because there is no jury present.
- The experience of cross-examination at committal often leads complainants to seek to have the proceedings discontinued.
- The final disposition of the proceedings is delayed.

The following are the main reasons advanced in favour of committal proceedings:

- The prosecution and the defence can observe the complainant giving evidence.
- Sometimes a plea of guilty results after the defendant has seen the complainant give evidence.\textsuperscript{15}
- Complainants can have a ‘practice run’ and are thus better prepared for the trial.\textsuperscript{16}
- The prosecution can often gain some foreknowledge of the defence case.

\textsuperscript{14} Barton v R (1980) 147 CLR 75; Grassby v R (1989) 168 CLR 1.
\textsuperscript{15} This was not borne out in the DPP file review of all sexual offence matters finalised in the ACT Supreme Court between 1 July 2002 and 30 June 2003. No pleas of guilty followed the 13 matters where complainants gave evidence at committal.
\textsuperscript{16} ‘Suggesting that it provides the opportunity to practice being a witness is somewhat akin, from the victim’s point of view, to suggesting that one should attend one’s dentist to have a tooth extracted some months prior to the extraction proper’—A Paterson, in J Vernon (ed.), The Future of Committals, p. 137.
Weaknesses in the prosecution case, which may be able to be rectified prior to the trial, are exposed.

Both the prosecution and the defence can elicit from witnesses more detail than that contained in the initial police statements, allowing both sides to be better prepared for the trial.

With one exception, the advantages just listed are advantages to participants other than the complainant. The disadvantages listed all adversely affect the complainant. Prosecutors and defence lawyers see great advantages in full committals. Prosecutors can see how the witness will stand up to cross-examination, perhaps get some idea of the defence case, and identify other avenues that may need further investigation or statements to fill in the holes. Defence lawyers can see how the complainant appears in the witness box and ascertain whether there are any particular weaknesses or inconsistencies in the prosecution case. But both defence lawyers and prosecutors can, and regularly do, conduct trials where there has been no committal hearing. In the United Kingdom, for example, for many years the bulk of committals have been conducted on the papers. In many Australian jurisdictions in the past 15 years there have been limitations on witnesses attending committals. More rigorous pre-trial procedures and disclosure might be necessary, but this can be managed. This is the situation for prosecutors and defence lawyers in most Australian jurisdictions now, and practitioners in the ACT would be no less able to adapt to new practices.

If complainants were no longer required to attend committal proceedings to give evidence, practices in the ACT DPP would have to change. Prosecutors would need to hold conferences with complainants earlier in the proceedings, to ensure that a complainant is capable of giving cogent evidence at trial. This was recognised by the Queensland DPP in her annual report for 2002–03, when she commented on recent amendments to the committal process for child sexual offence complainants in Queensland17: she acknowledged that the new system will require Crown prosecutors’ pre-trial contact with child complainants to be more extensive and comprehensive; pre-indictment conferences with the children would be necessary, as would a conference closer to the trial.18

The SARP team itself has experience of a number of complainants who sought to have proceedings discontinued after the committal hearing, and the result in each case was that the alleged offender was not tried. Eastwood and Patton noted that, because a jury is not present, cross-examination in committals is often more harsh than that occurring in the trial itself.19 Even if it is not the defence lawyer’s intention to intimidate a witness so that they will not want to give evidence at trial, there is a perception that in some cases it may be a deliberate tactic:

The most damaging element is the fact that the child is frequently cross-examined at committal proceedings, not always for the purpose of truly testing the evidence, but rather in order to intimidate the child and to force statements from the child which are then used to attack credibility at trial.20

This highlights another difficulty with committals: variations between the initial statement to the police and the evidence given at committal and between committal evidence and evidence at trial are invariably highlighted at trial. It is, of course, proper that they should

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17 Evidence (Protection of Children) Amendment Act 2003 (Qld).
20 Ibid.
be, but evidence given at committal can in this respect make prosecution of the matter more difficult. For example, a child who has been sexually abused over a period of months and who gives evidence some time after their initial statement to the police inevitably will leave out significant portions of their account because of memory loss and the stress of giving evidence in court. Prosecutors often rely on the ‘inconsistencies’ to discontinue proceedings; if the trial proceeds, the defence highlights them.

Such inconsistencies and omissions are not necessarily the result of false accusations: they are unavoidable with the current practice of giving evidence in court many months after the event in question took place. Some of the special measures discussed in this chapter—in particular, the pre-recording of evidence-in-chief—would mitigate the effects of delay and ensure that the most timely and comprehensive evidence available is put before the court. Modification of the committal procedure so as to reduce the number of times a child must recount details of the incident will also help to redress the problem.

6.1.3 New South Wales

New South Wales began reforming the committal process in 1987 and introduced the first legislation aimed at protecting particular classes of victims in 1992. The effect of those first amendments was that victims of offences of violence, including sexual offences, could be required to attend the committal proceedings only if the magistrate was satisfied there were special circumstances. There have been various amendments to the committal process since that time and the situation now is that, unless the magistrate orders witnesses to attend to give oral evidence, written statements of all prosecution witnesses are tendered. There are three categories of witnesses to which varying limitations apply—general prosecution witnesses, victims of violent offences, and complainants in child sexual assault cases. There is a complete prohibition on children being required to attend committal proceedings.

General prosecution witnesses

Unless the magistrate directs that a general prosecution witness attend the committal hearing, the usual position is that written statements are tendered. The direction can be given on the magistrate’s own motion or the defence or the prosecutor can make an application to the magistrate, who must be satisfied that there are ‘substantial reasons’ for the witness to attend.21

Victims of violent offences

For victims of violent offences, including sexual offences, the magistrate may order their attendance at the committal only if there are ‘special reasons’ why, ‘in the interests of justice’, the victim should attend.22 Case law in New South Wales has established that the fact that the prosecution case relies heavily on the account of the complainant in a sexual offence case and the defence wants to cross-examine her does not constitute special reasons requiring the magistrate to make an order. Lack of specificity about the dates of offences has, however, been held to be a special reason because cross-examination might pin the complainant down on dates.23

21 Criminal Procedure Act 1986 (NSW), s. 91.
22 ibid., s. 93.
Unless there are substantial reasons in the interest of justice for not so limiting the cross-examination, both general prosecution witnesses and victims of violent offences can be cross-examined only in respect of matters that were the basis of the reasons for the magistrate giving the direction.\textsuperscript{24}

\textit{Complainants in child sexual assault cases}

Before August 2003 the situation for child complainants in sexual offence proceedings was the same as that for adult complainants: the magistrate had to be satisfied there were special reasons before directing that they attend committal proceedings. In its Inquiry into child sexual assault prosecutions the New South Wales Legislative Council’s Standing Committee on Law and Justice heard evidence that as many as one-third of child sexual assault complainants were being required to give evidence in committal proceedings.\textsuperscript{25} The Committee reported that it was disappointing that the legislative provisions had not been successful in abolishing the requirement that child complainants appear at committals, saying that the consequent need for children to give evidence more than once and the opportunity for defence counsel to ‘roughe...\textsuperscript{26} As a result, it did not recommend any change.

Despite this, in late 2003 an amendment prohibiting the calling of \textit{any} child complainant in a committal hearing was passed. It applies to complainants who are aged less than 16 years at the time of the offence and less than 18 years at the time of the committal.\textsuperscript{27}

Apart from Western Australia, where no witnesses give evidence in committal proceedings, New South Wales is the only Australian jurisdiction where there is a complete prohibition on calling a class of witness to give evidence in committal proceedings. It was considered necessary to give children some measure of protection from the criminal justice system. In introducing the 2003 amendments, the New South Wales Minister for Justice stated:

\begin{quote}
Giving evidence at committal hearings can be more distressing for children than giving evidence at trial as counsel may not be as restrained at committal where a jury is not present. This amendment will reduce the number of times a child is subject to cross-examination over the course of a sexual assault prosecution, thereby reducing the re-traumatisation associated with multiple court appearances.\textsuperscript{28}
\end{quote}

\textbf{6.1.4 Victoria}

In Victoria the defence must apply to the court in writing to have a complainant attend the committal hearing. They must identify what they want the witness to be cross-examined

\textsuperscript{24} \textit{Criminal Procedure Act 1986} (NSW), s. 91(7).
\textsuperscript{25} NSW Legislative Council Standing Committee on Law and Justice, \textit{Report on Child Sexual Assault Prosecutions}, p. 80, quoting Eastwood & Patton, \textit{The Experiences of Child Complainants}.
\textsuperscript{26} ibid., p. 81.
\textsuperscript{27} \textit{Criminal Procedure Act 1986} (NSW), s. 91(8), inserted by the \textit{Crimes Legislation Amendment Act 2003} (NSW) with effect from 18 August 2003.
\textsuperscript{28} \textit{Hansard Articles}, NSW Legislative Council, 25 June 2003, no. 43, p. 1.
on and say why the evidence of that witness is relevant to the subject and why cross-
examination in that regard is justified.  

Between 1 July 1999 and 30 June 2001 a more rigorous test was applied to applications for
child witnesses (under the age of 18 years) to attend committal proceedings. The court had
to be satisfied that the evidence sought had substantial relevance to the facts in issue and
that the interests of justice could adequately be served only by granting leave. In
considering whether to grant leave, the court had to have regard to the need to ensure that
the prosecution case was adequately disclosed, the issues were adequately defined, the
evidence was of sufficient weight to support a conviction, and it was in the interests of
justice.

The more relaxed test (from a defence point of view) for child complainants was brought
in in 2001 because the Attorney-General was concerned that more children were being
cross-examined at trial as a result of fewer being cross-examined at committal.

The Victorian Law Reform Commission discussed committal proceedings in its final
report on sexual offences. It looked at 40 committal proceedings over a three-month period
and found that in 39 of them applications were made for the complainant to attend the
committal. Of these applications, 38 were successful. The Commission recommended
that Victoria adopt the New South Wales approach whereby children and people with
cognitive impairments are prohibited from attending committal hearings. The final report
was released in August 2004, and the recommendations are being considered.

6.1.5 Western Australia

Following the recommendations of the Law Reform Commission of Western Australia in
1991, child victims of sexual assault or intra-familial assault were required to attend a
committal hearing only if the magistrate was satisfied that there were special reasons
justifying the calling of the complainant. It was rare that children were required to give
evidence at committal.

Since September 2002 all contested committal hearings have effectively been abolished,
and no prosecution witnesses are required to attend for examination or cross-examination
at committal.

6.1.6 Tasmania

In Tasmania complainants in a range of sexual matters are required to attend a committal
only if the magistrate is satisfied that there are ‘special circumstances’.

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29 *Magistrates Court Act 1989 (Vic)*, Sch. 5, cl. 12(1).
30 ibid., s. 56(2).
   pp. 155–6.
32 ibid., p. 165.
33 Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable
35 *Justices Act 1902 (WA)*, s. 104, as amended by the *Criminal Law (Procedure) Amendment Act
   2002 (WA)*.
36 *Justices Act 1959 (Tas)*, s. 57A(2).
6.1.7 South Australia

For any witness to be called at committal in South Australia, the magistrate must be satisfied that there are ‘special reasons’ for doing so. The Act lists specific criteria for the court to consider in coming to this determination. In relation to children aged less than 12 years and complainants in sexual assault matters, leave will be granted only if the interests of justice cannot adequately be served otherwise.

6.1.8 Queensland

Before January 2004 there were no limitations on committal proceedings in Queensland. The legislation in relation to child witnesses underwent major amendment in response to the report of the Queensland Law Reform Commission and the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission report. The result was the Evidence (Protection of Children) Amendment Act 2003, a comprehensive legislative scheme dealing with the evidence of child victims of sexual offences.

Noting that Western Australia was the only jurisdiction that had effectively abolished committal hearings, the Queensland Government chose to adopt an approach similar to that in New South Wales at the time (before legislation prohibiting child complainants from giving evidence at committal was passed in late 2003). Pursuant to the 2003 Queensland legislation, an affected child can be cross-examined at the committal only if the magistrate is satisfied that the defendant has done the following:

- identified an issue to which the proposed questioning relates
- provided a reason why the evidence of the witness is relevant to the issue
- explained why the evidence disclosed by the prosecution or before the court does not address the issue
- identified the purpose and general nature of the questions to be put to the witness to address the issue.

The magistrate must also be satisfied that the interests of justice cannot adequately be served if examination of the child about the issue is left until the trial. In considering the matter, the court must decide whether the case for the prosecution is adequately disclosed and whether the charge is adequately particularised. An affected child is a child aged less than 16 years who is a witness to a sexual or violent offence. In practice, few applications have been made to have children attend at committal and, where they have been, few have been successful.

6.1.9 The Northern Territory

As noted, in the Northern Territory there are no special provisions restricting the calling of witnesses in committal proceedings.

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37 Summary Procedure Act 1921 (SA), s. 106(2).
38 ibid., s. 106(3).
41 Evidence Act 1977 (Qld), Division 4A.
### Committal provisions applying to complainants in sexual offence matters: a summary

**New South Wales**
- ‘Special reasons’ are required for adult complainants in sexual offences to attend and give evidence at committal.
- There is a complete prohibition on child complainants in sexual offences attending committal hearings.

**Western Australia**
- No witnesses are required to attend committal proceedings.

**South Australia**
- ‘Special reasons’ are required for all witnesses. For children aged less than 12 years and for complainants in sexual assault matters there is the additional criterion that the interests of justice are served only by doing so.

**Queensland**
- No special provisions apply for adults.
- For child (aged less than 16 years) victims of violent or sexual offences special provisions apply.

**Victoria**
- Special provisions apply for child and adult complainants.

**Tasmania**
- ‘Special circumstances’ are required for adult and child complainants.

**The Northern Territory and the ACT**
- No special provisions apply.

### 6.1.10 Committals in the ACT

All the Australian states have decided there are good reasons for limiting the attendance at committal hearings of complainants in sexual offences. The case for the ACT following the states and placing some limitations on committal proceedings is, in the SARP team’s view, overwhelming, but the extent of those limitations must be considered. There are several options:

- Retain the status quo and continue with full committal hearings, where the majority of complainants give evidence and are cross-examined.
- Introduce a ‘special reasons’ requirement for child and adult complainants—as in Victoria, Tasmania and South Australia.
- Introduce a prohibition on children attending committal hearings and impose a ‘special reasons or circumstances’ requirement for adults—as in New South Wales.
Introduce a prohibition on children and adult complainants attending sexual offences committal hearings—as in Western Australia, although in that state the prohibition applies to all prosecution witnesses.

As noted, only two jurisdictions in Australia have opted for a prohibition—Western Australia (for all witnesses) and New South Wales (for child victims of sexual offences).

A prohibition on calling certain classes of witnesses at committal offers the following advantages:

- The complainant can be confident that they will not be called at committal.

- It will reduce delays in proceedings. Other witnesses will still be able to be called, so there could be some delay, but in cases where it is the word of the complainant alone usually no other witnesses will be required.

- The stress on complainants is reduced because they have to give evidence only once—at the trial.

- It reduces the likelihood of complainants opting out of the criminal justice system after a difficult committal experience and so ultimately ensures that more matters go to trial.

Complete prohibition—as opposed to a limitation that must be determined by the magistrate—assures the complainant early on in the proceedings that they will have to give evidence only once, and it can significantly reduce delays in the proceedings. If pre-committal applications need to be made to determine whether a witness will be required to attend, delays will be exacerbated.

Eastwood and Patton support the view that child witnesses should no longer be required to give evidence in committal hearings. They interviewed 63 child victims of sexual offences who had been through the court experience and found that the wait for court was a particular difficulty. It had significant adverse psychological effects on children, and the 18 months of stress greatly affected the children’s education:

At a crucial stage of their emotional, social and cognitive development, the disruption caused by an eighteen-month wait may have significant consequences for their psychological well-being. One and half years spent ‘waiting and worrying’ represents a significant proportion of a child’s life at a crucial stage of their development.42

Queensland and New South Wales children interviewed for the study said rough cross-examination in committal unsettled them and made them more fearful of going to trial. They were also concerned about harassment from the alleged offender during the wait and had been told they could not talk about the abuse with people close to them until after the trial because it might affect their evidence.43 The authors state that the literature makes it clear the effects on children are even more profound than they are on adults and substantiates the view that the psychological cost of delay to the child may be considerable.

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43 ibid., p. 116.
Eastwood and Patton also interviewed a number of judges, prosecutors and defence lawyers in the three jurisdictions they studied. At the time, New South Wales required special reasons for children to be called at committal and the majority of children did not attend; in Queensland there were no restrictions on children at committals; and in Western Australia until 2001 the court could require a child to attend if there were special circumstances. The authors found that the New South Wales and Western Australian judges, prosecutors and defence lawyers they interviewed generally did not support restrictions on children at committals. In contrast, judges, prosecutors and defence counsel in Western Australia said the legislation works very well. Eastwood and Patton said that the situation in New South Wales led to more uncertainty for the child, who did not know whether they would have to give evidence at committal until some time down the track, when the court had heard and determined any application made by the defence.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission discussed committal hearings in their 1997 report on children in the justice system. That inquiry received—from people who had been involved as witnesses, from parents of witnesses and from victim support services—extensive evidence that committal hearings were extremely traumatic for children. Many written submissions from government and non-government bodies involved with children (including the Australian Federal Police) called for committals to be abolished. The final report recommended that children not be required to attend to give evidence in committals and that the Commonwealth Attorney-General encourage all states and territories to enact legislation to that effect.

The matter has not received such consideration in relation to adults as it has in relation to children. The New South Wales Heroines of Fortitude report found that women complainants were cross-examined at committal in only 7 per cent of the cases examined and concluded that the provision requiring special circumstances to be established was working well to limit the calling of complainants at committal.

If one approaches the question of committals from the victim’s point of view, there would obviously be less stress for both child and adult complainants if they were required to give evidence only once. Waiting times would be reduced, too. The SARP team was also told that committals offer the victim the advantage of feeling they have been taken seriously, even if the matter does not proceed to trial. That could be important for some people. Nevertheless, the comfort some complainants might derive from this does not override the advantages associated with restricting or prohibiting the calling of complainants at committal.

Defence lawyers should, of course, be consulted, but it is unlikely that they will support changes to the committal process. The adversarial system allows and supports cross-examination that is stressful—particularly so for children and victims of sexual offences. A voluntary code of conduct whereby members of the bar agree to certain behaviours when cross-examining children and complainants in sexual offence matters might be considered as an adjunct to any proposal prohibiting or limiting committal hearings.

44 ibid., pp. 128–9.
45 This was the justification for the NSW Attorney-Generals Department adopting the complete prohibition approach, despite that approach not being recommended by the Legislative Council Standing Committee.
47 ibid., p.319. The recommendation was in relation to all child witnesses.
48 NSW Department of Women, Heroines of Fortitude, p. 3.
6.1.11 Proposals for reform in the ACT

A discussion paper circulated in 2001 by the then Attorney-General, Bill Stefaniak MLA, considered the committal process in the ACT and recommended that the New South Wales legislation (as it was before the 2003 amendments) be adopted. The proposal was that for victims of sexual offences the magistrate must be satisfied there are ‘special reasons’ and for all other witnesses there must be ‘substantial reasons’. Although this idea has some appeal, the lack of certainty for complainants could make the situation even more stressful. Additionally, for many cases delays will be extended because extra hearing time will need to be allocated so that an application to have prosecution witnesses attend the committal can be heard.

The ACT Law Reform Commission also discussed the matter in its 2001 report on sexual offences. The Commission was firmly of the view that committals should be retained for victims of sexual offences. One concern it expressed was that restrictions on committals would result in an increase in the number of matters going to trial (with major implications for the cost of justice) and, importantly, more complainants would have to give evidence at trial.

This presupposes, however, that a large number of accused would enter a plea of guilty following the complainant giving evidence at committal. As noted, the SARP team’s file review revealed that in all the sexual offence proceedings finalised in the Supreme Court in 2002–03 not once did an alleged offender plead guilty after the complainant gave evidence at committal.

The Law Reform Commission’s views also presuppose that giving evidence at trial is more traumatic than giving evidence at committal. This ignores the fact that the absence of a jury at a committal hearing often leads to tougher cross-examination of complainants. It also overlooks the other protections available when a witness gives evidence at a trial—most notably closed-circuit television, which means that the complainant gives evidence at a remote location and can see only the judicial officer and counsel, thus avoiding the stress of having to give evidence before a large number of people.

The Commission further noted that committal proceedings provide an important opportunity to ascertain the nature and extent of the evidence relied on by the Crown. There is no doubt that seeing a witness at first hand does allow for a better assessment. But Crown disclosure of all material statements and any material information that becomes known to the Crown means that defence lawyers are now reasonably well informed of the case against them earlier in the proceedings.

The Commission’s final recommendations in relation to committals for sexual offences proceedings were that the Crown be required to serve copies of the statements of all witnesses before the committal hearing, that the defendant be required to provide written notification of witnesses they wish to cross-examine, and that magistrates permit evidence to be given by closed-circuit television and limit cross-examination. Effectively, these practices are already in operation.


\[50\] ACT Law Reform Commission, Sexual Assault, pp. 92–6.

\[51\] ibid., p. 93.
6.1.12 Conclusion

Although there are advantages—to both the prosecution and the defence and for the smooth running of trials—in retaining full committal hearings, ultimately it is a balancing act. There is little or no benefit in requiring that complainants give evidence twice. Any policy change of this nature is challenging but, if one is to endeavour to reduce the negative impact of the criminal justice system on victims of sexual offences while not impinging on the rights of the accused, the restriction on committal proceedings is an obvious option.

There should be a complete prohibition on complainants being required to attend committal hearings for sexual offences. The reasons that justify the prohibition on children attending apply just as forcefully to adult complainants. Consideration might be given to extending the prohibition to all child witnesses, as recommended by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission.52

Alternatively, at the very minimum children should no longer be required to attend committal hearings, and there should be limitations on adult complainants’ attendance, in keeping with practices in New South Wales, Tasmania and South Australia.

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<tr>
<th>Recommendation</th>
<th>Calling of complainants in committal proceedings</th>
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<td>6.1</td>
<td>The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings. Failing this, child complainants should not attend committal proceedings. For adult complainants, the court should be satisfied that there are special reasons for the complainant to attend. In making an application to have a complainant attend, the defence should specify the areas they wish to cross-examine the witness about and why. There should be no deviation from those areas during the committal hearing.</td>
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6.2 Pre-recorded evidence

The use of pre-recorded evidence in criminal hearings and trials is now legislated for in New South Wales, Victoria, Queensland and Western Australia, as well as New Zealand, the United Kingdom and much of the United States. The ACT has no provisions permitting the leading of pre-recorded evidence. Generally, the legislation applies to child witnesses, although in the United Kingdom and Western Australia, for example, it also applies to some adult victims of sexual assault.

Two distinct forms of pre-recorded evidence are used in criminal proceedings:

- the initial interview between police and the witness admitted as evidence-in-chief
- the entirety of the witness’s evidence.

The first form involves videotaping an interview with the victim, which is typically done shortly after their initial disclosure. The child is interviewed by police or child protection workers, the interview is recorded, and the videotape of the interview is played at the hearing or trial as the child’s evidence-in-chief. In some circumstances an audio recording is used. The child attends the hearing or trial for additional examination-in-chief (if any),

cross-examination and re-examination. Evidence is usually given from a remote location linked to the court via closed-circuit television. This method of taking pre-recorded evidence is legislated for in New South Wales, Victoria, Queensland and New Zealand.

The second form of pre-recorded evidence—the pre-recording of the entirety of a witness’s evidence—is legislated for in Western Australia and Queensland. In Western Australia, where the legislation was introduced in 1992, it applies to children and vulnerable witnesses. At a pre-trial hearing the witness gives evidence via closed-circuit television from a remote room. The judge, prosecutor, defence lawyer and accused are all in the courtroom. There is no jury. The witness gives evidence and is cross-examined and re-examined, and this is videotaped. Some months later the trial is held. The witness does not attend the trial, and the jury is played the videotape of the witness’s evidence.

Some states are moving towards merging the two approaches. Queensland has been using methods of pre-recording since January 2004, when a range of reforms to the way the evidence of children is taken were introduced through the Evidence (Protection of Children) Amendment Act 2003. A child’s evidence-in-chief is the videotape of their interview with police or child protection workers. The child attends a pre-trial hearing where the videotape is played as the evidence-in-chief. The child is then cross-examined and re-examined and this is also taped. When the trial proper occurs the witness’s evidence consists of the videotape of the initial interview (which takes the place of the child’s examination-in-chief) followed by the videotape of any additional examination-in-chief, the cross-examination and the re-examination. This approach also came into law in the United Kingdom in 1999.

Western Australia is considering a Bill that would permit the use of the video of the initial interview as evidence-in-chief. New South Wales and Victoria are considering adopting the Western Australian model of pre-recording evidence, to complement pre-recorded evidence-in-chief. If the three states follow through with such amendments, the majority of states in Australia will soon have comprehensive pre-recording of evidence regimes for child victims of sexual assault.

It should be noted, however, that introducing legislation to allow pre-recorded evidence to be admitted is just one step. Jurisdictions such as New South Wales and Victoria illustrate that the use of special measures by police and prosecutors can significantly lag behind the introduction of legislative provisions permitting them. Three factors are essential to the effective use of such measures:

- commitment from government, the bureaucracy, the judiciary and practitioners
- adequate technology and support for that technology
- comprehensive training.

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53 ‘Remote location’ simply means a room located away from the courtroom. Often the remote location will be close to the court. In NSW the pilot Child Sexual Assault Court at Parramatta District Court has a remote room that is 10 minutes’ walk away from the actual court complex and is also connected to courts at Campbelltown and Liverpool.
54 Evidence Act 1906 (WA).
55 Youth Justice and Criminal Evidence Act 1999 (UK).
56 Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004.
6.2.1 The rationale for pre-recording evidence

Pre-recording of evidence aims to redress some fundamental problems with the justice system and how it deals with children’s evidence. Unless those problems are tackled with a will, there will continue to be major difficulties with prosecuting people charged with sexual offences against children. The following two examples, based on ACT cases, illustrate the difficulties:

- A girl aged 5 told her mother that a family friend had touched her ‘private parts’. She repeated the assertion on the same day when speaking to police and this was recorded on videotape. DNA evidence was obtained to support her complaint, but this needed to be linked to the alleged offender’s actions by the girl giving evidence. The defence did not require her to attend the committal hearing. Before the trial the child met the prosecutor but did not speak about the incident, and it was clear she would be unable to give evidence. The DNA evidence could be led but not the child’s disclosures to the police and her mother. The defence consented to the tape of the girl’s disclosures being played in the trial and did not require her presence for cross-examination: had the defence not consented, though, it would not have been permissible to play the tape. In this case there was a conviction, but if only the DNA evidence had been led (without the evidence of the child on tape), which would normally be the case in the ACT, the prosecution might have had difficulty obtaining a conviction.

- A boy aged 9 alleged that his father assaulted him on the left side of his face. There were no other witnesses to the assault. Photos taken showed bruising to the left side of the boy’s face. The boy’s interview with the police was taped, and he gave evidence at committal and at trial. Before each occasion he recounted the event to the prosecutor, both times saying he had been hit on the left side of his face. At the trial, some 15 months later, he gave evidence via closed-circuit television, testifying that he had been hit on the right side of his face. The judge directed an acquittal because the boy’s evidence was not consistent with the photos.

Both examples highlight the problems with the fair and proper hearing of allegations of child abuse. Delays in the court process (discussed in Chapter 9) are inevitable but work against children’s ability to recount events. Added to that is the unfamiliarity and formality of the court environment, which can also distract a child from accurately recalling what might have been months of abuse. For young children, being able to give cogent evidence many months later might be beyond their developmental capacity, despite the fact that they were able to give coherent descriptions at a time closer to the events in question. Pre-recording of evidence is an attempt to redress this problem.

Pre-recorded evidence has been described as offering the following benefits:

- It improves the quality of evidence.
  - All witnesses’ memories of events deteriorate with time, and this is particularly the case with children. When a video interview is admitted as evidence-in-chief and there is a delay in cross-examination, the cross-examination can exploit the lapses in the child’s memory. Conversely, it could be more difficult to cross-examine a child some months after the original tape was made. A pre-trial hearing as close as possible to the time the child made the original tape captures the child’s evidence while it is still relatively fresh.

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Jurors observe the child closer to the date of the incident, thus reducing the distortion to their perception of a child whose physical and cognitive development has changed.

- It facilitates pre-trial decisions by the prosecution and the defence.
  - Pre-trial taking of evidence allows the prosecution to be clear about the indictment and about the case it will conduct. It will not be a matter of seeing how the witness performs on the day. If the witness does not give cogent evidence the trial might not proceed. There is thus the potential for more pre-trial hearings where evidence is taken, but in the long run this may lead to fewer trials being conducted.
  - Pre-trial evidence taking might lead to more pleas of guilty before the trial—but after the child has given evidence.

- It helps with the scheduling and conduct of the trial.
  - Any questions about admissibility of parts of the child’s evidence or the conduct of the examination-in-chief or cross-examination can be resolved before the trial, thus avoiding numerous applications to exclude evidence during the trial.
  - Trials will be shorter and will run more smoothly.

- It minimises system abuse of child witnesses.
  - Children will be able to give their evidence at a much earlier stage and so will be helped to put events behind them and get on with life.
  - Therapy can begin earlier, without the risk of contaminating the evidence.
  - A child will not have to give evidence again if a re-trial is ordered for reasons unrelated to the child’s testimony—as is often the case when re-trials are ordered because of incorrect summing up.

In relation to the last point, about system abuse of children, Eastwood and Patton’s findings on the impact of delays on children are discussed earlier in this chapter. Pre-trial hearings many months before the trial can greatly reduce the delay.

Hoyano lists a number of drawbacks to pre-trial videotaped testimony\textsuperscript{58}:

- It is unfair to require the defence to cross-examine the main prosecution witness before the formal trial has begun.

- Defence lawyers are concerned that they cannot prepare to cross-examine the most important prosecution witness until shortly before the trial is scheduled.
  - The defence finds it difficult to prepare its case until there has been full disclosure of the prosecution case.
  - If defence counsel is in receipt of legal aid, they might be paid for only one trial whilst having to prepare for the matter twice.

\textsuperscript{58} ibid.
Video technology lacks the immediacy and persuasiveness of a child’s live-in-court testimony.

There can be problems with the technology.

In relation to the last two points, the majority of children in the ACT and elsewhere in Australia give evidence via closed-circuit television. Pre-recorded evidence appears to the jury in the same way as evidence given via CCTV. The technology in the ACT is a problem: see Chapter 11. With good technology, however, pre-recorded evidence can have just as great an impact as live testimony.

6.2.2 Support for pre-recorded evidence in Australia

In referring to the Western Australian provisions permitting the recording of a child’s evidence-in-chief and cross-examination before trial, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission noted that pre-recording can also reduce the stress to a child witness by reducing the number of times he or she might come to court only to be told the trial has been postponed.59 They recommended that tapes of an interview between police and the child be used as evidence in court and that legislation permit the entire evidence of a child, including evidence-in-chief and cross-examination, to be taken before trial and videotaped for presentation at the trial whenever the interests of justice so require.60

In its December 2001 report The Receipt of Evidence by Queensland Courts: the evidence of children, the Queensland Law Reform Commission recommended that the evidence of any child aged less than 16 years be taken at a pre-trial hearing. The recommendation was taken up in the Evidence (Protection of Children) Amendment Bill 2003.

In New South Wales the 1997 Wood Royal Commission considered the question of videotaped interviews with child witnesses and the recording of evidence at pre-trial hearings and recommended that videotaped interviews with child witnesses be admitted as evidence-in-chief. This recommendation was adopted. The Commission also recommended that the entirety of the evidence of a child be recorded at a pre-trial hearing. It did not favour mandatory pre-trial hearings for young witnesses, saying that the goal should always be timely finalisation of the trial and any associated sentence proceedings. However, where it was apparent that the suggested time frame of six months from the date of charging to trial would not be met, or where the nature of the case suggests that a child under the age of 12 years would be at particular risk of trauma or prejudice through delay, the Commission considered that there should be a mechanism for taking evidence before the trial.61

The Commission noted that avoiding delay was not the only concern. If a child is aware that the trial is under way and that there are many people watching and listening, it is likely to be more stressful than a setting that is known to be a preliminary event.62 The Commission acknowledged that there could be complications in finding suitable dates and

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60 ibid., p. 316.
61 Wood Royal Commission, p. 1106.
62 ibid., p. 1105.
the same judge, prosecutor and defence counsel. These matters would, however, not be as complex in the ACT as they are in New South Wales.

Although New South Wales did not adopt the Wood Royal Commission’s recommendations in relation to pre-recording the entirety of a child witness’s evidence, the Legislative Council Standing Committee on Law and Justice took the matter up again in its 2002 inquiry into child sexual assault prosecutions. The Committee recommended that child witnesses’ evidence be recorded in full before a trial, that pre-recorded evidence be admitted as a child’s evidence in any committal proceedings, re-trials or appeals, and that the Attorney-General ensure that the pre-trial recording provisions allow for the court to order the editing of the video recording in order to omit irrelevant or prejudicial material prior to the trial. These recommendations have not yet been adopted.

6.2.3 The interview with police as evidence-in-chief

Use of a video-taped interview between a witness and the police as evidence-in-chief has been adopted in a number of states. The witness still attends the trial, where the tape is played and they are then cross-examined. Legislation permitting this has existed in New South Wales since 1997, in Victoria since 1991 and in New Zealand since 1990. The SARP team visited these three jurisdictions and discussed the operation of the provisions.

New South Wales

Legislation permitting the use of taped interviews was introduced in New South Wales by the Evidence (Children) Act 1997, which was proclaimed on 1 August 1999. The reforms were based on the recommendations of the Wood Royal Commission and the 1997 report of the Children’s Evidence Task Force. The legislation reformed the law by providing that audiotaped or videotaped interviews could be tendered as all or part of a child’s evidence-in-chief. The provision applies to children who are victims of sexual abuse, physical abuse or neglect and who are aged less than 16 years at the time their statement is recorded and less than 18 years at the time they give evidence.

Video recording of interviews was initiated in September 1999 by the Joint Investigative Response Teams in the Sydney metropolitan area. Interviews are conducted by specially trained police or Department of Community Services officers. The Evidence (Children) Act will eventually require that all interviews with children falling into the categories just described be recorded by the investigating official. In 2002, at the time of publication of the Legislative Council’s report on child sexual assault prosecutions, the relevant provision had not been proclaimed because of the practical difficulties associated with installing the necessary equipment throughout the state.

The Evidence (Children) Act permits a child to whom the provisions apply to give evidence wholly or partly in the form of a recording, orally in the courtroom or by closed-

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63 In Western Australia the pre-trial hearing may be heard before a judge different from the one that conducts the trial.
64 NSW Legislative Council Standing Committee on Law and Justice, Report on Child Sexual Assault Prosecutions, p. 189.
65 Wood Royal Commission, p. 1097.
67 See Chapter 3 for a discussion of the Teams.
68 Evidence (Children) Act 1997 (NSW), s. 7, not yet proclaimed.
circuit television.\(^6^9\) The electronic recording of the interview can be used as evidence-in-chief.\(^7^0\) The wishes of the child are to be taken into account by the person calling the witness: if the child does not want their evidence-in-chief to be given in this way it should not be. The trial judge must warn the jury not to draw any adverse inference from the giving of evidence in this way.\(^7^1\) The judge retains ultimate discretion and can disallow recorded evidence if it is not in the interest of justice for it to be presented this way.\(^7^2\)

**Victoria**

Section 37B of Victoria’s *Evidence Act 1958*, inserted in 1991, applies to sexual offences and indictable offences involving an assault on, or injury or threat of injury to, a person. For any prosecution witness who is aged less than 18 years or has ‘impaired mental functioning’ the evidence-in-chief can be given by audiotape or videotape.\(^7^3\)

The Victorian provision is broader than the provisions in other jurisdictions in that it is not limited to victims: it applies to any child witness giving evidence in the proceeding. In practice, however, a lack of resources means that the Victorian police limit videotaping to complainants in sexual matters and child witnesses in very serious matters such as homicides. The legislation also applies to witnesses with impaired mental functioning.

The Regulations require that interviews be conducted by a member of the police force who has successfully completed a Victoria Police course of training in the procedure.\(^7^4\) The seven-day Video and Taped Evidence Course is conducted in conjunction with a five-day training course for Sexual Offences and Child Abuse officers. The training includes a day with a child development specialist, being instructed in interviewing children.

The Regulations govern who has custody of the tapes, when copies are to be made and the custody of those copies, recording every person who watches the tape, the provision of transcripts to the defence, and destruction of the tapes.\(^7^5\)

Prosecutors from the Victorian Office of Public Prosecutions informed the SARP team that the tapes are now being used more often. In the early days the quality of the interviews was poor, with numerous leading questions being asked, and each interview would go through the stages of free narrative, clarifying questions, then a review. The review stage has now been cut out, reducing the length of the interviews. Training of interviewers has greatly improved the quality of the interviews.

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\(^6^9\) *ibid.*, s. 9.
\(^7^0\) *ibid.*, s. 11.
\(^7^1\) *ibid.*, s. 14.
\(^7^2\) *ibid.*, s. 15.
\(^7^3\) These are referred to as VATE tapes (video audio taped evidence).
\(^7^4\) *Evidence (Recorded Evidence) Regulations 1994 (Vic)*, r. 5
\(^7^5\) *ibid.*
Another factor that affects the quality of the tape is the editing. The Office of Public Prosecutions has a technical expert and sophisticated equipment for editing tapes.\(^76\)

In Victoria and New Zealand the SARP team spoke to senior prosecutors who regularly conduct trials using the tapes as evidence. They said the benefits of such tapes are considerable for the following reasons:

- The prosecutor is assured of a prima facie case based on the tape.
- They are particularly useful for very young children.
- They are useful for older children and teenagers who feel uncomfortable talking about what has happened, especially in a court environment.
- When the case involves abuse that has occurred over a long period, they are useful because complainants often forget substantial parts of the abuse when giving evidence in court.

**Other Australian states**

Queensland has recently passed legislation that will allow recorded statements of witnesses aged less than 16 years to be used as evidence-in-chief.\(^77\) In Western Australia the Government has introduced a Bill that, if passed, will permit the tendering of pre-recorded evidence-in-chief.\(^78\)

**New Zealand**

New Zealand has had a provision similar to that applying in New South Wales since 1990.\(^79\) It seems to be working well and is now relatively uncontroversial. Interviews are conducted by specialist interviewers from the New Zealand Police Service or the Department of Community, Youth and Family Services. The interviewers’ sole job is interviewing children; they do not investigate. Police and prosecutors the SARP team spoke with said this specialisation and the training the interviewers receive have contributed to the success of the provision. Specialisation allows the interviewers to keep abreast of the latest literature on the interviewing of children and to continually develop their skills. They conduct up to 200 interviews in a year. Specialisation is discussed in more detail in Chapter 4.

The Regulations provide that the tape is the property of the police. Police can make a copy available to Community, Youth and Family Services if they are asked to.\(^80\) Regulations also prescribe what happens to the tape and any copies. To use the tape in court, the Crown must make application to the court, and it is a discretionary matter for the court. Section 23E of the New Zealand Evidence Act 1908 provides for a number of different

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\(^{76}\) The SARP team discussed with Rod Hume, the Audio Visual Officer at the Victorian OPP, the equipment—two video recorders—used in the ACT DPP to edit tapes. He said the editing he is required to do could not possibly be done on such equipment and the quality of the tape would be diminished. Using his equipment, he can excise even syllables of words. If the ACT were to adopt this mode of evidence provision, suitable editing equipment would be needed, unless the evidence was recorded on disc. This is discussed further in Chapter 11.

\(^{77}\) Evidence Act 1977 (QLD), s. 93A.

\(^{78}\) Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004.

\(^{79}\) Evidence Act 1908 (NZ), s. 23E, and Evidence (Videotaping of Child Complainants) Regulations 1990 (NZ).

\(^{80}\) Evidence (Videotaping of Child Complainants) Regulations 1990 (NZ), Reg. 11A.
modes of giving evidence, such as closed-circuit television, using screens, and videotape, which are not mutually exclusive. A witness’s videotape can be played and the witness can then be cross-examined from a remote room via closed-circuit television. Applications are generally, but not always, made at pre-trial hearings.

The provision applies to offences of a sexual nature where the complainant is aged less than 17 years at the commencement of the proceedings or is over the age of 17 years and is mentally handicapped.81

The United States

Under the federal system in the United States criminal prosecutions come within state jurisdiction and there is considerable variation across the 50 states. Congress has legislated special provisions for child witnesses in the Federal Rules of Evidence, which provide a model for state legislatures. Constitutional constraints have dictated the particular provisions. The Rules require specific evidence that a child is likely to be unable to testify through fear or to suffer emotional trauma from testifying in an open court. Unless the order is based on evidence that the child is unable to testify in their presence, the defendant is entitled to be present. If the child is unable to testify for that reason, a two-way closed-circuit television is used to allow the defendant and the child to see one another during the testimony. The reason for this is the constitutional requirement that ‘in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witness against him …’.82 In Maryland v Craig83 the Supreme Court interpreted this right with some flexibility, holding that the confrontation clause does not guarantee an absolute right to a face-to-face encounter with witnesses at a trial. States have regarded the decision as giving the necessary authority to authorise special provisions for child witnesses: 36 states have authorised videotaped pre-trial depositions of a child’s entire testimony; 17 states have made videotaped interviews with children admissible in evidence at trial; and 13 states permit the use of closed-circuit television in criminal child abuse proceedings.84

Canada

Canada enacted reforms affecting the evidence of children in 1986, being one of the first Commonwealth countries to do so. In child molestation or sexual assault cases a videotaped interview with complainants aged less than 18 years is admissible as evidence-in-chief.85 There have been constitutional challenges to this measure—and other measures such as the use of screens and closed-circuit television—pursuant to the Canadian Charter of Rights and Freedoms, s. 7 of which guarantees ‘the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice’ and s. 11 of which guarantees a right to ‘a fair and public hearing by an independent and impartial tribunal’. The special measures were upheld by the Canadian Supreme Court in R v Levogiannis.86

The Court upheld the constitutionality of screens and videotaped interviews as necessary measures to sensitise the law to the realities of the child witness. The interview may also

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81 Evidence Act 1908 (NZ), s. 23C.
82 Sixth Amendment to the American Constitution.
84 Hoyano, ‘Striking a balance’, p. 951.
85 ibid., p. 952, referring to the Criminal Code of Canada, s. 715.1.
86 [1993] 4SCR475.
be admitted as a child’s entire testimony under a new judicially created discretion to admit hearsay evidence if it is necessary and reliable, if the child is ruled testimonially incompetent and, even more radically, if the child refuses to testify at the trial.  

*The United Kingdom*

In the United Kingdom video-recorded evidence-in-chief has been allowed for child witnesses since 1988. In 1999 it was extended to ‘vulnerable witnesses’ by the *Youth Justice and Criminal Evidence Act 1999*. The special measures provisions in that Act apply to all witnesses aged less than 17 years and to adult witnesses if the quality of their testimony is likely to be affected because of intimidation, because of their vulnerability as a result of the sexual nature of the offence charged, or because of mental or physical incapacity. Complainants in sexual matters benefit from a presumption of eligibility for the various special measures in the Act unless they waive that eligibility.

There is a presumption that children who are victims of or eyewitnesses to sexual offences are entitled to give their testimony by way of a video-recorded interview conducted by police or social workers and to be cross-examined and re-examined in a videotaped pre-trial hearing. The statute deems these witnesses to be in need of special protection. These measures are also available to adult witnesses if the court concludes the measures are likely to maximise the completeness, coherence and accuracy of their testimony and would not unduly inhibit the evidence being tested by a party.

6.2.4 Evaluation of the use of pre-recorded evidence in New South Wales

As noted, in New South Wales provisions permitting the use of a tape as evidence-in-chief were introduced in August 1999. Between May 2000 and May 2002 a detailed evaluation of the implementation of the provisions was carried out on behalf of the NSW Police Service. Members of the judiciary and the legal profession, members of NSW Police, child sexual assault counsellors and personnel from the DPP Witness Assistance Service were interviewed. A small number of child witnesses were also surveyed. The evaluation provides important insights into how such a major change in the giving of evidence was dealt with by participants in the criminal justice system.

The majority of people interviewed supported the use of electronically recorded statements as part of a child witness’s evidence-in-chief. McConachy found that police and child protection officers from the Joint Investigative Response Teams and lawyers with greater experience of the measure were more confident with its use than their less experienced colleagues. Defence lawyers were generally less supportive than other respondents.

The most commonly cited benefit of the electronic recording of children’s representations was reducing the level of stress suffered by children. McConachy concluded that the provision allowed a greater number of children to tell their story. The use of electronically recorded statements meant that the child spent less time in court and the need for them to repeat their evidence was minimised.

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88 *Criminal Justice Act 1988* (UK), s. 32 and 32A.
90 McConachy, *Electronic Recording of Children’s Evidence*.
91 There was 83 per cent support for the provisions among prosecution lawyers and 33 per cent among defence lawyers—ibid., p. 28.
92 ibid., p. 39.
A majority of Crown prosecutors, defence lawyers and members of the judiciary considered that use of a video-recorded statement improved the quality and completeness of the evidence obtained from children. Such statements were seen as transparent and as offering a way of reducing the risk of leading questions or witness contamination. Lawyers and members of the judiciary who took part in the evaluation identified the following additional advantages:

- reducing the stress on the child
- being able to hear the child’s own words
- being able to observe the child’s demeanour and developmental stage
- enabling the capture of the earliest memories of the incidents
- allowing the child’s credibility to be more easily assessed
- ensuring that information is more accurate and consistent.

The same group identified the following problems associated with pre-recording:

- Interviewers’ skills and interview standards were poor.
- It is harder for the child to settle in to cross-examination.
- Playing a tape distances a child from the jury.
- It is harder to assess credibility and check inconsistencies.
- Additional evidence is often required.

The most commonly cited disadvantage related to interviewers’ skills and the standard of interviews. The length of the interview and transcript was also cited as a major problem, and not just by the lawyers: 66 per cent of the 18 witness assistants and child sexual assault counsellors interviewed were concerned about this.

Proper training of interviewers is therefore a big concern. If such a provision is to be adopted in the ACT, it will operate effectively only if adequate resources are directed towards training. Specialist interviewers are discussed in Chapter 4; their use should be given serious consideration.

Despite the disadvantages, McConachy found that 82 per cent of the judicial officers interviewed supported the provision. In addition, 72 per cent of lawyers, 99 per cent of

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93 ibid., p. 29. The SARP team spoke to senior prosecutors in jurisdictions where similar provisions exist; they indicated that when a tape is used as a child’s evidence-in-chief the child’s evidence is far more complete.
94 91 per cent of the 12 experienced judicial officers saw this as an advantage of the provision—ibid., p. 32.
95 ibid., pp. 29, 32.
96 ibid., pp. 29, 33. This was not seen as a problem by the senior prosecutors spoken to in New Zealand and Victoria; in fact, they thought that leading some additional evidence-in-chief allowed the child to relax more and be better prepared for cross-examination.
97 ibid., p. 29.
98 ibid., p. 30, 35.
99 ibid., p. 31.
Joint Investigative Response Team officers, and 88 per cent of Witness Assistance Service officers and child sexual assault counsellors interviewed supported it.  

McConachy also looked at experiences in jurisdictions where similar provisions operate. The United Kingdom introduced a provision allowing a videotape to be tendered as evidence-in-chief in 1991. The Home Office carried out and reported on an evaluation in 1995, observing 93 trials involving 150 children. Videotapes were tendered as evidence-in-chief for 73 per cent of the children, who gave the rest of their evidence by what is referred to in the United Kingdom as ‘live link’, which is the same as closed-circuit television. The evaluation found that, compared with barristers, interviewers were generally more linguistically accommodating and supportive of the witness. Children appeared less anxious on the tape compared with their live-link evidence. Entering cross-examination without having given evidence in person was found to make no difference to the mood of the witness. An analysis of trial outcomes revealed that the mode of giving evidence did not affect the outcome; in fact, there was a trend (although not a statistically significant one) to higher rates of late guilty pleas where taped evidence was tendered as the evidence-in-chief.

A subsequent Home Office study of the admissibility and sufficiency of evidence in child abuse prosecutions noted that recorded interviews had three distinct functions that were sometimes difficult to reconcile:

- as the initial step in a criminal investigation
- as an inquiry into whether a child is in need of protection
- as the evidence-in-chief of a child.

McConachy noted that in this context there must be a trade-off, since a well-conducted multi-purpose interview will reduce the number of times a child is asked to recount what happened and reduce the potential for system abuse of the child. McConachy did, however, identify several practical problems associated with implementation of the provisions in New South Wales:

- The standard of interviewing. This has already been noted and must be dealt with through high-quality training of the interviewers. It is a very good reason to consider the use of specialist interviewers, as occurs in Victoria and New Zealand.

- Court facilities and equipment. Problems included the lack of playback facilities, lack of technical expertise on the part of court staff required to play the tapes, poor sound quality of the tapes, and inappropriately sized televisions. This problem was exacerbated in regional areas.

- DPP prosecutors not using the tapes in court. Some DPP prosecutors were not using the tapes, either because of the quality of the tape or the interview, or both, or because they thought it better to have the witness give evidence-in-chief in court.

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100 ibid., p. 38.
102 Referred to in McConachy, Electronic Recording of Children’s Evidence, pp. 9–10.
103 ibid., p. 10.
104 ibid., p. 63.
105 ibid., p. 61.
Overall, however, McConachy found there was support for the provision and that it resulted in positive outcomes for children.

Aside from McConachy’s evaluation, several other issues associated with the use of tapes as evidence-in-chief have emerged since the introduction of the provision in New South Wales.

- **Children being viewed by the court while the tape is playing.** Witnesses in the remote room were being viewed by the court as the tape of their interview was played. Prosecutors objected to this on the basis that it would add nothing to the child’s evidence. The concern was that the jury might misinterpret the child’s behaviour as he or she watched the video. For example, a child shown a lengthy videotape the day before the trial and then required to watch it again might appear bored and uninterested, whereas the jury may well expect them to react differently. As a result of a number of unfavourable rulings against the prosecution in this regard, legislation introduced in 2003 provides that a child is not to be viewed while watching the video.\(^{106}\)

- **Editing tapes before the trial.** Before the trial, defence lawyers often do not contact the DPP about the parts of the tape of the interview between police and the victim they object to being used. They say it is difficult to view the tapes before the trial because, although they are given transcripts, they must attend a police station in order to view videotapes. The result is that trials cannot begin on the day listed. The pilot Child Sexual Assault Court in Parramatta has a practice of not requiring a child to attend until the third day of the trial, so that questions of admissibility and the editing of the tape can be dealt with beforehand. The practice was introduced after the first trial in the pilot did not start until a number of days after the appointed date and all the while the child witness had to wait in the remote room. The problem could be resolved if a pre-trial hearing were held. This could be supported legislatively, requiring the parties and the court to determine admissibility before the trial begins. This is discussed further in Chapter 9.

- **Technical shortcomings.** In New South Wales the sound quality of tapes is often poor. The problem arises as a result of the positioning of the microphone, the microphone being covered up by clothing, or the child talking while behind a piece of furniture or under a table and therefore not being picked up by the microphone. The state has introduced legislation providing that a transcript can be given to the jury if it will help them understand the evidence.\(^{107}\)

### 6.2.5 Pre-recorded evidence-in-chief in the ACT

For some time ACT Policing has been recording interviews with complainants aged less than 14 years in allegations of sexual and physical abuse. The interviews replace formal statements, the aim being to allow the child to describe what happened in their own words. At present, however, there is no provision for the tapes to be admitted as evidence-in-chief. There are some very limited circumstances where they may be played in court—for example, to rebut suggestions of a prior inconsistent statement.

If provision were made for the tapes to be admitted as evidence-in-chief, there would need to be considerable investment in improved technology and in comprehensive training for

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\(^{106}\) Evidence (Children) Act 1997 (NSW), s. 11.

\(^{107}\) ibid., s. 15A.
interviewers. Technology and training are discussed in Chapters 11 and 12, but it is worth noting here that to legislate for the admission of the tapes without a concomitant investment in training and equipment will result in the provisions being under-used. The ACT can learn much from jurisdictions such as New South Wales: their experience shows that, although the introduction of such provisions is not without challenges, the provisions can work if those in the criminal justice system and the government are committed to them.

6.2.6 Custody and copying of videotapes in the ACT

There have been instances of tapes made overseas being placed on internet child pornography sites. As a result, jurisdictions permitting the use of videotapes as evidence generally have provisions governing the custody and copying of the tapes.108

ACT Policing currently makes audio or video recordings of interviews with children and, although the recordings cannot be tendered, the problem of their custody does arise. ACT Policing and the DPP should formulate for police and prosecutors a written policy designed to ensure the security of such tapes. They should also develop a procedure for authorising, at senior levels, the copying of tapes and prohibit the giving of any copies to anyone—including defence lawyers. Defence lawyers could attend a police station or the DPP offices to view the tapes. Transcripts should continue to be provided.

If defence lawyers issue a subpoena for the production of a tape, the DPP should appear and ask that the tape be viewed in the DPP premises and not be released to the defence. This might be sufficient to ensure the safety of tapes, although legislation would provide a more comprehensive safeguard.

6.2.7 Pre-recording all the witness’s evidence

The preceding sections deal with pre-recorded evidence-in-chief. Although that offers a step forward, the witness still must attend the trial and be cross-examined. In Western Australia and Queensland legislation permits the taping of the entirety of certain witnesses’ evidence before trial.

Western Australia

Following publication of the 1987 Child Sexual Abuse Taskforce’s report and the Law Reform Commission of Western Australia’s 1991 report Evidence of Children and Other Vulnerable Witnesses in 1992, Western Australia instituted significant legislative reform in relation to child witnesses.109 The Evidence Act 1906 allows for the pre-recording of a child’s evidence—evidence-in-chief, cross-examination and re-examination—where a child is aged less than 16 years when a complaint of an offence is made. The offences provided for are offences of a sexual nature and some offences causing physical harm.

The evidence is taken at a pre-trial hearing. The jury is not present, but the judge, prosecutors, defence counsel and the accused all are. The pre-trial hearing occurs within a

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108 For example, the NSW Evidence (Children) Regulation 2004.
few months of the matter being committed for trial. Theoretically, the hearing can occur within six months of the accused being charged.110

The child gives evidence-in-chief from a remote room connected to the court via closed-circuit television. They do not view the accused. The judge and counsel wear their usual robes. The child is cross-examined and re-examined in much the same way as occurs in a trial in the ACT; however, the jury is not present and the tape is played to the jury at a later stage. After the evidence is taken the court can authorise editing. There are statutory provisions relating to the control and custody of the videotape and offences for the misuse of tapes. The court stores the tapes for use at the trial.

A witness can be called back at the trial to give further evidence, although applications pursuant to this provision are rarely made and even more rarely granted.111

To use the pre-recording provisions, the Director of Public Prosecutions must make a written application to the court. The application is usually made at the first appearance in the District Court, which is three months after committal. If the application is consented to, orders are made at that first mention date and a date is set for pre-recording. If it is not consented to, the matter is set down for a directions hearing and argument is heard.

After the evidence is taken, the DPP receives a copy of the tape and the court keeps the original. The tape can be edited only with the court’s permission. The practice is that the DPP amends the copy in consultation with the defence and advises the court of the edits—obtaining the court’s post-facto approval. Indictments can be amended after the pre-recorded evidence is taken.

The legislation allows the taped evidence to be used at a re-trial—for example, if a verdict has been overturned on appeal—where the parties agree that it should be used and agree that the complainant will be available to be cross-examined at the second trial.112

The provisions apply not only to child witnesses. The court may declare a witness to be a ‘special witness’ if, by reason of physical disability or mental impairment, they would be unlikely to be able to give evidence or to give it satisfactorily or if, by reason of age, cultural background, relationship to any party to the proceedings, the nature of the subject matter of the evidence, or any other factor that the court considers relevant, they would be likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.113 This potentially allows adult witnesses who would have difficulty giving evidence in court to have their evidence pre-recorded in the same way as children’s evidence.

The Western Australian Law Reform Commission’s initial proposal in its 1991 report was that the pre-recording would take place in an informal setting, in a room attended by the child witness and a support person, the prosecutor, defence counsel and the judge. This follows a model proposed by the Pigot committee in the United Kingdom and is referred to as a ‘Full Pigot’. Pilot studies in Western Australia showed, however, that this model

110 The SARP team attended the taking of evidence during a special hearing in Perth. The accused had been charged 12 months before and it was expected that the trial would not begin until at least another six months had elapsed.
111 Jackson, ‘Child witnesses in the Western Australian criminal courts’.
112 Evidence Act 1906 (WA), s. 106H, as interpreted in H v R, Western Australian Court of Criminal Appeal, unreported, 30 July 1997.
113 Evidence Act 1906 (WA), s. 106R.
was unsuitable because it placed pressure on children who had to directly confront the parties, and the defence lawyer in particular.

As noted, the practice now is that the court is formally convened, with the judge, prosecutor, defence lawyer and accused in court, and the child witness is in another room connected by closed-circuit television. The child has two television screens to watch, one with the judge always present and the other showing whichever counsel is asking questions. The defence lawyer and the prosecutor see the child’s head and shoulders on a large projector screen, as well as on individual monitors on the bar table. The judge sees the child on one monitor and the entire CCTV room on another. When the trial proper begins, the jury sees the child’s head and shoulders on a large screen directly in front of them.

Compared with other states, the Western Australian model appears to be more effective at facilitating children’s participation in the criminal justice process. This is not simply because of the pre-recording provisions but also because a raft of legislative, administrative and attitudinal changes have taken place since the late 1980s.

Queensland

In Queensland the preliminary hearing for the purpose of pre-recording a child witness’s evidence is listed at the time the indictment is presented, and the aim is to have it occur within a fortnight of the presentation of the indictment. At the pre-recording the child is not shown their videotaped statement to police. That evidence will be led at the trial through the police officer who took the statement, as will any written statement the child made to police. The child is normally shown the tape of their interview on the day before or the morning of the pre-recording, to refresh their memory and prepare them for cross-examination. The child gives their evidence via closed-circuit television (where it is available) and is called by the Crown prosecutor to give their evidence-in-chief. That evidence normally consists of asking the child whether the statement given to police is the truth, whether they have anything to add or change, and when they last viewed the videotape or read their written statement. It can also include the child giving a brief account of their evidence. Cross-examination then occurs. During the process the child has a support person with them—usually a volunteer from a child advocacy organisation called PACT (Protect All Children Today)—and cannot see the accused at any stage. At trial the child’s videotape is played to the jury immediately before the tape of the pre-recording is played.

The United Kingdom

In the United Kingdom s. 28 of the Youth Justice and Criminal Evidence Act 1999 provides for the recording of cross-examination and re-examination, as well as for admission of the videotape of the interview with the child witness as the evidence-in-chief.

 Witnesses aged less than 17 years qualify automatically for a range of special measures in the Act. Witnesses with a mental disorder, mental impairment or significant learning disability, or a physical disorder or disability, and witnesses who are likely to suffer fear or distress in giving evidence qualify if the court is of the opinion that their vulnerability is likely to affect the quality of the evidence.114 The Act sets out the circumstances the court must take into account in deciding eligibility: some of these relate to the witness (such as age, background, ethnic origin, domestic and employment circumstances, and religious and political beliefs) and others relate to the offence and the behaviour of the accused. The

114 Youth Justice and Criminal Evidence Act 1999, ss. 16, 17.
witness’s views are relevant but not binding. Complainants in proceedings for a sexual offence are deemed eligible for special measures without inquiry unless the complainant informs the court that she does not wish that, in which case the decision is one for the court.

6.2.8 Does pre-recording of evidence make a difference for children?

The Eastwood and Patton study of the experiences of child complainants of sexual abuse in the criminal justice system in Queensland, New South Wales and Western Australia found that the Western Australian system seems to contribute to higher satisfaction levels for children in that state.115

In the sample interviewed by Eastwood and Patton 30 per cent of the Western Australian child victims had their evidence pre-recorded and the remaining 70 per cent gave evidence by closed-circuit television. There are still considerable delays in Western Australia: the average delay between charge and trial is 17.5 months—despite the fact that generally at that stage children are not required to give evidence at committal.116 It was found that prosecutors, defence lawyers and judges saw the legislation and the mandatory use of closed-circuit television as effective measures:

Prosecutors reported it facilitated the child’s evidence because the child exhibits better concentration, is more attentive and less traumatised by the experience. Defence counsel in Western Australia noted it has not affected the right of the accused, understood it was designed to prevent further damage to the child and believed it’s use does not affect conviction rates.117

The conclusion of the Eastwood and Patton report is worth noting here:

Given the manner in which the law traditionally sets itself apart, it is no easy task to persuade every Australian jurisdiction that nothing less than substantial legislative and procedural reform will prevent the abuse of children by the justice system. The ineffectiveness of legislation to control cross-examination substantiates the notion that reform must go beyond legislation and must include a concomitant shift in culture, attitudes and beliefs about sexual abuse and children.

Worthwhile, explicit and repeated recommendations have been made by a myriad of enquiries and reports. Most remain ignored and unimplemented, including key recommendations made by the ALRC and HREOC (1997) in relation to the three problem areas identified by the children in the current study. Policy-makers in many jurisdictions have still not adequately addressed the greatest areas of difficulty for child complainants identified in this study: the long delay between reporting and trial, being forced to see the accused, and damaging cross-examination at committal and/or trial. A more child centred focus needs to drive policy, and legislation must be clear and unequivocal to ensure the intent of legislation is not continually thwarted.

115 Eastwood & Paton, The Experiences of Child Complainants.
116 Ibid., p. 49.
In the end, as reported in the current study … if children refuse to report sexual abuse because of damage done by the justice system, the abusers are allowed to act with impunity. The law must be redefined to rebalance the justice system in favour of the victim, similar to recent policy directions in the United Kingdom. It must recognise erroneous beliefs, ineffective legislation, damaging practices and the reality of sexual abuse.\textsuperscript{118}

\section*{Conclusion}

The ACT should adopt a comprehensive package for the pre-recording of evidence. It is recommended that, for specified witnesses, recorded interviews between the police and the witness be tendered as evidence-in-chief and the remainder of the witness’s evidence be recorded before the trial. Such pre-recorded evidence should also be admissible at re-trials. The classes of witnesses the provisions should apply to are discussed in Section 6.7.3. At the very least they should apply to child (aged less than 18 years) victims of sexual offences and victims of sexual offences who are cognitively impaired.

\begin{table}[h]
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\begin{tabular}{|p{2cm}|p{15cm}|}
\hline
\textbf{Recommendations} & \textbf{Pre-recording the evidence-in-chief of child witnesses} \\
\hline
6.2 & The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a child complainant as the child’s evidence-in-chief. The provisions should apply to child witnesses who are victims of sexual or physical violence as well as witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played. \\
6.3 & The legislation should be supported by investment in up-to-date technology and a comprehensive training program for interviewers. Consideration should be given to the training of specialist interviewers. Participants in the criminal justice system should receive training in relation to the new provisions, including the rationale for them. Suitable equipment will need to be bought for the Supreme Court and the Magistrates Court. \\
\hline
\textbf{Recommendations} & \textbf{Pre-recording of the entire evidence of the witness} \\
\hline
6.4 & Witnesses aged less than 18 years at the time the alleged offence was committed should be permitted to give their evidence via closed-circuit television at a pre-trial hearing attended by the judge, the prosecutor, the defence lawyer, the accused and any other person the court deems appropriate. That evidence should be recorded and played at the trial as the witness's evidence. \\
6.5 & Recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances—for example, where the child witness's evidence is admissible as coincidence or tendency evidence. \\
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\end{tabular}
\end{table}

\textsuperscript{118} ibid., p. 6.
Recommendation: Custody and copying of tapes of children’s interviews

6.6 ACT Policing and the ACT Director of Public Prosecutions should immediately develop a policy prohibiting the copying and distribution of tapes of interviews between police, child protection workers and children where sexual abuse is discussed. Copies of tapes should be made only when necessary for the court proceedings. Defendants and their lawyers should not be given copies of tapes; instead, they should be invited to attend the offices of the DPP or a police station to view the tapes. The DPP should liaise with the ACT Law Society in formulating the policy and informing ACT lawyers of it and its rationale. If these measures are not sufficient, consideration should be given to legislation. The same approach should be taken with tapes of medical examinations involving intimate body parts of children and adults.

6.2.10 Implementation of recommendations

If the ACT were to introduce legislation providing for the use of taped interviews as evidence-in-chief and for the pre-recording of all evidence, the provisions would need to be supplemented by technology allowing evidence to be taken in this way. Without a significant and ongoing investment in technology, the legislative provisions will be meaningless. The closed-circuit television facilities in the Magistrates Court and the Supreme Court are poor. Even if the foregoing recommendations are not adopted, the effectiveness of the current CCTV provisions in ACT legislation is limited by poor technology. The technology was no doubt good at the time it was adopted, but there have since been major improvements and the ACT is now lagging behind many other jurisdictions.

Equipment is needed to allow a tape of the interview with police to be played in court, followed by the witness being cross-examined and re-examined via closed-circuit television. The judge would need to be able to view the CCTV room at all times. Equipment for taping the evidence is also needed.

In terms of technology the set-up at the New South Wales Child Sexual Assault Court in Parramatta is at the forefront. The Court has a document camera that can relay documents to and from the CCTV room. It also has equipment that improves the sound on the videotape, to ensure that it is of the best quality. Two large plasma screens on the wall of the Court show the head and shoulders of the child witness on one and the CCTV room on the other, allowing the jury to see the witness and the support person. While the videotaped interview with police is being played the child is not viewed: legislation was passed to ensure this. Other facilities allow the playing of a video in court and the relaying of that video to the witness in the CCTV room. The prosecutor or defence lawyer can also use their laptops to display photographs on the plasma screen and in the CCTV room.

Vital to the use of all this equipment is readily available technical support and comprehensive training for the court personnel who will operate the equipment. Early problems in Western Australia, when evidence was not properly recorded as a result of errors in operating the equipment, meant that children had to give evidence again. In the Child Sexual Assault Court in Parramatta the system is operated by means of a touch screen and is designed to be as easy to use as possible. Nevertheless, technical advice is often required. Technology is discussed in Chapter 11.
6.3 **Closed-circuit television**

The ACT’s *Evidence (Miscellaneous Provisions) Act 1991* requires that all complainants in sexual offences and all child witnesses aged less than 18 years (other than the defendant) give evidence by closed-circuit television. The ACT creates a presumption that, unless they do not wish to, those witnesses will give evidence in this way. The ACT’s *Evidence (Closed-Circuit Television) Act 1991* allowed victims of sexual offences to give evidence via CCTV if the court was satisfied that the witness would otherwise suffer mental or emotional harm and made an order in that regard. The *Evidence (Closed-Circuit Television) Amendment Act 1994* removed the need for the court to make an order, and complainants in prescribed offences are now entitled to give their evidence by CCTV as of right.

The ACT provisions in relation to closed-circuit television remain the most progressive in the country. In other jurisdictions an application must be made to the court and it is a discretionary matter for the judge. The ACT was innovative when the provisions were introduced—well ahead of other jurisdictions—and has been referred to as a model to work towards.

There is, however, much room for improvement in the use of CCTV technology in the ACT. There are some anomalies in its application, and assumptions are made about its effectiveness. This section discusses problems with implementation of the current provisions and the controversial question of whether giving evidence via CCTV undermines the impact of that evidence.

6.3.1 **Problems with closed-circuit television in the ACT**

Practical implementation of the CCTV provisions in the ACT is beset by a number of problems. The main one is that the equipment is out of date and badly configured and often fails to work properly. This causes delays and interruptions in the giving of evidence and can undermine the quality of the evidence. This is discussed in detail in Chapter 11.

Another problem concerns the witness seeing the accused in the ACT Supreme Court while giving evidence from the remote room. Until recently the CCTV facilities in the Supreme Court were such that, unless the accused was moved from the usual position in the body of the court reserved for them, the witness was obliged to view the accused. The legislation permits the court to make orders about who can, and who should not, be seen by the witness. But at least one ACT Supreme Court judge has expressed the view and made a ruling that, since the legislation says nothing specifically about the complainant being prevented from seeing the accused, the complainant (including a child complainant) should be required to view the accused while giving evidence. The purpose of having closed-circuit television is thus defeated.

Other states have not resolved this problem by way of a specific legislative provision, but in practice in those jurisdictions, in the ACT Magistrates Court, and before some ACT Supreme Court judges it is considered implicit in the legislation that the complainant will not see the accused. Magistrates in the ACT are generally careful to place the defendant where they cannot be seen by the complainant. The cameras have now been adjusted in the Supreme Court but, to ensure that all complainants who give evidence by closed-circuit

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119 Section 8 (children) and s. 43 for complainants in sexual offence proceedings. ‘Child’ is defined in the *Legislation Act 2001* (ACT) as a person aged less than 18 years.

television are protected from seeing the accused, it is recommended that the legislation be amended.

Alternatively, if the CCTV equipment were updated—as is strongly recommended—it could be done in such a way as to ensure that the complainant does not see the accused.

6.3.2 **Application of provisions**

As noted, the provisions of the Evidence (Miscellaneous Provisions) Act apply to child witnesses (other than a child defendant) and adult complainants in sexual offence proceedings. They do not apply to other witnesses in sexual offence proceedings, who might also be vulnerable because, for example, they are giving evidence of something they too have experienced at the hands of the accused. The classes of witnesses in sexual offence proceedings who can give evidence using CCTV should be broadened to include other witnesses who, because of the evidence they give, might be vulnerable—particularly other victims of alleged sexual offences by the accused.

Section 6.7.3 discusses the application of special measures provisions generally to various classes of witnesses.

6.3.3 **Screens**

In contrast with a number of other jurisdictions, the ACT has no provision for screens to be used in court to shield a complainant from seeing the accused. In Western Australia, where such a provision does exist, a camera relays the complainant’s image to a monitor before the accused, so there is no restriction on the accused seeing the complainant.

If the CCTV technology functioned adequately there would probably be no reason to have to rely on screens. One argument in favour of screens is that they allow witnesses who want to give evidence in court the chance to do so without seeing the accused. As Eastwood and Patton found, seeing the accused is one of the greatest fears of child sexual assault witnesses.

An argument against screens is that if there is such a provision witnesses might be pressured to give evidence in court rather than by closed-circuit television. Safeguards could be introduced in the ACT DPP to ensure that the use of screens does not lead to witnesses being pressured into giving evidence in court. The use of screens should be legislated for in the ACT.

<table>
<thead>
<tr>
<th>Recommendations</th>
<th>Complainants not viewing the accused while giving evidence via closed-circuit television</th>
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<tbody>
<tr>
<td>6.7</td>
<td>The ACT’s Evidence (Miscellaneous Provisions) Act 1991 should specify that the accused is not to be in the view of a complainant giving evidence via closed-circuit television.</td>
</tr>
<tr>
<td>6.8</td>
<td>The closed-circuit television provisions should be extended to apply to witnesses other than the complainant in sexual offence proceedings who give evidence of similar acts committed upon them by the accused.</td>
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</tbody>
</table>
6.9 The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused. The accused could be provided with a monitor allowing them to see the witness.

6.3.4 Closed-circuit television and jurors’ decision making

Closed-circuit television has spared many witnesses the stress associated with giving evidence in the presence of the accused. But lawyers are concerned that the use of CCTV adversely affects the impact of the evidence. Jurors are thought to gain important information about a witness from scrutinising their non-verbal behaviour. Some practitioners say CCTV prevents this process occurring. Comments in the US Supreme Court in *Coy v Iowa* epitomise this concern:

> It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back’. In the former context it will often be … less convincing … face to face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by some malevolent adult.121

This reasoning entails two important assumptions. It assumes that jurors are able to accurately conclude when a witness is lying on the basis of the person’s demeanour. And it assumes that witnesses are more likely to give inaccurate or deliberately false evidence when testifying via CCTV.

In the past decade there has been considerable cross-disciplinary research into the effect of CCTV on jurors’ decision making. The research has aimed to determine whether jurors are more or less likely to detect deception when a witness testifies in this way and to shed light on whether the accuracy of witnesses’ testimony is affected.

*The ability of jurors to interpret witnesses’ non-verbal behaviour*

Psychological research suggests that jurors are not very good at detecting deception in witnesses and that in fact adult jurors’ ability to detect deception is more a matter of chance.122 Jurors often mistakenly interpret signs of anxiety as evidence of dishonesty.123 In the United States mock trial studies have examined the influence of CCTV on jurors’ ability to detect deception in children’s testimony. One such study found no difference between a child testifying via CCTV and one testifying in open court:

> … the results did not support the prediction that jurors would be able to discriminate accurate from deceptive testimony more easily in open court. Thus,

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123 Ibid.
CCTV did not appear to detract from fact finders’ abilities to reach the truth. This finding supports the use of protective measures for child witnesses.124

Another US study found that CCTV reduced the suggestibility of young children (aged 5 to 6 years). In particular, the children responded more accurately to misleading questions when testifying via CCTV. They also displayed less pre-trial anxiety than those who knew they had to appear in court. Importantly, the study found that the use of CCTV did not prevent jurors from distinguishing accurate from inaccurate testimony, although it was noted that in any case jurors are generally not particularly good at doing so. Jurors tended to assess accuracy on the basis of perceived confidence and consistency.125

The accuracy of witnesses’ testimony

Some practitioners insist that the stress of testifying in open court elicits more accurate evidence from a witness than when evidence is given via closed-circuit television.126 There appears, however, to be no research evidence to support this. In contrast, psychological research has found a positive correlation between the accuracy of testimony and the use of less formal environments.

Australian studies have found that the use of CCTV may elicit greater detail from witnesses. A 1992 ACT Law Reform Commission research paper examined the use of CCTV in the ACT in part to ascertain whether it affects the quality of evidence obtained from child witnesses.127 The researchers found no direct correlation between accuracy and CCTV but that children who testified via CCTV were markedly less stressed than those were denied the use of CCTV.

Experimental studies and courtroom research suggest that the use of CCTV has no marked effect on the quality of children’s evidence. Its use might actually have a slight positive effect on accuracy, in so far as the witness testifies in a less formal environment and is consequently less stressed. Concerns that CCTV decreases the accuracy of the evidence received are not verifiable.

Bias

Lawyers practising in criminal law often say the use of CCTV could bias jurors in favour of either the accused or the witness. Goodman et al. found that the defendant was no more likely to be convicted or the trial regarded as unfair when CCTV was used.128 Research comparing the testimony of adult witnesses also found no difference in jury verdicts between testimony viewed as a video extract and given live in court.129 Several other studies have also found that the medium of presentation has little impact on the verdict.130

130 ibid., pp. 246–7.
Conversely, there is concern that the use of CCTV might bias the jury against the witness. Orcutt et al. found that jurors prefer testimony given in open court but that this preference did not affect their verdict. Jurors’ rating of their empathy towards child witnesses did not differ significantly between children who testified in open court and those who testified via CCTV.131

Conclusion

The benefits of distancing the witness from the accused cannot be overstated. The practical implication of the foregoing is that ACT Director of Public Prosecutions should ensure that prosecutors do not dissuade witnesses from using closed-circuit television when giving evidence. Recommendations in this regard are made in Chapter 5.

6.4 Intermediaries

One of the difficulties for children appearing in court is the unfamiliarity of the surroundings, the formality, and the alien nature of the process of giving evidence. The language of the courtroom—and in particular of lawyers—can be very confusing. An excerpt from the transcript of a recent ACT trial illustrates this point. Here, defence counsel is cross-examining a 16-year-old complainant by closed-circuit television; the complainant was aged 15 years at the time of the alleged offences:

DEFENCE COUNSEL: Well, I suggest to you, madam, that you were not at any stage in AP1’s car with him and [name of friend] at any time during this camp?

No audible reply.

DEFENCE COUNSEL: Are you going to answer that question?

COMPLAINANT: What’s the question, sorry?

DEFENCE COUNSEL: Did you hear it?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Well, are you going to answer it?

COMPLAINANT: You said, ‘I suggest to you’. That’s kind of just your thought.

DEFENCE COUNSEL: Well, what do you say about it?

COMPLAINANT: We were in his car that night, we weren’t …

DEFENCE COUNSEL: Thank you. When I put a proposition to you in future, PW1, you can either agree with it or disagree with it. You understand that?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You knew that before you got into the witness box, didn’t you?

The witness had difficulty understanding the unfamiliar language of the courtroom. Rather than acknowledge the arcane nature of this language and make an effort to accommodate the witness, some practitioners attack the witness and their intelligence.

In South Africa this problem has been redressed by using intermediaries. The approach is akin to using a foreign language interpreter in court proceedings—which often happens. It is in fact a more transparent process, in that the court can hear the questions the intermediary puts to the child and the child’s responses. Thus the process is open to the sort of immediate scrutiny that is not possible when language interpreters are used.

Both the United Kingdom and Western Australia have legislation permitting the use of intermediaries. The Western Australian provision has rarely been used, and in the United Kingdom, despite the provision having existed since 1999, only this year has a pilot been set up to implement the provisions.

6.4.1 Intermediaries in South Africa

South Africa introduced intermediaries in 1993. An intermediary can be appointed by the court if it appears to the court that a person under the age of 18 years would be exposed to undue mental stress or suffering if he or she testified at proceedings. The provision applies to all offences and is not limited to sexual offences, although in practice the applications are generally brought in sexual offence and murder trials.

The appointment of an intermediary is not an automatic right: the prosecutor must apply to the court. Applications are, however, rarely opposed. In the case of children, the younger the child the more likely it is that the court will grant the application.

Intermediaries are independent and impartial and are regarded as court officials. All examination-in-chief, cross-examination and re-examination of the child witness takes place through the intermediary, although the presiding officer may put questions directly to the child witness. The intermediary wears headphones, hears a question and then relays the purport of the question in a language and form understandable to the child witness. The child’s reply is heard directly by the court. The court can see the intermediary and the child via closed-circuit television or one-way glass. The child is unable to see or hear what takes place in the courtroom.

Intermediaries are appointed from categories of people—paediatricians, psychiatrists, family counsellors, childcare workers, social workers, teachers and psychologists—specified by the Minister of Justice. In practice, they are volunteers or are social workers provided by non-governmental organisations; in some communities volunteer retired teachers assist. The view of one South African Deputy Director of Public Prosecutions is that the intermediary provisions are highly effective, although she warns that careful consideration should be given to the categories of people who can be appointed and that they should receive adequate training. She says the most effective solution would be permanent appointment of social workers or childcare workers.

The intermediary must not have had any previous involvement with the witness. The two usually meet for the first time on the day of the trial. Intermediaries must be able to

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132 Criminal Procedure Act 1977 (South Africa), s. 170A. The information about intermediaries in South Africa comes from a paper provided on 31 March 2004 by Ms Rita Blumrick, Deputy Director of Public Prosecutions in South Africa (‘How an adversarial system can change—the South African experience’).
communicate with children in simple, understandable, age-appropriate language; they must be able to understand and convey to the court a child’s non-verbal expressions; and they must have a working knowledge of court procedure and the rules of evidence.

The constitutionality of intermediaries has been upheld in case law in South Africa. The High Court considered whether the accused’s right to a fair trial was violated or curtailed by the use of an intermediary and the physical separation of the child witness from the court room in *Klink v Regional Court Magistrate NO and Others*. The Court commented extensively on the background that led to the enactment of the provision and concluded that the accused’s right to cross-examine the witness had not been violated. It noted that cross-examination is a powerful weapon that plays a vital role in proceedings but that it is not an absolute right, in the sense that courts can disallow questions in certain circumstances.

The Court noted that the object of cross-examination is to cast doubt on the evidence of the witness and to elicit evidence favourable to the accused. Although use of an intermediary might blunt the cross-examination, it does not mean the accused is denied a fair trial. It might help the court establish the truth because the child witness is in a better position to participate in the proceedings. The child witness is protected and this redresses the imbalance between the child and skilled counsel. The trial court must ensure that unfairness does not result, and it has the power to instruct the intermediary to put the question as phrased by counsel. The High Court also held that the physical separation of the child does not violate the accused’s right to a fair trial.

The Deputy Director of Public Prosecutions in South Africa says the intermediary system is effective in reducing the intimidation of children, establishing equality before the law, and ensuring equal protection of the parties. It achieves a balance between protecting a child witness and the accused’s right to a fair trial.

Although South Africa has an adversarial system and its criminal procedure and laws of evidence stem from English law, trial by jury is not available. The concept of intermediaries has, however, been accepted in common jury jurisdictions such as the United Kingdom and Western Australia.

### 6.4.2 The United Kingdom

Although the legislative framework for intermediaries has existed in the United Kingdom since 1999, it was not until April 2004 that the first pilot of their use began. The function of an intermediary is described in s. 29 of the *Youth Justice and Criminal Evidence Act 1999*:

s. 29(2) The function of an intermediary is to communicate;

(a) to the witness, questions put to the witness, and

(b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

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133 1996 (1)SACR 434 (E).
This provision presupposes that examination of the witness may not take place in court but must take place in circumstances where the judge or justices and at least one legal representative acting for each party can see and hear the examination of the witness and communicate with the intermediary. Unless the examination has been videotaped, the jury must also be able to see and hear it.\textsuperscript{134}

Intermediaries are to be appointed for three years, will be subject to annual review, and will be listed on a national register.\textsuperscript{135} They will be available to children who are under the age of 17 years at the time of the hearing and to people who suffer from a mental disorder, significant impairment of intelligence and social functioning, or physical disability or physical disorder, if the court considers that the quality of their evidence is likely to be diminished by reason of that disorder or disability. Children whose only disadvantage is age will be assessed to see if they are old enough to give evidence without an intermediary but with the help of other special measures. Intermediaries will not be available to witnesses whose evidence or the quality of it is likely to be diminished by reason of fear or distress or to witnesses solely because they are complainants in respect of a sexual offence.\textsuperscript{136}

It is expected that intermediaries will be involved in the investigatory and pre-trial stages and will assist at trial but that the one who assists at trial will not have been involved earlier.\textsuperscript{137}

The scheme will not apply only to prosecution witnesses: intermediaries will also be available to defence witnesses. They will not, however, be available for defendants. The plan is that the intermediaries will be health care professionals who have been specifically recruited and trained; they will be registered after successfully completing their training.

Because implementation of these UK provisions is in its infancy, it is not possible to provide any assessment of the provisions’ success or otherwise. Nevertheless, the fact that they have been implemented is important. Similar provisions could be considered for the ACT.

6.4.3 Western Australia

In Western Australia the only legislative provision permitting something equivalent to an intermediary is s. 106F of the state’s Evidence Act 1906, which provides as follows:

106F. Child witness under 16 may be given assistance

(1) Where a child under the age of 16 years is to give evidence in any proceeding in a Court, the Court may appoint a person that it considers suitable and competent to act as a communicator for the child.

(2) The function of a person appointed under this section is, if requested by the judge, to communicate and explain—

(a) to the child, questions put to the child; and
(b) to the Court, the evidence given by the child.

\textsuperscript{134} Youth Justice and Criminal Evidence Act 1999, s. 29(3).
\textsuperscript{135} D Wurtzel ‘Intermediaries’, Archbold, issue 6, 1 July 2003, p. 7.
\textsuperscript{136} Youth Justice and Criminal Evidence Act 1999, s. 18.
\textsuperscript{137} Wurtzel, ‘Intermediaries’, p. 7.
(3) A person appointed under this section is to take an oath or make a declaration,
in such form as the Court thinks fit, that he or she will faithfully perform his or
her function under subsection (2).

(4) A person appointed under this section who, while performing or purportedly
performing his or her function under subsection (2), wilfully makes any false or
misleading statement to the child or to the Court commits an indictable offence
and is liable on conviction to imprisonment for 5 years.

The provision is rarely used and no recognised training course for the communicators
exists. In its 2000 report the Queensland Law Reform Commission cited two examples
of the provision being used in Western Australia. One involved a 5-year-old who was
very anxious about giving evidence. She was prepared to whisper her answers to the
coordinator of the Child Witness Service, and it was decided that the coordinator should
act as the child’s communicator. In any event, the child’s answers could be heard by the
court without the need for the communicator to relay them. The other case involved an
Aboriginal complainant. An elder was appointed as her communicator, but again the
complainant was able to give her evidence without the communicator’s assistance. It
seems, however, that in both the cases the witnesses found it easier to give evidence
because of the presence of the communicator.

6.4.4 Intermediaries elsewhere in Australia

The Australian Law Reform Commission and the Human Rights and Equal Opportunity
Commission briefly considered the subject of intermediaries in their 1997 report on
children in the legal process. They did not recommend that they be used, noting that
many submissions to the inquiry opposed intermediaries on the basis that judges and
lawyers themselves were required to have training in skills for dealing with children. The
report did not refer to the South African provisions and predated the UK provisions.

As noted, the Queensland Law Reform Commission examined in detail the question of
intermediaries in its report of December 2000. It concluded that child communicators
should not be adopted in Queensland. Although mindful of the need for improved
communication between child witnesses and others in the court process and recognising
that, without effective communication with child witnesses, courts might be denied
essential evidence, the Commission was of the view that using a child communicator was
not the most effective way of facilitating communication with child witnesses. In its
opinion the preferable approach was to increase awareness on the part of members of the
legal profession who are involved in communicating with children.

It may well be desirable for judges and lawyers to develop these communication skills, but
both reports failed to acknowledge that it can take many years to acquire the necessary
communication skills. Having judges and lawyers attend a few training sessions on
communication with children will not be a substitute for using a person who has specific
skills in that area.

138 Jackson, ‘Child witnesses in the Western Australian criminal courts’, p. 204.
140 Australian Law Reform Commission & Human Rights and Equal Opportunity Commission,
Seen and Heard, p. 345.
6.4.5 Conclusion

Communicators or intermediaries are used elsewhere—most notably in South Africa and now in a pilot program in the United Kingdom. The idea has little support in Australia, but the ACT could be a leader in the field. Communicators could be seen in the same way as language interpreters. They would, however, be more open to court scrutiny because the court would be able to understand what is said between communicator and child. The court could thus more readily intervene when there appears to be unfairness to the accused.

There is no doubt that in trials involving children, including teenagers, the defence gains much advantage by confusing witnesses—deliberately or not. Many lawyers are not equipped to meet the challenge of speaking to children in language comprehensible to them. Confusing language in the court prevents children giving the best possible evidence. If a communicator or intermediary reduces the stress of cross-examination and elicits clearer evidence—evidence that is truly responsive to questions the child can understand—the trial process would be fairer, without derogating from the defence’s right to cross-examine. The accused’s right to a fair trial includes the right to cross-examine, but that does not necessarily mean a right to confuse and mislead.

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<thead>
<tr>
<th>Recommendation</th>
<th>Child communicators</th>
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<tr>
<td>6.10</td>
<td>The ACT should introduce legislation permitting the use of communicators, or intermediaries, for child witnesses in sexual offence proceedings. The role of the communicator would be to rephrase, in age-appropriate language, the questions of counsel and the judge or magistrate. The child could then respond in their own words, which would not need to be interpreted. If necessary, the judge could seek clarification of an answer from the intermediary. The communicators should have qualifications in child psychology, should be specifically recruited to the position, and should receive training in court procedure. There should be a presumption that communicators can be used for all witnesses aged less than 18 years—in the same way there is a presumption that child witnesses can give evidence via closed-circuit television.</td>
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6.5 Cross-examination of victims by the accused

The ACT has no prohibition on an unrepresented accused cross-examining a complainant. This means that when an accused represents himself or herself in sexual offence proceedings he or she cross-examines all prosecution witnesses, including the complainant. Other Australian and overseas jurisdictions have legislated to prohibit an unrepresented accused from cross-examining the complainant. Queensland, the Northern Territory and New South Wales all have such provisions, and the Victorian Law Reform Commission has recommended that they be introduced in Victoria.

Introduction of the provisions has not been without controversy, most recently in New South Wales, where amendments to the *Criminal Procedure Act 1986* were enacted in 2003, following recommendations of the New South Wales Law Reform Commission in
Provisions prohibiting the accused from cross-examining complainants arose out of cases where complainants in sexual matters were subject to lengthy and traumatic cross-examination by the accused. In 1998 the Victorian Court of Criminal Appeal considered a trial where the complainant in a rape case was cross-examined by the accused for four days. Much of the questioning was repetitious or irrelevant, and the jury was so concerned about the length and nature of the cross-examination that the foreperson approached the judge with the jury’s concerns. The judge was reluctant to intervene and interfere with the defendant’s right to cross-examine.

During 1997 and 1998 several infamous trials in the United Kingdom brought the question of the accused cross-examining the complainant into focus. In *R v Milton Brown* the defendant, who was ultimately convicted on two counts of rape, personally cross-examined the complainant. On appeal, Lord Bingham commented:

> A trial is not fair if a defendant, by choosing to represent himself, gains the advantage he would not have had if represented of abusing the rules in relation to relevance and repetition which apply when witnesses are questioned.

In *R v Ralston Edwards* the accused was convicted on two counts of rape but not before cross-examining the complainant for six days, wearing the clothes he had worn during the alleged attack. At one stage the complainant left the witness box to be physically ill. These cases highlight the need to protect complainants of sexual offences from being cross-examined by an unrepresented accused.

### 6.5.1 Legislative responses

#### United Kingdom

The response in the United Kingdom was to pass legislation preventing an unrepresented defendant from personally cross-examining a complainant. Unrepresented accused had previously been prohibited from cross-examining child witnesses in sexual or violent offences, and the 1999 amendments extended this to adult complainants in sexual matters.

Sections 34 and 35 of the *Youth Justice and Criminal Evidence Act 1999* impose a blanket prohibition on the accused cross-examining complainants in sexual offences and child complainants and witnesses in cases of sexual and physical violence. Section 36 gives the court an additional discretionary power to prevent the accused cross-examining any witness in cases where the court is satisfied the circumstances of the case warrant the prohibition and it is not contrary to the interests of justice.

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144 *R v Cremmen*, Supreme Court of Victoria, Court of Criminal Appeal, 27 June 1988, unreported.


147 *Youth Justice and Criminal Evidence Act 1999*, s. 34.
The Act sets out the procedure to be followed when an accused is prevented from cross-examining a witness. The court must first invite the accused to arrange for a legal representative to act for him for the purposes of cross-examining the accused and must require the accused to notify the court, within a certain period, whether he has arranged that representation. If the accused does not arrange legal representation the court must then consider whether it is necessary, in the interests of justice, for the witness to be cross-examined. If it is, the court must select a qualified legal representative to cross-examine the witness ‘in the interests of the accused’. The legislation specifies that the legal representative ‘shall not be responsible to the accused’.  

**New Zealand**

In New Zealand an unrepresented accused in a sexual offence trial is not permitted to cross-examine a child or a person with a mental handicap. Where the accused is not represented by counsel, the accused may put questions to the witness by stating the questions to a person approved by the judge, who repeats the questions to the complainant.  

**Scotland**

In Scotland a person accused of a sexual offence is required to have legal representation throughout the entire trial.  

**Canada**

In Canada in a trial for a sexual or violent offence there is a presumption against the accused cross-examining a witness aged less than 18 years. The court may, however, allow direct cross-examination in some circumstances. The court appoints counsel for an unrepresented accused.  

**Queensland**

In Queensland provisions preventing the accused from cross-examining ‘protected witnesses’ were introduced in 2000, following a report of the Taskforce on Women and the Criminal Code. The resulting legislation, recommended by the Taskforce, applies not only to complainants of sexual offences but also to complainants in other serious violent offences, children aged less than 16 years, and intellectually impaired witnesses. If the accused wants the witness to be cross-examined they must arrange for private legal representation or they will be provided with a lawyer funded by legal aid.  

**The Northern Territory**

In the Northern Territory an unrepresented defendant is prohibited from directly cross-examining the complainant of a sexual offence. Instead, the defendant must direct questions through an intermediary. The intermediary can be the judge or another person approved by the court.

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148 ibid., s. 38.
149 Evidence Act 1908 (NZ), s. 23F.
151 Criminal Code 1985 (Canada), s. 486.
153 Sexual Offences (Evidence and Procedure) Act 1983 (NT), s. 5.
Victoria

The Victorian Law Reform Commission has recently recommended that in any criminal proceeding for sexual offences the accused may not cross-examine the complainant or a protected witness. It has also recommended that the accused arrange private legal representation; otherwise, a legal aid representative will be appointed for the purpose of cross-examining the witness.

Western Australia

In Western Australia child witnesses under the age of 16 years are protected from cross-examination by the accused. The accused may put questions to the child through the judge or a court-appointed person.

The Commonwealth

In the Commonwealth’s jurisdiction a person appointed by the court must put questions to child complainants of sexual offences on behalf of unrepresented accused persons.

New South Wales

Section 28 of the New South Wales Evidence (Children) Act 1997 provides that children who are witnesses in a personal assault offence cannot be cross-examined by an unrepresented accused. The court appoints a person for the purpose of putting the questions to the child witness, and that person is limited to putting only those questions asked by the accused.

Introduction of the provisions relating to adult complainants, with effect from September 2003, was surprisingly controversial because there had been a prohibition in relation to child witnesses since 1997. Section 294A of the state’s Criminal Procedure Act 1986 provides:

Arrangements for complainant in sexual offence proceedings giving evidence when accused person is unrepresented

1. This section applies to sexual offence proceedings during which the accused person is not represented by counsel.

2. The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court.

3. The person appointed by the court is to ask the complainant only the questions that the accused person requests that person to put to the complainant.

4. Any such person, when acting in the course of an appointment under this section, must not independently give the accused person legal or other advice.

5. The court does not have a discretion to decline to appoint a person under this section, despite anything to the contrary in section 28 of the Evidence (Children) Act 1997 or any other Act or law.

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155 Evidence Act 1906 (WA), s. 106G.
156 Crimes Act 1914, s. 15YF.
This section applies whether or not closed-circuit television facilities or other similar technology (or alternative arrangements) are used by the complainant to give evidence.

If such a person is appointed in proceedings before a jury, the judge must:

(a) inform the jury that it is standard procedure in such cases to appoint the person to put the questions to the complainant, and

(b) warn the jury not to draw any inference adverse to the accused person or to give the evidence any greater or lesser weight because of the use of that arrangement.

Implementation of this provision in a trial in 2003 was problematic. The trial judge indicated that he required senior counsel to be appointed to cross-examine the complainant. The Bar Association arranged for senior counsel to appear, but the accused declined to speak with counsel. The accused thus did not cross-examine the complainant and were convicted. The convictions were appealed, and the matter received detailed consideration by the New South Wales Court of Criminal Appeal in R v MSK and MAK.\textsuperscript{157} The provisions were held to not have interfered with the fairness of the trial to the accused and the convictions were upheld.

Before the September 2003 amendments the New South Wales Law Reform Commission had considered the issue in detail.\textsuperscript{158} The primary recommendation in the Commission’s report was that unrepresented accused be prohibited from personally cross-examining complainants in sexual offence proceedings. If an accused does not arrange for a legal representative to cross-examine the complainant, the Commission recommended that the Legal Aid Commission assist the unrepresented accused—for the purpose of cross-examining the complainant only. The Commission was not unanimous in relation to this recommendation: Justices James and McColl were of the view that there should be no blanket prohibition on cross-examination by an accused.

In making its recommendations, the Commission identified the nub of the matter as being whether or not the current law strikes a balance between the accused’s need to test the evidence brought against him by questioning the complainant and the desire to reduce the trauma suffered by complainants of sexual offences when cross-examined by the accused. The Commission concluded that the current law did not strike this balance.

Submissions presented to the inquiry raised numerous arguments in favour of and against the proposed prohibition. It is useful to consider these arguments and the Commission’s responses to them.

\textit{The fairness of the trial}

The Commission reiterated an accused person’s ‘right not to be treated unfairly’ and emphasised the importance of cross-examination in the criminal justice system. But it rejected the argument raised in one submission that the fairness of a trial depends on the accused having the opportunity to cross-examine the complainant. The Commission noted

\textsuperscript{157} NSW Court of Criminal Appeal, 6 September 2004, unreported.

\textsuperscript{158} NSW Law Reform Commission, \textit{Questioning of Complainants}. 

Responding to sexual assault: the challenge of change
that the right to a fair trial ‘does not mean, however, that the interests of the accused take priority over all other interests affected by the proceedings’.\textsuperscript{159}

It concluded that it is in the interests of justice that complainants of sexual offences are not made to suffer the added trauma of being cross-examined by the accused. Sparing complainants this ordeal would potentially increase the accuracy of evidence they give during cross-examination. The Commission concurred with the contention of the majority of submissions—that the proposed prohibition on an accused person cross-examining the complainant does not render a trial unfair since the complainant can be cross-examined by a legal practitioner.\textsuperscript{160}

The sufficiency of current limitations on the conduct of cross-examination

The Commission noted that the law already places some limitations on the conduct of cross-examination. For example, courts have the power to disallow improper questions put to a witness. Some submissions asserted that these limitations are sufficient to protect complainants of sexual assault when being cross-examined by the accused. The Commission rejected this suggestion. Judges’ ability to eliminate questions that are aggressive, offensive or intimidating is restricted, and individual judges might be reluctant to use their discretion, especially when the accused is unrepresented, and in any event judicial intervention cannot spare the complainant the trauma of being directly questioned by the person she has accused of committing a sexual offence.

Reducing the distress of complainants

Several submissions argued that it is less traumatic for the complainant of a sexual offence to be cross-examined by the accused than by an experienced barrister. The Commission indirectly dismissed this argument in finding that prohibiting an accused person from personally cross-examining the complainant does reduce the distress suffered by the complainant. It held that ‘it is inherently offensive to the proper administration of justice that those questions [relating to the alleged assault] should be put personally by an alleged attacker …’.\textsuperscript{161} It is highly likely that during cross-examination the complainant will be subjected to detailed questioning about the alleged offence. The Commission noted that a person known to the complainant is often the alleged perpetrator in sexual offence prosecutions, and in such cases it is inappropriate that the accused should be able to gain any advantage out of the relationship that may be conferred by personal confrontation.\textsuperscript{162}

The effect in the minds of jurors

Opponents of the prohibition proposal argued that juries will draw an adverse inference in relation to the accused’s guilt if the accused is prevented from personally cross-examining the complainant. The Commission thought that if the judge gave the jury a warning this could be avoided.

The scope of the prohibition

There were differing opinions about whether judges should retain a discretion to allow some accused people to cross-examine complainants of sexual offences. Some submissions contended that the prohibition should be dependent on the gravity of the offence; others argued that a blanket prohibition provides systematic protection for complainants, saves the courts time because they do not have to consider applications for the exercise of discretion, and gives certainty to people who are considering bringing a

\textsuperscript{159} ibid., p. 45.
\textsuperscript{160} ibid.
\textsuperscript{161} ibid., p. 46.
\textsuperscript{162} ibid.
complaint. The Commission favoured the latter approach. It was of the view that only a mandatory prohibition in all sexual offence proceedings fulfilled the policy rationale of securing a fair trial: a mandatory prohibition would bring "consistency, certainty and simplicity".163

6.5.2 A prohibition in the ACT?

As is apparent, many jurisdictions have adopted provisions prohibiting an unrepresented accused from directly cross-examining a complainant. Although in some cases the provision results in an accused being refused the right to cross-examine a complainant (as in the recent New South Wales case of R v MSK and MAK164), the provisions ensure that the accused has legal representation. This provides a means of cross-examining the witness. There would no doubt be some challenges in implementing such a provision in the ACT, but a balance needs to be struck between the unfettered right of the accused to cross-examine—which in any case is subject to various restrictions and limitations—and the fairness of the process for complainants. If direct cross-examination so intimidates a witness that they are unable to give evidence, the interests of justice are not served.

A prohibition should be introduced in the ACT. It should apply to the cross-examination of adult and child complainants in sexual offence matters. Consideration could also be given to extending it to child complainants and child witnesses in violent offences—or all child witnesses. Additionally, consideration could be given to the prohibition applying on discretionary grounds to other witnesses, such as complainants in domestic violence or stalking charges. It is further suggested that the ACT Legal Aid Office could be required by legislation to make a legal representative available for the purpose of cross-examining a witness. This is in keeping with the Queensland legislation.165

**Recommendation Prohibiting an unrepresented accused from cross-examining complainants in sexual assault proceedings**

6.11 An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses. Consideration should be given to extending this to other categories of witnesses such as complainants in domestic violence and stalking proceedings. An unrepresented accused should be advised that they will need to arrange their own representation; if they fail to do this the court should appoint a lawyer for the purpose of cross-examining the complainant. Legislation should provide that the court may arrange for the accused, through the ACT Legal Aid Office, free legal representation to cross-examine the complainant. If the accused does not want to put questions through the appointed representative, they should be refused the right to cross-examine the complainant.

6.6 Supplementary measures in Western Australia

Experience in Western Australia shows that if legislative amendments are to work effectively they must be supported by a range of other measures. In 1992, following the publication of reports by the Western Australian Child Sexual Abuse Taskforce and the Law Reform Commission of Western Australia, the Government introduced a wide-ranging package of changes that have led to the development of an environment that is less
hostile to child witnesses. Judge Hal Jackson, a judge of the District Court of Western Australia with extensive involvement in the legislative and other changes (such as the development of the Child Witness Service), has identified four layers of change in the last decade in the state:\(^{166}\):

- legislative change
- judicial and professional support
- technological support
- support for child witnesses.

Each is important, and they must react sympathetically with each other.

6.6.1 **Legislative change**

Numerous legislative changes designed to improve the situation for child witnesses were introduced in 1992. The provisions allowing the pre-recording of children’s evidence are discussed in Section 6.2. Further changes relate to children giving sworn and unsworn evidence.

Section 106C of the state’s *Evidence Act 1906* provides that a child under the age of 12 years who is not competent to give evidence may give evidence without taking an oath or making a solemn affirmation if the court or a person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events he or she has observed or experienced. Thus, children do not have to show they understand that the giving of evidence is a serious matter and that, in giving evidence, they are obliged to tell the truth beyond the ordinary duty to tell the truth. In this way, young children can give evidence provided they are able to give an intelligible account of what they observed or experienced. The question of competency is dealt with before a jury, albeit by means of pre-recorded evidence.

A child witness aged less than 16 years has the right to have a support person seated nearby whilst giving evidence. They may not be cross-examined by an unrepresented accused.

If a child’s evidence is not pre-recorded, it is mandatory that the child give their evidence via closed-circuit television. The Act also provides for screens when CCTV facilities are not available.

The special measures available to children can also be made available to ‘special witnesses’\(^{167}\), which means adult witnesses who are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence satisfactorily unless they are entitled to benefit from one or more of the special measures available to children. The Bill currently before parliament will, if passed, extend those provisions to all adult victims of sexual offences.

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\(^{167}\) *Evidence Act 1906* (WA), s. 106R.
6.6.2 Judicial and professional support

Judicial guidelines have been developed for the use of closed-circuit television, videotapes and other means of giving evidence in relation to children and special witnesses. The guidelines acknowledge that children have been reluctant to come forward for fear of giving evidence in open court and having to face the accused and refer to the aim of the special measures procedures as obtaining the best evidence from the witness while at the same time doing justice to the accused person. The guidelines cover the following:

- legislation
- the operation of the CCTV and pre-recording equipment
- the need for the child or special witness and the accused person to know what is happening at all times during the hearing
- providing regular breaks for child witnesses—when a witness is very young they need a break every 15 to 20 minutes
- the need for the judge to always advise witnesses of any break to deal with objections to evidence—including the anticipated length of the break—and that they can leave the remote room whilst on the break
- the availability of books and toys for child witnesses while they are on breaks
- the rationale for CCTV
- the identification procedure in court when the witness is giving evidence by CCTV.

There is continuing education of the judiciary and the profession, particularly members of the Child Witness Service. A panel oversees the Child Witness Service and considers further changes and legislative amendments.

6.6.3 Technological support

For the special measures provisions to function, the technology to support them is necessary. A new court complex is being built, and the technology for pre-recorded evidence, plus the remote rooms and other witness facilities, are being factored in. The Government has made a commitment to improving the technology in courts throughout Western Australia; this entails a substantial financial commitment.

6.6.4 The Child Witness Service

The Child Witness Service, part of the Ministry of Justice, is located in the complex that houses the Magistrates Court and the District Court in Perth. Its role is non-evidentiary court preparation for all witnesses aged less than 18 years and adults with an intellectual disability. The Service is discussed in detail in Chapter 10. Suffice to say here that it is seen as one if the main factors in ensuring that the Western Australian criminal justice system meets the needs of child witnesses.

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168 ‘Evidence of children and special witnesses: guidelines for the use of closed-circuit television, videotapes and other means for the giving of evidence’, Western Australian District Court, Perth, May 1998. The guidelines are being updated.
6.6.5 Conclusion

The Western Australian experience shows that legislation is not enough. For change to be effective, there must be judicial and professional support and good victim support for witnesses. Having special measures will only partly ease the trauma of giving evidence: supplementary measures are essential.

6.7 Special measures: aspects to consider

When contemplating special measures that could be adopted in the ACT, some aspects warrant attention. The first is whether special measures impinge on an accused’s right to a fair trial. This is a common objection to measures that vary the traditional mode of giving evidence or restrict what evidence may be called, and it has a further dimension in the ACT because the first Australian human rights legislation—the Human Rights Act 2004—came into effect in the Territory on 1 July 2004.

Another question concerns the application of special measures: should they be mandatory or discretionary and to whom should they apply?

6.7.1 The accused’s right to a fair trial and the ACT Human Rights Act

Section 21(1) of the ACT’s Human Rights Act 2004 provides, ‘Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing’. The concept of a fair trial is not new in Australian jurisprudence, although the ACT is the only jurisdiction to have enshrined it in legislation.

Preferring the concept of the ‘principle’ of a fair trial rather than the ‘right’ to one, the Chief Justice of New South Wales, His Honour Justice Spigelman, recently wrote, ‘In Australian jurisprudence, the principle of a fair trial is based on the inherent power of the court to control its own processes and, particularly, on its power to prevent abuse of its processes’.169 He noted that it is not feasible to list all the attributes of a fair trial. It is now recognised in case law that a fair trial must be fair to both sides—not only the accused but also the prosecution170:

An individual accused in a criminal trial is not the only person who has rights and interests deserving of respect. There is a well recognised public interest in the securing of convictions of guilty persons and the vindication of the rights of the victims of criminal conduct. The Crown prosecutes on behalf of the whole community … The maintenance of public confidence in the administration of justice, which may be adversely affected by lack of fairness in the process of the court, may also be undermined by a failure to provide protection to the community in the conviction of guilty persons.171

The New South Wales Law Reform Commission considered the notion of a fair trial in Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials.172 It noted that the ‘right not to be tried unfairly’ or ‘an immunity against conviction otherwise

170 ibid., at p. 44.
171 ibid., at pp. 44–5.
172 NSW Law Reform Commission, Questioning of Complainants.
than after a fair trial’ more accurately expresses what is often referred to as the accused’s right to receive a fair trial. Fairness depends on the interests of justice in the light of the circumstances surrounding the trial. The concept accommodates the interests of both parties—the Crown and the accused.\textsuperscript{173} It requires no more than that the trial be as fair as the courts can make it. The loss of some advantage normally available to the accused (such as the availability of committal proceedings) will not necessarily undermine the fairness of a trial.\textsuperscript{174}

In this way, the concept of a fair trial is one of the basic tenets of the criminal justice system. Whether the Human Rights Act will have any impact on the application of current special measures in the ACT remains to be seen. In many jurisdictions—such as Canada, England, and various states of the United States—special measures for particular classes of witnesses sit side by side with human rights legislation, and courts have been required to consider the validity of such provisions in the light of the legislation.

In the United States the Sixth Amendment to the Constitution provides that ‘in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witness against him …’ In the case of \textit{Coy v Iowa}\textsuperscript{175} the placing of a screen between a child witness and the accused was found to breach the accused’s right to confrontation\textsuperscript{176}, even though cross-examination was not otherwise limited. In the later case of \textit{Maryland v Craig}\textsuperscript{177}, however, the Supreme Court considered whether the use of closed-circuit television violated the accused’s right to confront her accuser. It held that, because closed-circuit television is functionally equivalent to live testimony, cross-examination in those circumstances did not violate the accused’s right to confrontation, that the general preference for face-to-face confrontation can give way to public policy, and that the state’s interest in protecting victims in sexual offences may in some cases outweigh the accused’s interest in facing their accuser in person. Following that decision, a number of US states have authorised videotaped pre-trial depositions of a child’s entire testimony. Some states have made videotaped interviews with children admissible as evidence and have legislated to allow evidence to be given via CCTV (albeit with the child and the accused being able to see each other).

As noted in Section 6.2.3, challenges to special measures have been made under the Canadian Charter of Rights and Freedoms. In \textit{R v Levogiannis}\textsuperscript{178} a 12-year-old complainant testified behind a screen. The accused challenged the constitutional validity of the provision allowing the evidence to be given that way on the basis that it violated his right to a fair trial as guaranteed by ss. 7 and 11 of the Charter of Rights and Freedoms. The Court dismissed the appeal unanimously and Her Honour L’Heureux-Dube stated:

\begin{quote}
The examination of whether an accused’s rights are infringed encompasses multi-faceted considerations, such as the rights of witnesses, in this case children, the rights of accused and court’s duties to ascertain the truth. The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth … one cannot ignore the fact that, in many instances, the court process is failing children, especially those who have been victims of abuse, who are then subjected to further trauma as participants in the judicial process … Despite the
\end{quote}

\textsuperscript{173} ibid., referring to \textit{Barton v The Queen} (1980) 147 CLR 75 at 101 per Gibbs ACJ and Mason J.
\textsuperscript{174} ibid., referring to \textit{Barton v The Queen} (1980) 147 CLR 75 at 114 per Wilson J.
\textsuperscript{175} (1988) 487 US 1012.
\textsuperscript{176} There is no ‘confrontation clause’ in the ACT Human Rights Act.
\textsuperscript{177} (1990) 497 US 836.
\textsuperscript{178} [1993] 4 SCR 475.
increase in child sexual assault complaints since the early 1980s, the ratio of charge to conviction rate remains unchanged. In addition, young complainants often suffer tremendous stress when required to testify before those whom they accuse … the plight of children who testify and the role courts must play in ascertaining the truth must not be overlooked in the context of the constitutional analysis in the case at hand.179

Hoyano considered the question of whether the provisions in the UK Youth Justice and Criminal Evidence Act 1999 are compatible with the fair trial guarantees in Article 6 of the European Convention on Human Rights. Her conclusion was that generally the provisions are compatible. She examined the particular measures canvassed in this chapter (with the exception of restrictions on committal hearings), concluding that they would withstand any challenge on the basis of the constitutional guarantee:

However, affording witnesses some protection by mitigating the rigours of the orthodox adversarial trial does not necessarily mean that one is hollowing out the defendant’s rights. The defendant’s birthright under any rational criminal justice system is to a fair trial, that is a public process whereby the probative value of all the available admissible evidence can be fairly, thoroughly and effectively tested in the court’s quest to ascertain the truth about past events. Enabling witnesses to give the best evidence of which they are capable not only does not collide with the defendant’s rights but, it is submitted, is entirely compatible with them. Extending the special measures to child defendants, and possibly also adult defendants with handicaps, could be the most effective means of refuting the critics of the new regime.180

The Legal Aid Commission of New South Wales submitted to the Legislative Council’s inquiry into child sexual assault prosecutions that routine use of closed-circuit television for child witnesses would minimise prejudice to the accused.181 In the United Kingdom all child witnesses other than those who are accused can use the special measures. Allowing special measures to be used by all child witnesses—whether they appear for the prosecution or for defence—would make any further special measures adopted in the ACT more palatable.

New South Wales has had restrictions on committals for some years and has allowed the admission of videotaped evidence since 1997. Victoria has allowed the admission of such evidence since 1991, and New Zealand has had similar provisions since 1990. New Zealand also has a Bill of Rights Act and allows evidence-in-chief to be given by way of pre-recorded video. Western Australia has admitted pre-recorded evidence since 1992. In all these jurisdictions the provisions are regularly used.

But the provisions have caused some angst. In R v NRC182 the Victorian Court of Appeal overturned a conviction in a case where the complainant was a young child and her evidence-in-chief was given by way of videotape. The interview had been conducted some 10 months after the alleged events. On cross-examination, the child had been unable respond with any particularity. The Court of Appeal overturned the conviction because of the inadequacy of the judge’s warning to the jury about convicting on the uncorroborated evidence of the complainant. The President of the Court, Winneke P, observed that the

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179 ibid., at pp. 483–4.
180 Hoyano, ‘Striking a balance’, p. 969.
181 NSW Legislative Council Standing Committee on Law and Justice, Report on Child Sexual Assault Prosecutions.
182 [1999] 3 VR 537.
provisions of s. 37B of the Victorian Evidence Act 1958 permitting the evidence-in-chief of young children to be presented by way of videotape:

… represent a radical departure from the common law, and, although the court is required by s. 23(1) of the Act to satisfy itself that the witness is (inter alia) capable of responding rationally to questions about the facts in issue, that satisfaction will normally be gleaned in circumstances of limited opportunity and without the capacity of observing the witness’s ability to respond to cross examination.

The question of whether the recording should have been excluded was not specifically raised at the appeal. Winneke P noted a number of factors in the case that required clear warnings by the trial judge—such as multiple interviewing and the delay between the events and the taped interview. There was, however, in Winneke P’s view, a more subtle prejudice flowing to the accused as a consequence of the procedures employed in putting the evidence before the jury:

… a further prejudice potentially flowed to the applicant from the procedure adopted because he was effectively deprived of any realistic opportunity of testing the credibility and reliability of the complainant’s evidence through cross-examination, which the adversarial system of justice allows as a means of determining where the truth lies.183

After sounding a warning about the provisions, Winneke P stated:

… the comments which I have made should not be interpreted as meaning that, in every case where the procedures prescribed by section 37B are employed, the judge will be obliged to give the warning which in my view should have been given in this case. Each case will depend on its own facts and there will no doubt be many cases where there will be no relevant unfairness simply because the evidence in chief has been given by means of the VATE procedure.184

As noted, s. 21(1) of the ACT Human Rights Act asserts the right to a ‘fair and public hearing’ on criminal charges. Section 22 of the Act specifies the rights of the accused in criminal proceedings:

(1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:

(a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;

(b) to have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her;

(c) to be tried without unreasonable delay;

183 ibid., at p. 551.
184 ibid., at p. 552. ‘VATE’ means video and taped evidence.
(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her;

(e) to be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;

(f) to have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance;

(g) to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;

(h) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;

(i) not to be compelled to testify against himself or herself or to confess guilt.

These provisions could have implications for the application of special measures in the ACT. It is beyond the scope of this report to consider this matter in detail, but in drafting any legislation the effect of the Human Rights Act will need to be considered—and considered in the context of experience internationally. As noted, various overseas jurisdictions that have legislated for special measures also have human rights legislation, and it should not be assumed that the rights outlined in s. 22 of the ACT Act are inconsistent with the special measures discussed in this chapter.

6.7.2 Special measures: presumption or discretion?

Determining whether the court should have a discretionary role in determining the special measures that can be used in a particular case or whether legislation should provide that special measures are to be used for witnesses who fall into particular categories has led to differing approaches by different legislatures. In the ACT, for example, the legislation allowing children and adult complainants in sexual offence proceedings to give evidence via closed-circuit television provides that if the court has the necessary equipment the witness’s evidence shall be given from a remote room unless the court orders otherwise.185 There is thus a presumption that a witness will give evidence in this way. The Court can make an order requiring the witness to give evidence in the courtroom only if it is satisfied that the witness prefers to give evidence that way, the proceedings will be unnecessarily delayed, or there is substantial risk of the court being unable to ensure that the proceedings are conducted fairly if the order is not made.186 Similar presumptions in favour of the use of closed-circuit television exist in New South Wales, Western Australia, Queensland and the Northern Territory.187 In contrast, in Victoria applications must be made to the court before the hearing and the court has discretion to grant the application or refuse it.188

Different legislatures take differing approaches to the various special measures. As noted, for example, in sexual and violent offence proceedings in Western Australia the use of closed-circuit television for witnesses aged less than 18 years is mandatory—except where

185 *Evidence (Miscellaneous Provisions) Act 1991* (ACT), ss. 8, 43.
186 ibid., ss. 8(2), 43(2).
187 *Evidence (Children) Act 1997* (NSW), s. 18; *Evidence Act 1906* (WA), s. 106N; *Evidence Act 1977* (Qld), s. 21AQ; *Evidence Act 1939* (NT), s. 21A.
188 *Evidence Act 1958* (Vic), s. 37B.
the facilities do not exist, in which case screens must be used. This is subject only to the child’s wishes. Pre-recording of evidence is, however, at the judge’s discretion after a pre-trial application. Another example is that in New South Wales child complainants in sexual offence proceedings are not required to attend committals to give evidence. Adult complainants can be required to attend committals if the magistrate considers there are ‘special reasons’ in the interest of justice that the witness should attend.

The UK legislation provides a complicated regime whereby some classes of witness, such as children, are entitled to special measures. Other classes of vulnerable witnesses may use the special measures upon application. The legislation provides for myriad special measures, but it is still a matter for the court to determine which of the special measures can be used in each particular case.

In the absence of a presumption that a special measure will apply, pre-trial and pre-hearing applications must be made and determined. The court might require evidence as to the vulnerability of individual witnesses—this is the case in the United States—before allowing special measures to be used. Such an approach would involve additional costs for the police and the Director of Public Prosecutions because they would need to obtain professional psychological assessments of each witness who might be eligible to use special measures provisions. This adds another layer of complexity, as well as increasing costs and causing delays.

There is merit in the idea of following the current ACT approach in relation to closed-circuit television and adopting it for other special measures. That is, for particular categories of witness there would be a presumption that special measures provisions will apply unless the witness opposes this. The court could hear evidence from the witness to determine whether it is appropriate to order that the witness not use the special measures. This provides some certainty for witnesses in advance: they will know how they are to give to their evidence.

The UK model requires prosecutors to make applications for special measures for child witnesses. This takes the discretion away from prosecutors, for children at least, and could also be considered.

Another aspect of the presumptive approach is that it reduces the prejudice to the accused. If the use of special measures occurs in all cases involving, say, child complainants, the judge can inform the jury of this, and in this way there is less prejudice to any particular accused. If the measures are discretionary and rely on the court being satisfied of a requisite level of fear or intimidation, this can create difficulties in hearings or judge-alone trials, where the trier of fact (the judge or magistrate) must hear evidence relating to the witness’s fears before embarking on the hearing or trial. It also reduces the impact of any direction or comment a judge might make to a jury.

Which special measures are adopted and the classes of witness they apply to would determine which approach is taken. Some legislatures take a presumptive approach with child witnesses while giving courts greater discretion to determine if special measures should be used for vulnerable adult complainants.

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189 Evidence Act 1906 (WA), ss. 106N, 106O.
190 ibid., s. 106I.
191 Criminal Procedure Act 1986 (NSW), s. 91(8).
192 ibid., s. 93.
193 Youth Justice and Criminal Evidence Act 1999 (UK).
6.7.3 Who should benefit from special measures provisions?

In adopting any special measures, the ACT will need to consider when such measures should apply, taking account of witnesses’ age, impairment and vulnerability and the nature of the offence.

Children

It appears there is little one can say against the adoption of the special measures discussed in this chapter for very young children. For example, using initial interviews with police or child protection workers as the evidence-in-chief of very young children seems logical and the most suitable way of capturing the evidence as soon as possible. On the surface, the justification for other young witnesses (aged less than 18 years) might seem a little less clear. But leading evidence of sexual offences from young people can be difficult: young people can be just as intimidated by the court environment as young children—and perhaps even more so because they understand the gravity of the proceedings. The ACT closed-circuit television provisions apply to all child witnesses up to the age of 18 years. The New South Wales special measures provisions contained in the Evidence (Children) Act 1997 and the provisions for pre-recorded evidence-in-chief apply to all children aged less than 16 years and those aged less than 18 in some circumstances.194 The NSW closed-circuit television provisions apply to child witnesses in personal violence offences, including sexual offences195, and in limited circumstances can be used by accused children.196 In Victoria, provisions relating to pre-recorded evidence-in-chief are available to children up to the age of 18 years and people with a mental impairment.197 In South Africa, intermediaries are available to children up to the age of 18 years.

There is much to be said for reducing the complexity in the application of special measures. If the ACT adopts any of the special measures discussed in this chapter, the measures should, at the very least, apply to all child victims of sexual offences and physical violence offences—including witnesses who are not the complainants but are giving evidence of physical or sexual acts perpetrated on them. This encompasses children up to the age of 18 years.

Adults

The question of whether special measures in addition to those that already apply in the ACT should be available to adults is less straightforward. With the exception of limitations on giving evidence at committal proceedings and the prohibition on cross-examination of the complainant by the accused, the legislation reviewed tends to favour the application of special measures to children.

In relation to pre-recorded evidence, the arguments for its use by adult witnesses are less clear than they are for children, and this is reflected in the recommendations in this chapter. Nevertheless, the giving of evidence via closed-circuit television is undoubtedly a benefit to adult victims, and the practice should continue. The same applies to limitations on adult witnesses attending committal proceedings: the benefits are such that one could argue there should in fact be a complete prohibition on adult complainants attending committals.

194 Evidence (Children) Act 1997 (NSW), s. 9.
195 ibid., s. 18.
196 ibid., s. 19.
197 Evidence Act 1958 (Vic), s. 37B.
Jurisdictions such as Western Australia and United Kingdom recognise that some adults can be particularly vulnerable as a result of the nature of the offence, the relationship to the offender, and their own personality and experience. In Western Australia a judge can declare a witness to be a ‘special witness’; this person is then entitled to the special measures available to children.198 The criteria for determining that a witness is a ‘special witness’ are contained in s. 106R(3) of the state’s Evidence Act 1908:

The grounds on which an order may be made are that if the person is not treated as a special witness he or she would, in the Court’s opinion—

(a) by reason of physical disability or mental impairment (as defined in the Criminal Law (Mentally Impaired Defendants) Act 1996), be unlikely to be able to give evidence, or to give evidence satisfactorily; or

(b) be likely—

(i) to suffer severe emotional trauma; or

(ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the Court considers relevant.

If passed, a recently introduced Bill will provide that, in cases of serious sexual offences, the complainant will automatically be deemed to be a special witness, without any application being made by the prosecution.199

Mental or physical impairment
Mental or physical impairment has been taken account of by many legislatures but not by the ACT in any particular way. At the heart of this report is the vulnerability of complainants in sexual offence proceedings, although the difficulties arising for people with physical or mental impairments are not a focus. In contemplating the adoption of any of the special measures discussed here, the ACT should give consideration to making special measures available to people with impairments, on the same or a similar basis as for children; that is, there should be a presumption that the special measures will apply.

The type of offence
The types of offences special measures apply to differ from jurisdiction to jurisdiction. Although it is beyond the scope of this report to examine offences other than sexual offences, there may be good reason to expand the application of current special measures to domestic violence offences and other offences that involve intimidation—stalking, for example. The CCTV provisions in the ACT’s Evidence (Miscellaneous Provisions) Act 1991 do not currently apply to those witnesses, yet on the face of it the arguments would

198 Evidence Act 1908 (WA), s. 106R.
199 Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004.
seem to be strongly in favour of such provisions.\textsuperscript{200} The CCTV provisions in the ACT apply to all child witnesses other than defendants and are thus not limited to sexual offences. It is recommended that any new special measures adopted apply to all child witnesses other than defendants. It is further recommended that consideration be given to applying special measures provisions to adult complainants and other witnesses who may feel intimidated in a broader range of offences.

<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Application of special measures</th>
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<tr>
<td>6.12</td>
<td>A presumption in favour of special measures should be adopted in the ACT for the following classes of witnesses:</td>
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<tr>
<td></td>
<td>- child witnesses</td>
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<td>- witnesses with a mental or physical impairment that will affect their ability to give evidence satisfactorily.</td>
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<td></td>
<td>For adult complainants, there should be a presumption in relation to the following special measures:</td>
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<td>- a prohibition on cross-examination of the complainant by the accused</td>
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<td></td>
<td>- use of closed-circuit television, as is currently the case.</td>
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<tr>
<td></td>
<td>Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.</td>
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### 6.8 Conclusion

The ACT was ahead of its time in relation to closed-circuit television, but a failure to take advantage of modern technological developments and to consider and develop further special measures that have been legislated for in many other jurisdictions means that the Territory does not offer an optimum environment for vulnerable witnesses who give evidence. It is heartening that overseas reports often cite Australia as leading the field in this regard. The ACT is in an ideal position to learn from the experiences of other jurisdictions where special measures have been introduced, to choose the best, and to avoid some of the pitfalls. Much of the innovation relates to children: the ACT could become a leader by considering the adoption of similar special measures for adult complainants.

Enactment of legislation permitting the use of taped interviews as evidence-in-chief would be a step forward. The experience of other jurisdictions shows very clearly, however, that this will be a success only if it is properly resourced. Sending police to a one-week training course is not enough. Consideration should be given to the use of specialist interviewers with comprehensive training that is supplemented on a regular basis. (If there

\textsuperscript{200} In \textit{Brodie v Streeter} (ACT Supreme Court, 5 November 2003, unreported) Higgins J upheld an order of a magistrate that a witness who did not fall within the specific CCTV provisions be permitted to give evidence by CCTV pursuant to s. 30 of the \textit{Evidence (Miscellaneous Provisions) Act 1991}, which allows the court to make an order for evidence to be given by CCTV from another location if “the evidence … can be more conveniently given” and the order is not unfair to any party.
is no financial commitment to comprehensive training for interviewers it is pointless to introduce the legislation.) Additionally, the ACT should follow the lead of Queensland and Western Australia and introduce the taking of pre-recorded evidence.

Restrictions on committal proceedings and on the accused cross-examining complainants in sexual offences proceedings apply in most other states: the ACT should consider their introduction.

If the ACT does more than ‘just catch up’, it could become a leader by being the first Australian jurisdiction to introduce and use child communicators or intermediaries.

Although legislative change providing for a range of special measures for victims of sexual offences to give evidence is long overdue in the ACT, a common theme in the literature is that special measures by themselves are not enough. There must be comprehensive witness support and comprehensive training of the participants in the criminal justice system.
7 The rules of evidence and jury directions

The rules of evidence and their application have a major influence on the course and outcome of the prosecution of sexual assault cases. The following aspects of evidence law directly affect sexual offence proceedings:

- evidence of complaint
- hearsay evidence of children who are unavailable to give evidence
- evidence given by experts
- tendency, coincidence and relationship evidence, and joint trials where multiple victims are involved
- child witnesses’ competence to give evidence.

In the ACT the laws and rules governing the admission of evidence in criminal trials come from four sources:

- the Commonwealth Evidence Act 1995
- the ACT Evidence Act 1971
- the ACT Evidence (Miscellaneous Provisions) Act 1991
- the common law.

The primary source is the Commonwealth Evidence Act. To the extent of any inconsistency between provisions of the ACT Act and the Commonwealth Evidence Act, the provisions of the Commonwealth Act prevail, although some provisions of the ACT Act are expressly preserved by the Commonwealth Act. The Commonwealth Evidence Act is a uniform code that has also been enacted in New South Wales (in 1995) and Tasmania (in 2001). ACT legislation can be amended by the ACT Legislative Assembly; the Commonwealth Evidence Act can be amended only by Federal Parliament.

The ACT Law Reform Commission’s view is that the effect of the Commonwealth Evidence Act, in particular s. 56, is that no ACT legislation can override the general rule that relevant evidence is admissible. If that interpretation is correct, any amendments limiting the admission of relevant evidence (subject to other provisions in the Commonwealth Act) would require an amendment to the Commonwealth Act. The substantive provisions of the Commonwealth Act would not necessarily need amendment: the Commonwealth could pass legislation to exempt particular provisions in ACT legislation from being overridden by the Commonwealth Act. Alternatively, the ACT

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1 Section 8(4) of the Commonwealth Evidence Act provides that, until the day fixed by a proclamation under s. 4(6), the Commonwealth Act does not affect the operation of provisions of the ACT Evidence Act that are specified in the Regulations. Regulation 4 of the Commonwealth Evidence Regulations specified a number of provisions of the ACT Act for the purposes of s. 8(4). With the exception of ss. 76F(1), 76F(3) and 76G(4), the sexual offences provisions contained in Part 10A of the ACT Act were preserved. From 30 April 2004, as a result of amendments made by the ACT Evidence (Miscellaneous Provisions) Act, Part 10A of the ACT Evidence Act was repealed. All the provisions relating to sexual offences applicable in the ACT are now contained in the ACT Evidence (Miscellaneous Provisions) Act.

2 ACT Law Reform Commission, Sexual Assault, Report no. 17, p. 98.
could consider adopting the Uniform Evidence Code as a piece of ACT legislation, thus allowing the ACT legislature to amend it.

In collaboration with the New South Wales Law Reform Commission, the Australian Law Reform Commission is examining the operation of the Commonwealth and New South Wales Evidence Acts. The final report is due in December 2005. The Commissions will no doubt consider recent reports on the evidentiary aspects of sexual assault trials and child sexual assault trials. This represents an appropriate forum for the ACT Government to submit proposals for reforms arising from the recommendations in this report.

7.1 Current evidentiary provisions in the ACT

Since 1985 a number of provisions in the ACT have applied specifically to sexual offence proceedings. These were contained in Part 10A of the Evidence Act 1971 until 30 April 2004, when that Part was repealed by the Evidence (Miscellaneous Provisions) Amendment Act 2003. The provisions are now contained in the Evidence (Miscellaneous Provisions) Act 1991.

Part 10A of the ACT Evidence Act contained the following provisions:

- Evidence of complaint was inadmissible unless otherwise admissible under another rule of law or practice.4
- Common law rules requiring the corroboration of the complainant’s evidence, or requiring the judge to give a warning to the jury to the effect that it is unsafe to convict a person on uncorroborated evidence, were abolished.5
- Evidence relating to the sexual reputation of the complainant was inadmissible.6
- Evidence relating to the sexual experience of the complainant with a person other than the accused person could not be adduced without leave of the court.7

The Evidence (Miscellaneous Provisions) Act contains the following provisions relevant to sexual offences:

- The judge must not give the jury any warning or suggestion to the effect that the law regards complainants to be an unreliable class of witness.8
- The judge must not give the jury any warning or suggestion to the effect that the law regards children to be an unreliable class of witnesses.9

3 Such as the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission report Seen and Heard, the Wood Royal Commission report, the Queensland Law Reform Commission’s The Receipt of Evidence by Queensland Courts, the New South Wales Legislative Council Standing Committee on Law and Justice’s Report on Child Sexual Assault Prosecutions, and the Victorian Law Reform Commission’s Sexual Offences: final report.
4 Section 76C.
5 Section 76F.
6 Section 76G(1).
7 Section 76G(2).
8 Section 69.
9 Section 70.
If evidence given by, or a question asked of, a witness tends to suggest that no complaint was made or there was a delay in making a complaint, the judge must give the jury a warning to the effect that the absence of, or the delay in making, the complaint does not necessarily indicate that the allegation is false. In addition, the judge must tell the jury there could be good reasons why a victim of a sexual offence might not make, or might delay making, a complaint about the offence.\textsuperscript{10}

The Commonwealth Evidence Act contains no provisions specific to sexual assault offences. It provides that corroboration warnings are no longer required, although there is no prohibition against giving such a warning.\textsuperscript{11} It also permits the judge to warn the jury of evidence that might be unreliable, and this can include circumstances where the reliability of the evidence is affected by the witnesses’ age. This might apply to evidence given by children, depending on their age.\textsuperscript{12}

\section{7.2 Development of the rules of evidence}

The rules of evidence have evolved through the common law over hundreds of years. In the ACT they are now largely codified in the Commonwealth Evidence Act; the common law rules that evolved informed the development of the Act, however, and the common law still applies in areas not covered by the Act.

In an adversarial criminal justice system it is necessary to have rules of evidence to guide parties to proceedings on the sort of evidence that can properly be led in legal proceedings. The rules of evidence as they apply to criminal trials have developed to ensure fairness in the trial process. In a historical context of fear of oppressive state regimes and an inequality in the resources of the state vis-à-vis those of the accused, fairness to the accused has been central; the accused has been considered to have the most at stake—his or her liberty—in the process.

The rules of evidence relevant to trials of sexual offences and trials involving child victims developed over the centuries in a legal and social environment where women and children participated in the justice system only as witnesses or accused. In the past, cross-examination of rape victims on their sexual reputation and all aspects of their sexual life was allowed on the basis that women who were sexually active were less likely to have withheld consent. Women and children were considered unreliable witnesses, and judges were required to warn juries that it was unsafe to convict on the uncorroborated evidence of the complainant.\textsuperscript{13} Any delay in complaint, however minor, could be taken into account by juries as indicating that the allegation was false.

\section{7.3 Reform of the rules of evidence}

Feminist challenges to the assumptions that underpinned substantive and procedural laws relating to rape led to campaigns for law reform in this area. The rules of evidence were reformed in the 1970s and 1980s, with the effect that in most Australian jurisdictions it is

\begin{itemize}
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\end{itemize}

\begin{footnotes}
  \item[10] Section 71.
  \item[12] ibid., s. 165.
\end{footnotes}
no longer permissible to cross-examine a complainant on her general sexual history\(^\text{14}\), nearly all states have legislated to abolish the common law rule that judges must warn juries it is unsafe to convict on the uncorroborated evidence of the complainant\(^\text{15}\), and there is legislation in various states requiring the judge to tell the jury that a delay in complaint does not necessarily signify a false complaint.\(^\text{16}\) More recently, a number of states have introduced legislation preventing the production of notes made by counsellors dealing with victims of sexual assault.\(^\text{17}\)

Some commentators see the reforms to have been a failure.\(^\text{18}\) For example, the prohibition on raising sexual reputation is not absolute and is subject to judicial discretion. *Heroines of Fortitude*, the report of a 1995 New South Wales study that analysed all tape-recorded sexual assault trials held over a year, found that in 12 per cent of the trials evidence of sexual reputation was admitted—this being a reference to the promiscuity of the victim, the fact that they were a prostitute, or other generally known sexual proclivities. Previous sexual experience was raised in 63 per cent of the trials in the study, most commonly where there was a relationship between the accused and the victim.\(^\text{19}\) Similarly, in Victoria, where since 1991 the defence has been required to make a written application to cross-examine the victim on her past sexual conduct, sexual reputation and experience continue to be raised in many cases.\(^\text{20}\)

In relation to provisions requiring judges to warn juries that there are good reasons for a delay in, or the absence of, complaint and the abolition of the requirement for judges to warn juries of the dangers of convicting on the uncorroborated evidence of the complainant, the High Court has held, in a series of decisions, that these provisions still require warnings to be given of the dangers of convicting where there has been delay in making a complaint to someone or there is a lack of corroboration.\(^\text{21}\)

Impetus for further reform of substantive laws and evidence laws has come from the various inquiries into and reports on the prosecution of child sex offences in some states. This has led to some states and territories allowing the calling of expert evidence in matters concerning child sexual abuse, relaxing hearsay rules in relation to the complaint evidence of children, and allowing cases involving multiple child victims to be joined.

\(^{14}\) G Mason, ‘Reforming the law of rape: incursions into the masculinist sanctum’, in D Kirkby, (ed.), *Sex, Power and Justice*, Oxford University Press, Melbourne, 1995, p. 55. The ACT provision, s. 76G of the *Evidence Act 1971*, was enacted in 1985. It was repealed with effect from 30 April 2004 and has been replaced by Division 4.4 of the *Evidence (Miscellaneous Provisions) Act 1991*, inserted by the *Evidence (Miscellaneous Provisions) Amendment Act 2003*.

\(^{15}\) Section 76F of the *Evidence Act 1971* (ACT), enacted in 1985, was the legislative provision applicable in the ACT. It has been replaced by ss. 69 and 70 of the *Evidence (Miscellaneous Provisions) Act 1991*.

\(^{16}\) The ACT provision is s. 71 of the Territory’s *Evidence (Miscellaneous Provisions) Act 1971*. The ACT provisions, for example, prevent counselling communications made about a complainant from being disclosed in criminal proceedings. The immunity is absolute in preliminary proceedings. In trials it can be overridden by the court. First, the party seeking the communications must specify to the court that there is a legitimate forensic purpose in releasing the notes. The court then examines the notes and decides whether to release them. Similar legislation also exists in New South Wales, Victoria, Tasmania, the Northern Territory and South Australia. The ACT provisions are contained in Division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991* and came into force on 30 April 2004.


Although many recent legislative amendments relate to children, they also have relevance for adult victims of sexual assault.

### 7.4 Complaint evidence

What is referred to as ‘complaint evidence’ often arises in sexual assault trials—more so than in trials for other sorts of offences. At common law, evidence of complaint could be used to bolster the credibility of the complainant if the complaint was made close to the time of the offence. Conversely, lack of complaint close to the time of the offence could be used to discredit the complainant. This rule was an exception to the common law rule that evidence going only to credibility was generally not admissible. The exception can be traced to a medieval common law rule that required victims of violent crimes, including rape, to raise a ‘hue and cry’ before their allegation could be accepted. A 1275 statute stipulated that, to be actionable by the complainant, a complaint of rape had to be made within 40 days. This developed into a rule of evidence that a rape victim’s evidence of early complaint could be used to bolster their credibility and lack of complaint could be used to attack their credibility. The High Court confirmed this common law principle in *Kilby v R* in 1973, with the limitation that the jury could use evidence of complaint only in relation to the credibility of the complainant, rather than as going to the truth of the contents of the complaint.

Calls for reform of this area of the law were made in the 1970s and resulted in legislative amendments in many jurisdictions. There was objection to the common law rule that unless the rape was reported soon after it occurred the credibility of the complainant would be attacked. The assumption underlying this attack on credibility was that a woman or child who is a genuine rape victim would raise a ‘hue and cry’ immediately.

Much more is now known about the nature of sexual assault and the diversity of responses to it. We now know that the majority of sexual assault victims know the offender, that there are many reasons why victims of rape often do not immediately report it, and that children do not immediately report, if they report at all.

In sexual assault trials evidence of recent complaint or its absence can be a significant issue. For the defence, the lack of any complaint of a sexual assault by a victim has traditionally been a major factor undermining the credibility of complainant. For the prosecution, evidence of complaint can be useful. It may be the only corroboration for the complainant’s evidence. Details given soon after the incident by the complainant to another person can be consistent or inconsistent with the complainant’s evidence at trial, and this is obviously a major factor at the trial.

Reforms in various jurisdictions have attempted to redress the perceived unfairness of the common law in one of two ways:

- by restricting the admissibility of evidence of complaint or lack of complaint

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22 Bronitt, ‘The rules of recent complaint: rape myths and the legal construction of the “reasonable” rape victim’, p. 44.
23 (1973) 129 CLR 460.
24 This distinction no longer always applies as a result of s. 60 of the *Evidence Act 1995* (Cth).
25 Data from all sources suggest that the majority of perpetrators are known to their victims. The Recorded Crime Statistics show that 58 per cent of female victims of sexual assault aged over 15 years knew the offender; of these, half were family members—Australian Bureau of Statistics, *Sexual Assault in Australia: a statistical overview*, p. 45.
by requiring judges to give warnings to the jury about delay in, or the absence of, complaint.

7.4.1 The admissibility of complaint evidence

The first approach chosen in the ACT was the option of prohibiting evidence of complaint in trials for sexual offences. Section 76C of the Territory’s Evidence Act 1971, inserted in 1985, prohibited the admission of any evidence of complaint in prescribed sexual offence proceedings. This was an attempt to counter the common law rule that delay in, or absence of, complaint could be used to attack the credibility of the complainant, but it also operated to prevent the prosecution leading evidence of recent complaint—evidence that could provide some corroboration for the complainant’s evidence. When discussing this provision in its report on sexual offences, the ACT Law Reform Commission referred to concerns that reforms of this nature might have backfired and noted that in Canada it had been suggested that similar legislation had not prevented the defence from raising any delay in complaint and the prosecution had been denied a comparable opportunity of proving that a complaint had been made promptly.26 In R v Kirkman27 Higgins J of the ACT Supreme Court held that, since the enactment of the Commonwealth Evidence Act in 1995, s. 76C of the ACT Evidence Act had no effect. The section was formally repealed by the ACT Evidence (Miscellaneous Provisions) Amendment Act, with effect from 30 April 2004.

The current provisions relating to the admissibility of complaint evidence in the ACT are therefore the general hearsay provisions in the Commonwealth Evidence Act. No provisions in the Commonwealth Act deal specifically with sexual offences.

Section 66 of the Commonwealth Act allows hearsay evidence to be adduced in specific circumstances, where the maker of the statement is called to give evidence. This is the provision most frequently relied on by the prosecution to adduce evidence of complaint in sexual offence proceedings. The hearsay statement must be made when the event to which it relates is ‘fresh in the memory’ of the person who makes it. The evidence of it can be given by the person who heard the complaint, provided the person who made the complaint also gives evidence. For example, if a child tells her mother about abuse, the mother can give evidence of what the child said only if the child also gives evidence. Depending on the circumstances of the complaint, such evidence can provide some corroboration.

The evidence of complaint can prove the truth of the complaint, rather than merely bolstering the credibility of the victim28, although the court can direct that the evidence be used for a limited purpose.29

The term ‘fresh in the memory’ in s. 66 of the Act has created some difficulty. In Graham v The Queen30 the High Court considered the term in an appeal against a conviction for sexual offences against a child. Evidence of complaint made six years after the last of the acts alleged against the accused was admitted at the trial. In considering the temporal limitations to the word ‘fresh’, Gaudron, Gummow and Hayne JJ stated:

28 Evidence Act 1995 (Cth), s. 60.
29 ibid., s. 136.
The word ‘fresh’, in its context in s 66, means ‘recent’ or ‘immediate’. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.

The High Court’s reference to ‘hours or days, not … years’ provides little guidance for courts on how to deal with cases that fall within those extremes. There is some New South Wales authority for the proposition that an incident can be ‘fresh in the memory’ up to seven weeks later.\textsuperscript{31} However, the High Court’s focus on the temporal aspect has led to uncertainty about the admission of evidence of complaint—especially in cases involving sexual offences committed on children, who typically do not complain immediately.

### 7.4.2 Complaint evidence and proposals for reform

During its inquiry into child sexual assault prosecutions the New South Wales Legislative Council Standing Committee on Law and Justice heard from Dr Annie Cossins\textsuperscript{32} evidence critical of the High Court’s decision in \textit{Graham}. Dr Cossins thought that the case illustrated the unstated assumption that evidence of a complaint made months or years after the alleged events is to be treated with suspicion and that the decision displayed no understanding of the context in which child sexual abuse occurs and the relationship of power between the child victim and the adult offender.\textsuperscript{33} Having reviewed the literature on sexually abused children’s patterns of disclosure, Dr Cossins found the following:

- The majority of sexually abused children do not report the abuse at the time it occurs.
- The majority of sexually abused children either disclose the abuse some years after it occurred or never disclose it at all.
- The younger the child, the less likely it is that she or he will report the abuse.
- The primary factors that prevent sexually abused children from reporting are embarrassment, shame, fear of punishment, and feeling responsible for the abuse.
- A significant minority of children will experience repeated abuse over an extended period.
- Repeated abuse appears to be more likely to occur if the abuser is a relative, and the intrafamilial relationship means the child is less likely to disclose.\textsuperscript{34}

Her conclusion that the under-reporting of child sexual assault is a typical, rather than an aberrant, feature of the crime has implications for how complaint evidence is viewed.

The New South Wales Legislative Council Standing Committee on Law and Justice inquiry into child sexual assault prosecutions considered the phrase ‘fresh in the memory’

\textsuperscript{31} In the case of \textit{Adam} (1999) 47 NSWLR 267 the New South Wales Court of Criminal Appeal approved the following comment from Wood J, the trial judge in the trial: ‘In my view a statement made seven weeks after an event is not one which should be regarded as being outside the period of fresh memory. It is in fact a relatively short period after the events of the kind here involved’.
\textsuperscript{32} Senior Lecturer, Faculty of Law, Centre for Gender Related Violence Studies, University of New South Wales, Sydney.
\textsuperscript{33} NSW Legislative Council Standing Committee on Law and Justice, \textit{Report on Child Sexual Assault Prosecutions}, p. 110.
in s. 66 of the Evidence Act as interpreted by Graham. The inquiry could see no reason for a distinction to be drawn between evidence of recent complaints and evidence of delayed complaints—particularly as it related to children, among whom delayed complaints are common and the event, because of its nature, is likely to remain ‘fresh in the memory’ of the victim regardless of the passage of time. The Committee noted Levine J’s interpretation of ‘fresh in the memory’ in the New South Wales Court of Criminal Appeal decision in Graham:

Shortly stated, common sense would seem to indicate that the notion of ‘freshness’, particularly in this area of the law is not anchored to nor determined by simple notions of ‘lapse of time’. It is concerned with, in my opinion, the ‘quality of the memory’. A person might never forget the details of an event many years previously because it took place in circumstances which impressed it into the witnesses memory.35

The Committee was of the view that evidence of complaint should be admitted in child sexual assault proceedings whether or not the complaint is delayed and that the probative value of any such evidence is a matter the jury should decide. It recommended that s. 66 of the Evidence Act be amended to define ‘fresh in the memory’ in terms of the quality of the memory (not having deteriorated or changed by lapse of time) of the asserted fact, regardless of the time that has elapsed between the making of the assertion and the occurrence of the asserted fact, rather than in terms of time.36 This recommendation has not yet been implemented.

In Queensland, following publication of the Law Reform Commission’s report on the evidence of children in 200037, legislation allowing complaint evidence to be admitted in trials for sexual offences, regardless of whether the evidence was recent or not, was introduced. The provision—s. 4A of the Criminal Law (Sexual Offences) Act 1978—permits any complaint, including an initial complaint to a police officer before a formal witness statement is taken, to be admitted. It also contains a safeguard, allowing the court to exclude evidence if it is satisfied it would be unfair to admit that evidence. The provision is intended to reflect the comments of Thomas JA in R v S:

In my view it would assist any jury in a case involving a sexual complaint to know how and when any complaint about the conduct of the accused person first emerged. Evidence of this kind is pivotal to explaining how the complainant comes to be in the witness box and the accused in the dock. An assessment of the truth of the complaint can hardly be attempted without some knowledge of how it first saw the light of day. It is my view that evidence of first complaint should always be receivable in cases involving sexual misconduct, as evidence which permits a better understanding of the story, irrespective of when it was made. To say that an early complaint is merely a bolster, or a late complaint a drawback, to the complainant’s credibility is an oversimplification. The circumstances of first emergence of the complaint may enable the story to be seen in a different light …

Unfortunately I do not think that the authorities on this question permit it to be said that the above views currently represent the law. The rules concerning evidence of recent complaint are still fairly rigidly tied to their historical origins and the requirement of recency has recently been affirmed by the High Court as a

36 ibid., p. 112.
criterion of the admissibility of such evidence: *Suresh*. Of course once such evidence is received, counsel for the respective parties, in the light of community perception at the time concerning such matters, might urge upon the jury that the circumstances bolster or cast doubt upon the credibility of the complainant. But the initial hurdle is admissibility.38

Evidence admitted pursuant to s. 4A is not admitted as evidence of the truth of the asserted fact.

The term ‘fresh in the memory’, as it appears in s. 66(2) of the Commonwealth Evidence Act, should be amended to require a court to take into account the quality of the witness’s memory, rather than the amount of time that has passed since the events described in the complaint. Alternatively, a provision could be enacted providing that in sexual offence proceedings evidence of preliminary complaint is admissible no matter when the complaint was made, as in Queensland.

7.4.3 Jury warnings about delayed or absent complaint

The second method of countering the common law rule that allowed the absence of, or delay in, complaint to be used to assess the credibility of the complainant was the introduction of legislation requiring judges to give directions to juries to counter such misconceptions.39 In the ACT, recently introduced legislation adopts the New South Wales and Victorian approaches of mandatory jury directions in cases of delayed or absent complaint.40

Such mandatory jury directions on complaint must be read in the light of the 1996 High Court decision in *Crofts v R.*41 In that decision the Court considered the Victorian provision and unanimously held that it did not prevent the trial judge, as a matter of law, from commenting on the relevance of delay on the victim’s credibility:

Delay in complaining may not necessarily indicate that an allegation is false. But, in the particular circumstances of a case, the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false.42

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39 In New South Wales, for example, s. 294 of the *Criminal Procedure Act 1986* provides that where evidence is given or a question is asked that suggests a delay in, or the absence of, complaint, the trial judge must direct the jury that this does not necessarily indicate that the allegation is false and there may be good reasons for delay in making a complaint. The trial judge must not speculate as to what the reasons for delay might have been, although he or she can take the jury to any evidence as to what those reasons for delay were: *R v Williams*, New South Wales Court of Criminal Appeal, unreported, 22 February 1999. Victoria has a similar provision in s. 61 of its *Crimes Act 1958*. The provision, introduced in 1991, was in terms similar to those of the New South Wales provision. It was amended in 1997 to delete the requirement for the judge to direct that a lack of, or delay in, complaint does ‘not necessarily’ indicate the allegation is false. The reason for the amendment was that the original wording still contained an inference that delay in complaint can indicate falsity. The amended provision simply requires judges to direct juries that there may be good reasons for delay.
42 ibid., at 428.
The High Court noted that the aim of the legislation was to restore the balance of jury instruction, not to remove the balance. It was of the view that reforms achieved this by removing outdated notions such as the assumption that in sexual matters complainants as a class of witness were particularly suspect. The legislation did not, however, remove the need for warnings on delays in complaint specific to the particular circumstances of the case.43

In relation to delay in, or the absence of, complaint and the effect of the High Court decision on the New South Wales provision, Justice Wood of the New South Wales Supreme Court (and Royal Commissioner in the Royal Commission into the New South Wales Police Service) expressed concern about the Crofts decision in a paper given at a 2003 conference on sexual assault practice and procedure:

> It is obviously appropriate that the jury have an explanation that any evidence showing reasons for the delay in, or absence of, a complaint, can be taken into account in relation to the credibility issue, although the directions must not invite speculation, or suggest reasons which are not supported by evidence: R v Williams [1999] NSW CCA 9. Similarly it is appropriate that they have an explanation, in relation to the prejudicial effect of delay, so far as the defence case is concerned, that it is the fact of the delay that is relevant and that the existence of a good reason therefore does not negate any resulting prejudice. However, without some firm basis for the suggestion that the delay might have affected the complainant’s credibility or some evidence pointing to the actual prejudice to the accused, it is arguable that the balance has been tipped too far in these respects.44

The Victorian Law Reform Commission recommended that Justice Wood’s views be reflected in a legislative amendment making it clear that a Crofts warning must not be given in the absence of evidence indicating the complainant’s credibility was affected by delay.45 In New South Wales, the Wood Royal Commission (in 1996) and the Legislative Council Standing Committee on Law and Justice (in 2002) looked at this question. The Royal Commission recommended that in child sexual assault trials juries should receive the following instruction:

- The experience of the courts is that children who are sexually abused frequently do not complain.
- There are many reasons why children may hesitate before making a complaint; these include embarrassment, fear of getting into trouble, misplaced shame or guilt.
- You have been invited to regard the delay in complaining in this case as affecting the complainant’s credibility; and
- It is open for you to do so if you wish, but you should also bear in mind the matters I have just mentioned.46

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43 ibid., at 451.
46 Wood Royal Commission, pp. 1122–3.
The Standing Committee recommended that judges be prohibited from giving juries a 
_Crofts_ warning about delayed complaints in child sexual assault cases.\(^{47}\)

At the very least, the ACT provision, s. 71 of the _Evidence Act 1971_, should mirror the 
Victorian provision, removing s. 71(2)(a)—the requirement that the judge must warn a 
jury that a delay, or absence of complaint, does not necessarily indicate that the allegation 
is false—from the section. The ACT should adopt the Wood Royal Commission’s 
recommendation for mandatory jury directions in child sexual assault proceedings. The 
Victorian Law Reform Commission’s recommendations should also be considered, in 
particular the following:

- The judge must not state or suggest to the jury that the credibility of the 
  complainant is affected by a delay in reporting unless the judge is satisfied 
  that there is sufficient evidence in the particular case to justify such a 
  warning.

- The judge must not warn the jury that it is unsafe or dangerous to convict the 
  accused unless there is evidence that the accused has in fact suffered a 
  specific forensic disadvantage due to a substantial delay in reporting.\(^{48}\)

### 7.5 The _Longman_ direction

At common law, judges were required to warn juries in cases of rape and other sexual 
offences that it was ‘dangerous to convict’ on the uncorroborated testimony of the victim. 
The warning that was required, as stated by Gibbs J in _Kelleher v The Queen_, was as 
follows:

> It is dangerous to convict on the uncorroborated testimony of the person (whether 
> male or female) on whom the offence was committed, although the members of 
> the jury may act upon that testimony if, after scrutinising it with great care, and 
> paying heed to the warning, they are satisfied of its truth and accuracy.\(^{49}\)

According to the majority in the _Longman_

> The reason for the rule of practice (which did not quite harden into a rule of law 
> in Australia) was stated by Salmon L J in _Reg. v Henry; Reg. v Manning_ ((1968) 
> 53 Cr App R 150 at p. 153). His Lordship said that it was dangerous to convict on 
> the evidence of a woman or girl alone ‘because human experience has shown that 
> in these courts girls and women do sometimes tell an entirely false story which is 
> very easy to fabricate, but extremely difficult to refute.\(^{50}\)

Various legislatures in Australia have tried to overcome the common law requirement for 
corroboration in rape and other sexual offence trials. In the ACT, for example, s. 76F of 
the _Evidence Act 1971_ abolished ‘any rule of law or practice requiring the 
corroboration of the evidence or requiring that the judge give a warning to the jury in 
criminal proceedings to the effect that it is unsafe to convict a person on uncorroborated evidence’ as far as such 
a rule applied to complainants in sexual offence proceedings. That provision has now been

\(^{47}\) NSW Legislative Council Standing Committee on Law and Justice, _Report on Child Sexual 


\(^{49}\) _Kelleher v The Queen_ (1974) 131 CLR 534 at 553.

\(^{50}\) _Longman v The Queen_ (1989) 168 CLR 79 at 85.
repealed, but it is in effect repeated in ss. 69 and 70 of the ACT Evidence (Miscellaneous Provisions) Act 1991.

In *Longman* the High Court considered a similar provision in Western Australian legislation—s. 36BE(1) of the state’s *Evidence Act 1906*. The Court held that the provision dispensed only with the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class and did not affect the requirement to give a warning in the particular circumstances. *Longman* dealt with a case where there had been a substantial delay in complaint (some 20 years), and in that circumstance it was considered appropriate to give a warning to the jury that it was ‘dangerous to convict on that evidence [the evidence of the complainant] alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy’.

According to Justice Wood of the New South Wales Supreme Court, as a result of further appellate decisions, the warning is now required to be given in almost every case involving delay, even where the complainant’s evidence is corroborated. His Honour suggested that there may be occasions to relax the approach taken to the *Longman* warning in *Doggett* and later cases by confining the use of the expression ‘that it would be dangerous to convict’ to those trials where ‘there is sufficient concatenation of events, including delay, to warrant such a warning’.

### 7.6 Hearsay evidence of children who are unavailable to give evidence

In the case of child witnesses, there are persuasive reasons for relaxing the rule against the admission of hearsay evidence. The Victorian Law Reform Commission identified a number of reasons for doing so:

- The hearsay rule prevents the jury hearing evidence about the initial complaint of sexual abuse by a child, although this can be crucial to assessing the veracity of the allegation. (The tape of the interview between the child and police, which is admissible in Victoria, can give the jury access to the initial interview, but it is not used in all cases. Further, it reveals only what the child said to the police, rather than what was ever told to anyone else.)

- The rule is based on the principle that the best evidence is evidence given orally in open court, yet this may not be the case with children. The literature suggests that a child’s statement when the abuse is first disclosed is more persuasive evidence of abuse than anything the child might say at the time of the trial. The evidence of a disclosure may be better than the evidence at trial because the child’s memory of events might have faded by the time of the trial.

- Many allegations of child abuse are not prosecuted, because either the child is not competent to testify or is too traumatised to do so.

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51 *Longman v The Queen* (1989) 168 CLR 79 at 91 per Brennan, Dawson and Toohey JJ.
53 His Honour Justice James Wood, ‘Sexual Assault and the admission of evidence’.
Another matter requiring consideration is whether evidence of complaint by a child should be led if the child is not able to give evidence.

A 4- or 5-year-old might make a disclosure to a family member and even repeat that disclosure to police soon afterwards. There might be cogent evidence corroborating the child’s disclosure—such as the alleged offender being nearby and acting in ways consistent with the child’s complaint. There might be DNA evidence linking the accused to a sexual offence committed on the child. But by the time the matter has been listed for hearing or trial a young child might no longer be able to give evidence about something that occurred many months before.

The Canadian case of Khan v R highlights the difficulties. In that case, a 3-and-a-half-year-old child and her mother attended a medical examination performed by the accused. The child and Dr Khan were alone for some time, during which the child did not come into contact with any other male person. When the child and her mother left the doctor’s surgery the mother noticed the child had a wet spot on her sleeve. Fifteen minutes after leaving the office the child told her mother the doctor had put his penis in her mouth and ejaculated (obviously in her own terminology). The wet spot on the sleeve was found to consist of semen and saliva. The trial judge refused to let the child testify because of her age and disallowed the mother’s evidence of the statements the child had made. The Crown appealed. The Court of Appeal upheld the appeal and reversed the trial judge’s decision on both issues, holding that the mother’s evidence of the statements the child had made to her should have been admitted even if the child had not been called. The applicable test in Canada was whether hearsay evidence was necessary and the evidence was reliable. The Supreme Court held that it was both necessary and reliable in this case.

There is some logic in that approach. Had the evidence not been admitted, despite the presence of semen on the child’s clothing, there would have been no conviction. Would such evidence be admissible in the ACT? If not, should it be?

A similar example was seen recently in the ACT Supreme Court case of R v Bull. A 5-year-old told her mother the accused had touched her in her genital area. She repeated the allegation to her father, as well as the police in a taped interview. DNA analysis of the child’s underwear revealed semen of the accused. By the time of the trial the child either did not wish to discuss the incident or could not recall it. The judge admitted the out-of-court hearsay statements to the child’s parents and the police on the condition that the child was made available for cross-examination. The accused’s barrister said he would not cross-examine the child, and the child was not called at the trial. The accused was convicted. What would have happened had the child not been made available for cross-examination? Would the evidence of the child’s statements to her parents and the police have been admissible?

The Commonwealth Evidence Act 1995 arguably gives some scope to the leading of evidence of complaint made by a child without calling the child to give evidence. Section 65 of the Act allows for a witness to give evidence about what another person said to him or her if the other person is not available to give evidence. The representation must come within one of the specific provisions in s. 65 for it to be admissible. This includes representations:

- made when, or shortly after, the asserted fact occurred and in circumstances that make it unlikely that what was said by the other person is a fabrication

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56 [190] 2 SCR 531.
57 R v Bull, ACT Supreme Court, Madgwick J, 15 September 2003, unreported.
made in circumstances that make it highly probable that the representation is reliable

that are against the interests of the person who made the representation at the time the representation was made.\textsuperscript{58}

If the person who made the representation is not competent to give evidence about the fact, the person is unavailable for these purposes.\textsuperscript{59} On the face of it, this provision allows evidence of a complaint by a young child to another person to be led from that other person—provided it passes the discretionary grounds for exclusion—if it is accepted by the court that the child is not competent. So, for example, it seems to permit a mother to give evidence of her child’s statements to her, despite the child not being called to give evidence.

This interpretation is, however, subject to another provision, in s. 61 of the Evidence Act, which would prohibit a mother from giving evidence of what her child had said to her if, when the child made the statement, the child was not capable of giving a rational reply to a question about a fact.

If a child is deemed to be not competent pursuant to s. 13(2) of the Act or not competent in relation to the facts in issue pursuant to s. 13(3), it may still be possible pursuant to ss. 61(1) to have the evidence of complaint admitted pursuant to s. 65 if the court is satisfied that at the time the representation (that is, the complaint) was made the person who made it (that is, the child) was capable of giving a rational reply to a question about the fact. It may be conceivable or arguable that a child is capable of giving a rational reply to a question about a fact when it is close in time to the incident, despite the child not being competent to give evidence.

Section 61 is further qualified by s. 61(2), which states that the section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind. The effect is that if a child complained to her mother that she had a sore vagina and that the accused had touched her vagina, the mother could give evidence of what the child said about having a sore vagina notwithstanding that the child was not capable of giving a rational reply to a question about a fact.

Although this might seem like a sensible balancing act between the need to prosecute offenders and the need to ensure fairness to the accused, it can have some illogical consequences.

Applying the Commonwealth Evidence Act provisions to the Khan situation, for example, and assuming the child was too young to give unsworn evidence, could the mother’s evidence have been led pursuant to s. 65 of the Act? If the child is not competent, he or she is unavailable. The criterion in s. 65(2) would be satisfied in that the complaint was made shortly after the asserted event occurred. Unless the court was satisfied the child was capable of giving a rational reply to a question about a fact at the time the representation was made, s. 61(1) would preclude the mother from giving evidence. If the child has repeated the complaint on tape to the police shortly after making the complaint, the court might be in a position to decide the issue by viewing the tape. It is arguable therefore that, if the child appears responsive to questions and is able to give a rational reply about an alleged fact, the evidence of the mother, and indeed the taped interview with police, may

\textsuperscript{58} Evidence Act 1995 (Cth), ss. 65(2)(b)–65(2)(d).

\textsuperscript{59} ibid., Dictionary, cl 4(1)(b). The question of competence is dealt with in s. 13 of the Act—see Section 7.9.
be admissible notwithstanding the child’s absence from the proceedings. The final hurdle to the admission of the evidence would be the discretionary grounds for exclusion in ss.135 and 137 of the Evidence Act.

The Victorian Law Reform Commission noted that approaches similar to the Canadian approach apply in a number of US jurisdictions. In Pennsylvania, for example, the court can admit the evidence of a child who is unavailable to give evidence if the court has determined that testimony by the child will result in the child suffering serious emotional distress. The evidence is admissible if the court finds that the time, content and circumstances of the statement provide sufficient indications of reliability. This principle has been upheld by the US Supreme Court.\(^{60}\)

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended an exception to the rule against hearsay similar to that applied in Khan. In addition, they recommended that, in the interests of fairness to the accused, no person should be convicted of an offence solely on the basis of the evidence of one statement admitted under this exception. Corroborating evidence—such as other statements by the child, medical evidence, DNA evidence, or expert psychological evidence—should be required.\(^{61}\)

Such a provision would allow the prosecution of matters that at present cannot be prosecuted—for example, where the child is young and the delay between the event and the trial means the child is unable to give some evidence about the alleged incident. Requiring other cogent and reliable evidence corroborating the child’s representation would provide a safeguard. Admission of such evidence would be subject to the Evidence Act’s general discretions to exclude evidence.\(^{62}\)

### 7.7 Expert evidence

Underpinning the focus on early complaint in sexual assault trials is an assumption that a victim would immediately complain if the complaint was genuine. Other assumptions haunt sexual assault trials, one of them being an expectation that a victim of sexual assault will physically resist and therefore have injuries. This assumption prevails even in relation to child victims, where the dynamics of sexual abuse are such that children typically do not resist. Assumptions can also be made about how a victim of sexual assault appears in court when recounting the experience. With child victims of sexual abuse, continuing contact with the offender might lead to questioning of the veracity of the complainant’s evidence, when in fact it is not unusual for a person abused as a child to have continuing contact if the abuser is part of their extended family.

Although the 1970s and 1980s saw legislative amendments to counter some common assumptions, the assumptions still play a role in sexual assault trials:

> Fundamental planks of the defence strategy in sexual abuse cases appeal to misunderstandings or wrong assumptions that may be made by members of the

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\(^{61}\) Australian Law Reform Commission & Human Rights and Equal Opportunity Commission, *Seen and Heard*, p. 332. The report said that implementation of this recommendation would be by amendments to the Commonwealth Evidence Act and the Commonwealth Attorney-General, through the Standing Committee of Attorneys-General, should encourage all states and territories to enact similar legislation.

\(^{62}\) *Evidence Act 1995* (Cth), ss. 135–137.
community about the behaviour of victims after they have been sexually
violated.63

In Freckelton’s view, three responses are open to the prosecutor to counter suggestions
made during a trial that a genuine victim of sexual assault would have complained and
reported promptly, would have a clear and detailed recollection of incidents of sexual
abuse, and would not have changed or recanted in respect of the allegation:

- During the final address to the jury, the prosecution might seek to counter the
  suggestions by appealing for more thoughtful understanding in connection with the
  plight of the victim.

- The prosecution might seek to have the complainant provide an explanation for the
  ‘defects’ in the evidence or post-assault behaviour, although not all witnesses can
  clearly express these things.

- The prosecution might present expert evidence to counter assumptions the jury might
  otherwise make in relation to the behaviour of victims of sexual abuse.64

This last kind of evidence, expert evidence, has also been called ‘myth-dispelling’, or
‘counter-intuitive’, evidence because it is evidence that seeks to debunk myths or widely
held beliefs that can in reality be quite erroneous.

There are obviously limits to what an expert can give evidence about. Freckelton considers
it would be inappropriate for an expert to give evidence that children behave in a certain
way after being sexually assaulted because it appears that the behaviour of children in
response to assault varies—just as that of adults does. However:

… if the expert evidence were confined to removing potential sources of error
from the fact-finding process by explaining to jurors (and judges) that there can
be good reasons for children failing to complain or report, for their being
imprecise or unconvincing in their allegations, and even for their retracting or
qualifying previous assertions, this could be a positive contribution to the difficult
job of fact-finding.65

Freckelton’s view is that counter-intuitive evidence could also have a place in relation to
adult victims of sexual assault.

Much cross-examination in sexual assault trials focuses on the delay in making a
complaint.66 It is not generally understood that some delay in making a complaint or
failure to complain is common. The legislated mandatory directions to juries are
insufficient to really counter the expectation that complaint will be loud and immediate.
Take, for example, the ACT provision, as expressed in s. 71(2) of the Evidence
(Miscellaneous Provisions) Act 1991:

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63 I Freckelton, ‘Sexual offence prosecutions: a barrister’s perspective’, in P Easteal (ed.),
Balancing the Scales, p. 148. (Ian Freckelton is a Melbourne barrister and editor of the Journal of
Law and Medicine and Expert Evidence.)
64 ibid.
65 ibid., p. 149.
66 NSW Department of Women, Heroines of Fortitude, p. 208.
The judge must—

a) give the jury a warning to the effect that the absence of, or the delay in making, the complaint does not necessarily indicate that the allegation that the offence was committed is false; and

b) tell the jury that there may be good reasons why a victim of a sexual offence may not make, or may hesitate in making, a complaint about the offence.

Simply giving the jury that direction does little to dispel common assumptions about typical behaviour.

Lack of evidence of physical injury is another area a jury might not necessarily understand. The New South Wales Legislative Council Standing Committee on Law and Justice report referred to 1992 research on juries’ knowledge about child sexual assault. The researchers found that large numbers of jurors believe that children are easily manipulated into giving false reports, that most children are physically damaged when sexually assaulted, and that the typical reaction of a child would include resistance, crying for help or escape. As Cossins notes, however, research findings put the lie to these assumptions, but if juries are not aware of this they may act on the basis of incorrect assumptions.

7.7.1 **Admission of expert evidence**

At common law, expert evidence about the ways children might respond to abuse was inadmissible because it concerned the question the trier of fact had to decide or because, in the view of the court, it was about a matter that was within the experience of the trier of fact. The Commonwealth *Evidence Act 1995* abolished these common law ‘ultimate issue’ and ‘common knowledge’ rules. The Act retains the common law rule that evidence cannot be admitted solely for the purpose of bolstering the credibility of a witness, and this would include expert evidence. There are, however, exceptions to this, including an exception allowing the rehabilitation of a witness whose credibility has been impugned, although this exception does not allow the calling of expert evidence.

A number of appealed cases in various Australian states and in New Zealand between 1987 and 1995 considered whether expert psychological evidence could be led in cases of child sexual assault. Those cases progressively limited the calling of such evidence. Most of them involved ‘child sexual abuse accommodation syndrome’ evidence to explain some aspect of the child’s evidence. The cases were decided on varying grounds, among them that such evidence was seeking to bolster the child’s credibility, that there was not sufficient expertise, and that such evidence was unduly confusing.

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69 *Evidence Act 1995* (Cth), s. 102.

70 *Evidence Act 1995* (Cth), s. 108.

In recent reports dealing with child victims of sexual offences there is a sound basis to support the legislature in permitting greater use of expert evidence. Expert witnesses often give evidence in cases involving children in family law or care and protection cases. The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission were of the view that expert evidence—on such matters as patterns of children’s disclosure in abuse cases, the effects of child abuse on children’s behaviour, and the effects of child abuse on children’s demeanour in or out of court—should be admissible to explain why general assumptions about a child witness’s behaviour or a certain line of cross-examination might not reflect adversely on a particular child witness’s credibility.72

Noting that jurors might find behaviour such as failure to report abuse or continued association with the abuser as inconsistent with the child witness’s account (despite such behaviours having been found to be typical of children subjected to repeated abuse by trusted adult figures), the Wood Royal Commission considered it was appropriate that expert evidence be admitted in sexual assault trials—along the lines of the New Zealand model (see Section 7.7.2).73

These proposals were not implemented, but the matter was reconsidered by the New South Wales Legislative Council Standing Committee on Law and Justice in 2002. After reviewing the recommendations of other reports and the current provisions in New Zealand and Tasmania, the Standing Committee recommended that the New South Wales Evidence Act be amended to permit the admission of expert evidence relating to child development (including memory development) and the behaviour of child victims of sexual assault in child sexual assault proceedings—along the lines of s. 79A of the Tasmanian Evidence Act 2001 (see Section 7.7.2).74

### 7.7.2 Approaches to the admission of expert evidence

New Zealand and Tasmania have introduced provisions permitting the calling of expert evidence in child sexual assault proceedings but have taken quite different approaches.

**New Zealand**

Section 23G of the New Zealand Evidence Act, inserted in 1990, allows the admission of expert evidence specific to the particular child in child sexual offence trials:

(2) In any case to which this section applies, an expert witness may give evidence on the following matters:

(b) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness’s assessment of the complainant being based on—

(i) Examination of the complainant before the complainant gives evidence; or

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73 Wood Royal Commission, pp. 1116–18.

Observation of the complainant giving evidence, whether directly or on a videotape:

(b) The general development level of children of the same age group as the complainant:

(c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant’s behaviour is, from the expert witness’s professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

The provision focuses on evidence relevant to the particular child. The expert either meets the complainant before the complainant gives evidence or observes the videotaped interview with police or the complainant giving evidence at the trial. One of the difficulties of such a provision is that if the expert examines the child this exposes the child to yet more interviews and intervention during the court process. Further, the defence does not have equal access to the child for the purpose of an assessment by its own expert.

Although the provision is regularly used, there have been some difficulties with its application.75

_Tasmania_

Tasmania has adopted the Uniform Evidence Act76 but has included an additional section in order to permit the calling of expert evidence on child development and behaviour generally and on children who are victims of sexual offences:

79A. A person who has specialised knowledge of child behaviour based on the person’s training, study or experience (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in proceedings against a person charged with a sexual offence against a child who, at the time of the alleged offence, had not attained the age of 17 years, in relation to one or more of the following matters:

(a) child development and behaviour generally;

(b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

The provision allows the expert to deal with matters that might not be understood by juries—such as delay in complaint, apparent acquiescence to the offending behaviour, and ongoing contact with the offender. The expert does not need to refer to the specific child or specific allegations.

75 For example, in _R v Jarden_ (New Zealand Court of Appeal, 4 August 2003, unreported) convictions on 16 counts of sexual offences against girls aged between 6 and 10 years were overturned on appeal as a result of the expert evidence led at trial going beyond the permissible limits of s. 23G.

76 _Evidence Act 2001_ (Tas).
7.7.3 Conclusion

A number of reports that have considered the question of children’s evidence have expressed broad support for the leading of expert evidence in child sexual assault cases. Juries, judges and the legal profession cannot be expected to understand child development and behaviour in general and the effect of sexual or physical abuse on a child—delays in reporting, lack of resistance, retractions, continuing contact with the offender, as well as communication ability when giving evidence. The particular issues that arise, such as what the evidence can go to and whether it is general evidence or evidence that must relate to a particular child, are complex and deserving of further consideration.

The Tasmanian approach allows general evidence about children to be led, thus obviating the need for an expert to have contact with the child witness. It also allows the prosecution to lead evidence countering some common misconceptions, to help the jury gain an understanding of the cognitive and developmental age of the child, and it avoids arguments of unfairness to the accused by allowing the defence to call expert evidence on the same issue.

Many inaccurate assumptions are also rife in relation to adult victims. Mandatory directions to juries represent an attempt to redress misconceptions about delays in reporting and lack of corroboration. Although these go part of the way to resolving the situation, they have led to the development of complex directions to juries, and failure to provide them can result in a conviction being overturned. Education and training of the judiciary and the legal profession can help, but it is the finder of fact—that is, the jury or judge—who needs the information with which to rebut incorrect assumptions.

7.8 Evidence of uncharged acts

The rules governing the admission of evidence relating to acts other than those on the indictment have a major impact on the trial process, especially in child sexual assault trials. As noted, most children who report offences are victims of people they know. Multiple offences and multiple victims are common, and the victims often know each other. Abuse in a familial or other similar context can be perpetrated for months or years. Children are often unable to distinguish specific incidents with any particularity, although they are able to describe the general nature of the abuse, which often takes place in the context of a continuing relationship. Child sex offenders frequently select their victims because of their vulnerability, and there is often a period of preparatory behaviour—called ‘grooming’—by the offender before progressing to overtly illicit behaviour.

When applied to child sexual assault proceedings, the laws of evidence can result in the exclusion of evidence that may, on the face of it, seem relevant. Joint trials with more than one victim are generally not permitted, so—despite the fact that there may be another or several other children who have been similarly abused by the offender—the child’s evidence is usually uncorroborated. In general, only specific instances of abuse included on the indictment can be led in evidence. Evidence of other sexual acts committed on the victim by the same offender is often not allowed to be adduced if the victim is unable to

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77 Data from the Recorded Crime Statistics for 2003 show that 63 per cent of female victims of reported sexual offences aged between 0 and 14 years knew the offender; for male victims the figure was 59 per cent—Australian Bureau of Statistics, Sexual Assault in Australia: a statistical overview, pp. 45, 49.

78 Cossins, ‘Children who concoct stories or rules that sanitise the facts?’
provide sufficient detail. Evidence of continuing sexual abuse or other conduct that could amount to grooming is only sometimes admissible.

There is some incompatibility between the reality of sexual abuse of children and the artificial environment of a courtroom regulated by the complex rules of evidence. Any prosecutor who has conducted a child sexual assault prosecution understands the difficulty of conducting such trials within the confines of the rules of evidence, particularly as they relate to evidence of uncharged conduct. Children are told to tell the truth in court, but in reality they can tell only a restricted version of it. Before giving evidence, they are often told they must not mention significant portions of the sexual abuse because mention of other matters may lead to the discharge of the jury.

There are sound reasons for rules of evidence that limit the admission of evidence of other activity on the part of the accused. The prejudicial effect of such evidence could affect the jury. The incompatibility between the rules of evidence and the reality of child sexual abuse does, however, raise a question about the criminal justice system’s ability to adequately deal with the problem.

The desire to protect children from sex offenders can often be seen as clashing with the requirements of fairness to the accused and the rules of evidence that have evolved to prevent the admission in a criminal trial of any evidence other than that directly relating to the offence on the indictment. The challenge for legislatures and courts is to find a balance. As a Western Australian judge submitted to the Queensland Law Reform Commission in 2000:

> It is of great concern that in so many cases the isolation of one child pitted against an adult alleged to be the perpetrator leads to acquittal of the adult, when at the same time there are other allegations of similar behaviour against the adult from family members not before the court, or when a history of such offending is known but excluded, or when the conduct is part of an alleged wider course of conduct, but evidence of which for one reason or another is excluded …

> The fundamental error is the fixation with the concept that admission of prejudicial evidence can be equated with an ‘unfair trial’. ‘Unfair trial’ in this context is implicitly equated with ‘diminished chance of acquittal’. Given those assumptions an undue burden is weighted against admissibility. Exclusion is just as likely to lead to an unfair trial if unfair trial is equated to an unfairly elevated charge of wrongful acquittal.\(^79\)

It is a controversial question. On one hand, it is essential to uphold the basic tenets of our justice system and protect an accused from being convicted on his or her past criminal record, for example, or on the basis of highly prejudicial evidence. On the other hand, there is the need to protect children from sexual violation.

The High Court and various state appellate courts have dealt with the complexities of evidence of uncharged acts (referred to as ‘propensity evidence’) in its various forms, and a body of complex case law has developed.

In *Pfennig v R*\(^80\) the High Court used the term ‘propensity evidence’ to describe evidence that is received despite the fact that it discloses the commission of offences other than


\(^80\) (1995) 182 CLR 461.
those with which the accused is charged. The Court said such evidence is always propensity evidence but that it can be divided into three categories:

- similar fact evidence
- relationship evidence
- identity evidence.

The first two categories are relevant to this discussion.

**Similar fact, tendency and coincidence evidence**

At common law, evidence of other acts that were strikingly similar to the alleged offence was admissible to prove the commission of the charged act. This was referred to as ‘similar fact evidence’.81

The Commonwealth’s Evidence Act 1995 codified the law on similar fact evidence, referring to it as ‘tendency’ and ‘coincidence’ evidence.82 Tendency evidence is evidence sought to be admitted to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind.83 Coincidence evidence is evidence that two or more related events occurred, and, because of the improbability of the events occurring coincidentally, it can be used to prove that a person did a particular act or had a particular state of mind.84 The admissibility of both classes of evidence is dependent on the party leading the evidence giving reasonable notice and the evidence having ‘significant probative value’.85 In addition, the Act stipulates that tendency or coincidence evidence can be adduced by the prosecution only if the ‘probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant’.86

Both classes of evidence arise in many child sexual assault trials. It might be alleged that the accused has committed similar acts on a number of victims or that the accused has committed acts of a similar nature against a single victim. Whether evidence of these other acts is admissible is to be determined according to the provisions in the Evidence Act and common law concepts such as relationship evidence.

**Relationship evidence**

Relationship evidence is evidence that casts light on the relationship between the victim and the accused. It can consist of evidence of uncharged acts, including criminal offences, that provide some contextual understanding. An example is evidence of previous sexual acts or acts of violence committed on the victim (or threats to the victim) by the accused to explain why the victim did not resist or complain about the alleged offence that is the subject of the proceedings. It falls outside the definition of tendency and coincidence evidence in the Evidence Act, and its admissibility is governed by common law principles. The admissibility of relationship evidence is determined by its relevance.

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81 See ibid.
82 In R v Ellis (2003) 58 NSWLR 700 the New South Wales Court of Criminal Appeal held that the Evidence Act provision relating to tendency and coincidence evidence provides a complete code, and the common law on similar fact evidence has no applicability. Leave has been granted to appeal to the High Court on this point.
83 Evidence Act 1995 (Cth), s. 97.
84 ibid., s. 98.
85 ibid., ss. 97(1)(b) and 98(1)(b).
86 ibid., s. 101(2).
As with any evidence, the trial judge can exercise a general discretion to exclude evidence under one or more of the various exclusionary discretions contained in Part 3.11 of the Evidence Act. In contrast with tendency and coincidence evidence, the admissibility of relationship evidence does not depend on the evidence having ‘significant probative value’; nor does it require that the probative value ‘substantially outweigh’ any prejudicial effect.\(^\text{87}\)

### 7.8.1 Joint trials of multiple victims: the rule in Hoch’s Case

In the 1986 case of *De Jesus v R*\(^\text{88}\) the High Court held that trials for offences against different victims by the same alleged offender should be held jointly only when evidence on one count is admissible on the other count. This means that the evidence of an offence on child B must be admissible to prove the offence on child A—as coincidence or tendency evidence, for example—before the trial can be conducted jointly. In 1988 in *Hoch v R*\(^\text{89}\) the High Court held that evidence of offences committed on a number of victims by the same offender can be led in the same trial only if there is no possibility of concoction between the victims. The High Court considered that the possibility of concoction is inconsistent with the guilt of the accused person and there is a rational view of the evidence that is consistent with innocence. In such cases the probative value of the evidence, which is a condition for its admission, is destroyed.\(^\text{90}\)

More recently, in *R v OGD*\(^\text{91}\) the New South Wales Court of Criminal Appeal held that, where evidence is capable of disclosing a tendency on the part of an accused person and the Crown fails to exclude the reasonable possibility of concoction on the part of the proposed witness or witnesses, that evidence must be excluded—not because of *Hoch* but because of the statutory requirement in s. 101(2) of the New South Wales Evidence Act 1995 that the probative value of such evidence be weighed against its prejudicial effect.

The practical effect of these decisions is that where victims of an offender know each other the trials must be conducted separately for each victim and the evidence of other victims is not admissible. Actual concoction between the victims or a real probability of concoction is not the test: it is simply whether there is a possibility of concoction.

The effect of these cases has been the subject of discussion in various reports on child sexual assault prosecutions and the subject of legislation in Queensland and Victoria.

### Queensland

Section 132A of Queensland’s Evidence Act 1977, inserted in 1997, sought to prevent tendency evidence being ruled inadmissible on the grounds of possible joint concoction. Although the provisions still require the evidence’s probative value to outweigh its potentially prejudicial effect, the question of possible concoction is now a matter to be determined by the jury.

In 2000 the Queensland Law Reform Commission pointed to difficulties with the interpretation of s. 132A.\(^\text{92}\) As noted, in *Hoch* the High Court held that the possibility of joint concoction destroyed the probative value of the evidence. The question that therefore

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\(^{87}\) *Conway v R* (2000) 172 ALR 185 at 213.

\(^{88}\) (1986) 61 ALJR 1.

\(^{89}\) (1988) 165 CLR 292.

\(^{90}\) *Hoch v R* (1988) 165 CLR 292 at 296.

\(^{91}\) (2000) 50 NSWLR 433.

arises in relation to s. 132A is whether the possibility, or even probability, of concoction can be taken into account in weighing up the probative value of the evidence, as it was in

_Hoch_. An alternative view of the provision is that the possibility of concoction must be put out of the mind of the judge ruling on the admissibility. This interpretation would make sense if the purpose of the legislation were to override _Hoch’s Case_. If this is the effect, the provision is not clear.

**Victoria**

Sections 372(3AA) to 372(3AC) were inserted in the Victorian _Crimes Act 1958_ in 1997 to overcome the effect of _De Jesus v The Queen_. The provisions create a presumption that, where two or more counts charging sexual offences are joined, they should be tried together and that this presumption cannot be rebutted merely because evidence on one count is inadmissible on another count.

Section 398A of the Victorian Crimes Act, also inserted in 1997, aims to deal with _Hoch’s Case_. The effect of this provision is that a possibility of concoction will not render evidence inadmissible. It will be a matter that can go to a witness’s credit and thus be a question for the jury, but it will not be a threshold issue of admissibility. It allows evidence to be admitted, even if it is prejudicial to the accused, provided it is in the interests of justice to admit it.

The test on which s. 398A is based is the House of Lords decision in _DPP v P._ The case considered an appeal from a trial where two sisters gave evidence of their father’s sexual abuse of them. The convictions were overturned in the English Court of Appeal and the prosecution appealed to the House of Lords. The House of Lords held that, in admitting evidence of an offence against one victim in connection with an alleged offence against another, it was inappropriate to single out ‘striking similarities’ as an essential element in every case. The essential feature of admissibility of such evidence was that its probative force was so great as to make it just to admit it, even though this was prejudicial to the defendant because it suggested he was guilty of another crime. Although probative force might be derived from striking similarities in the evidence about the manner in which the crime was committed, it is not restricted to such cases, and the question whether the evidence had sufficient probative value to outweigh its prejudicial effect was one of degree.

The Victorian Law Reform Commission reported that it is now more common for offences involving multiple complainants to be tried together and that the provisions seem to be working fairly well.

**Other proposals for reform**

In their 1997 report the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission noted that the rules in _Hoch and De Jesus_ meant that the jury is not informed that there are multiple allegations of abuse against the accused. They recommended that multiple proceedings relating to more than one incident involving a child victim and the accused or more than one child victim and the accused be joined in a single trial. The purpose was to obviate the need for children to give evidence in numerous proceedings over long periods and to avoid the problems associated with rules against

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93 (1986) 61 ALJR 1.
tendency and coincidence evidence. They also recommended that joinder rules and rules against tendency and coincidence evidence be reviewed in the light of the hardship these rules cause to particular child witnesses and that the Standing Committee of Attorneys-General convene a working group to conduct the review.96

The Wood Royal Commission considered the two Commissions’ proposal too broad. It pointed out that the principles governing the circumstances in which separate trials are conducted are designed to ensure a fair trial for the accused and that in many instances joint trials of multiple charges involving different complainants can bring prejudice to the accused. It noted, however, its sympathy with the view that in some cases—particularly those involving allegations of familial abuse—there might be good reasons for joining the counts and referred to the approach in the United Kingdom, where it is considered appropriate to have regard to, among other things, the impact of severance on Crown witnesses.97

The New South Wales Legislative Council Standing Committee on Law and Justice preferred a broader mechanism that rendered tendency evidence prima facie admissible in child sexual assault trials, whilst retaining the general discretion to exclude evidence that is unfairly prejudicial under s. 137 of the state’s Evidence Act 1995.98

The ACT could give consideration to these matters and the approaches taken in Victoria and Queensland to link the impact of the High Court decisions. At the least, a legislative amendment leaving it to the jury to determine the question of concoction between multiple victims is warranted. Consideration should also be given to the recommendations of the New South Wales Legislative Council Standing Committee on Law and Justice in this regard.

7.8.2 Uncharged acts committed on a victim

Uncharged acts committed on a victim can be challenging for prosecutors conducting sexual assault prosecutions if the abuse has continued for a long time. In child sexual assault cases this is common since the abuse often occurs over a lengthy period. Not all acts or aspects of conduct are necessarily included on the indictment if details are insufficiently specific. An example of this is a child who has been sexually abused for some months. He or she may recall two or three incidents with some clarity. These are included on the indictment, but the more extensive abuse is not included because the child does not recall other incidents with the same clarity. His or her recollection of them is generalised as to place, time and the act of abuse alleged.

Child witnesses are told they must not mention most of these other acts of abuse, and this creates problems for them. The expectation is that in court they will be able to be specific about times, dates and circumstances, even when the abuse has been sustained from a young age. This is inconsistent with young children’s ability to remember isolated incidents, especially in the context of abuse that has occurred over an extended period at the hands of a close family member or friend.

In criminal trials specificity is required so as to allow the accused to answer the charges. When the alleged offender and the victim have been residing together for some time,
specific dates may be less important than in cases where the abuse is alleged to have been committed by an infrequent visitor to the child’s premises. The need to specify particular instances in the indictment limits the criminal justice system’s ability to accommodate the reality of child sexual abuse. Often, the evidence led from the complainant is limited significantly. Evidentiary rules that are appropriate for other types of offences might not necessarily be suited to child sexual assault matters.

**Persistent sexual abuse**

Attempts have been made to reform the law in relation to persistent sexual abuse. Most jurisdictions (among them the ACT) now have ‘persistent sexual abuse’ provisions, although the provision is rarely used in the ACT. The Victorian provision, in contrast, has permitted more prosecutions in child sexual assault matters.99

The New South Wales provision was introduced following recommendations of the Wood Royal Commission, which said in its report that, pursuant to the High Court decision in *S v The Queen*100, an offence of persistent sexual abuse should be introduced. In *S v The Queen* the High Court overturned a conviction because of ambiguity in the indictment. The Royal Commission considered that the underlying reasoning for the Court’s decision gave insufficient recognition to the reality of child sexual abuse. It is not possible for the victim to recollect the detail of many individual events; witnesses tend to blur events; and it is difficult for witnesses to be completely certain about time and place. A sexual encounter of this nature encompasses a number of separate acts, rather than a single act, and it is difficult for a child to pinpoint exactly what occurred and to provide a consistent account of it.101

In *KBT v The Queen*102 the High Court held in relation to the equivalent Queensland provision103 that it was necessary for the jury to be in agreement about the commission of the same three or more illegal acts. The effect of this is that there must be some specificity in relation to three of the offences. However, the Queensland Court of Appeal, in *R v S*,104 and the Victorian Court of Appeal, in *KRM v R*,105 have distinguished the decision of *KBT*, in one case where the complainant gave evidence of sexual abuse that occurred every night for some months and in the other where the sexual abuse had occurred frequently. In both cases there were no specific dates for the three offences relied on.106 The Victorian Court of Appeal’s approach in *KRM* perhaps explains why the provision is used more often in Victoria than it is in New South Wales or the ACT.

Where there has been continuing sexual abuse of a child, the evidence of uncharged acts might be essential to understanding the context of the assaults. The New South Wales Legislative Council Standing Committee on Law and Justice noted that excluding evidence of uncharged acts not only creates problems for the complainant in providing the necessary details of the offence but also, because of the resultant loss of context, can cause a jury to doubt the credibility of the complainant’s story. The Committee cited the example of a 14-year-old giving evidence of sexual abuse by a family member. It might seem implausible to a jury that a 14-year-old would not cry out or complain when such

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99 *Crimes Act 1958*, s. 47A.
100 (1989) 168 CLR 266.
103 Criminal Code, s. 229B.
104 [1999] 2 Qd R 89.
inappropriate conduct takes place. But the reality could be that the child had been sexually abused by the alleged offender for many years: in that context, her response to the assaults is easier to understand. This evidence might be admissible as relationship evidence, although that raises its own difficulties. The Standing Committee recommended that the New South Wales Evidence Act be amended to provide that evidence of uncharged acts relevant to the facts at issue in child sexual assault proceedings be admissible.  

7.8.3 Admissibility of relationship evidence

The question of the admissibility of evidence of uncharged acts often comes before appellate courts in the context of child sexual assault cases. The High Court considered relationship evidence in *Gipp v R* 108 and *KRM v R* 109, in 1998 and 2001 respectively. In *Gipp* the High Court was divided as to the use of relationship evidence. In that case the accused had been indicted on seven charges concerning his stepdaughter—four charges of unlawful and indecent assault and three of rape. The evidence was mainly the uncorroborated evidence of the complainant. The prosecution led evidence of seven charges as well as evidence of a general nature relating to longstanding sexual abuse of the complainant by the accused. During the trial the Crown discontinued the prosecution of two counts but the evidence that had been led on those counts was left before the jury. The judge directed the jury that evidence of the history of sexual abuse was led to show the relationship between the accused and the complainant and there was no need for the jury to be satisfied beyond reasonable doubt of those background facts. Although the High Court held by a three-to-two majority that the verdict was unsafe and unsatisfactory on each count and the accused was entitled to a new trial, the reasoning of the majority varied.

Gaudron J’s view, for example, was that, except where it becomes an issue at the trial because of the way the defence is conducted, general evidence of sexual abuse on occasions other than those charged is admissible only if it has special probative value that renders it admissible as similar fact or propensity evidence. In this case the evidence was inadmissible because it contained no feature or special probative quality of a kind necessary to constitute similar fact evidence. Callinan J held that, unless it is received for some other purpose (such as proof of a guilty passion, intention, propensity, opportunity or motive) or in cases where a relationship is directly relevant to an issue at trial, non-specific, highly prejudicial background evidence may not be led by the prosecution in the absence of forensic conduct by the defence that makes it admissible. His Honour held that the evidence of other sexual abuse was admissible as propensity evidence in this case because all acts were sufficiently similar to warrant their admission into evidence, although the nature and significance of the evidence and the use to which it might be put were never explained to the jury.

In *KRM* McHugh and Hayne JJ were of the view that, because of the divided reasoning in *Gipp*, it could not be said that evidence of uncharged acts of sexual conduct is no longer admissible to prove the relationship between the parties, and courts should treat evidence of such acts as admissible in order to explain the nature of the relationship between the

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complainant and the accused, as has been done previously. It is essential, however, that trial judges warn juries of the limited use that can be made of such evidence.\textsuperscript{110}

In 2002 in \textit{R v TAB}\textsuperscript{111} the New South Wales Court of Criminal Appeal took the view that, because of the uncertainty of the High Court rulings, the position as stated by Ireland J in \textit{R v AH}\textsuperscript{112} was applicable; that is, evidence of conduct with a sexual connotation between the complainant and the accused other than that which is the subject of the offences charged is relevant in two different ways. First, the relationship revealed might place the evidence of the events that gave rise to a particular charge in their true context as part of the essential background against which the evidence of a complainant and of the accused must necessarily be evaluated. Second, the guilty passion (or sexual desire or feeling) of the accused for the complainant is directly relevant to proving that the offence charged was committed.

When the Crown introduces the evidence to demonstrate context it is not tendency evidence, and the requirements of ss. 97 and 101 of the Evidence Act do not apply. The use to which the evidence can be put is, however, limited, and the jury should be directed that such evidence cannot be used to infer that the accused committed the alleged offences. As noted, if the evidence is admitted as tendency evidence the Crown must establish that the evidence has significant probative value. If the conduct is not remote from the time of the alleged offence the Crown should have little difficulty in establishing this.\textsuperscript{113} The formulation—referring as it does to the conduct in question not being remote in time from the commission of the alleged offence, making it more likely to be admitted as tendency evidence—creates difficulties if the conduct has taken place over a number of years in relation to a single complainant. If the conduct occurred some years before the counts on the indictment, it does not have that close temporal connection and would be less likely to be admitted as tendency evidence.

If evidence is relied on as tendency evidence, it may go to prove the offender committed the charged offences, and the uncharged acts must be defined with some particularity. If there is to be general evidence of sexual offences committed by the offender on the victim, it might be admissible as relationship evidence, but the jury needs to be directed as to the limited use it can make of that evidence.

Until any objection to the admissibility of evidence of prior conduct is resolved at the beginning of a trial there is no certainty about whether such evidence will be admissible. Any reformulation of the common law rules or the Evidence Act provisions would, of course, not be able to cover all possible scenarios, but there might be merit in the view that the current law needs clarification. The New South Wales Legislative Council Standing Committee on Law and Justice considered that any ambiguity about the admissibility of evidence of related acts in child sexual assault proceedings should be removed and that the New South Wales Evidence Act should be amended to make it clear that relationship evidence relevant to the facts at issue is admissible in child sexual assault prosecutions and not subject to ss. 97 and 101 of the Act. Further, it argued that, in applying the discretions in s. 137, additional factors (including the public interest in admitting all relevant evidence) should be considered.\textsuperscript{114} The Committee concluded that it would be useful to codify the types of related acts that are to be considered relationship evidence for child

\textsuperscript{110} ibid.
\textsuperscript{111} 16 July 2002, unreported.
\textsuperscript{112} (1997) 42 NSWLR 702.
\textsuperscript{113} ibid., at 708–9.
\textsuperscript{114} NSW Legislative Council Standing Committee on Law and Justice, \textit{Report on Child Sexual Assault Prosecutions}, p. 102.
sexual assault proceedings and it recommended that the New South Wales Attorney-General consult with experts to determine what should be included in a definition of types of acts to be considered admissible as relationship evidence in child sexual assault proceedings.115

Specifying types of behaviour, including grooming behaviour, as suggested by the Standing Committee, could help the courts recognise behaviours they might not otherwise consider relevant. Such legislation would need to be accompanied by training for legal professionals, to help them recognise what might be relevant conduct.

7.8.4 Previous convictions

A relevant consideration in this broad area of tendency and propensity evidence is previous convictions for similar offences. Two issues arise: the question of admissibility; and how such evidence should be adduced if it is admissible. In a recent case in the ACT Supreme Court the accused, on trial for a child sex offence, had a record of similar offences against two children 10 years previously. He had pleaded guilty to those offences and had been convicted and sentenced to a term of imprisonment. To lead the evidence of the earlier convictions as tendency evidence would have required the prosecution to prove that the evidence had significant probative value116 and that the probative value substantially outweighed the prejudicial effect on the defendant.117 On one hand, courts would be reluctant to allow evidence of a conviction 10 years previously as evidence of tendency, particularly in the light of \textit{R v AH}.118 On the other, the fact that the accused had previously committed offences of a similar nature would provide corroboration.

Admission of evidence of past convictions of child sexual assault is controversial. The danger of admitting such evidence is that the jury will be so prejudiced by the evidence it will find the offender guilty regardless of any weaknesses in the evidence on the counts on the indictment. Conversely, the evidence of a child victim is often uncorroborated, and it is often his or her word against that of the accused. The fact that the accused has committed similar offences previously might be said to corroborate the child’s evidence. Is it fair to say there is no corroboration of the child’s evidence when in fact the accused has previously been found guilty of offences that suggest a sexual interest in children? This vexed question needs further discussion. Balancing these competing concerns—that is, protection of the community (in particular children) and the accused’s right to a fair trial—presents challenges.

Once the question of admissibility is determined, the next question is how evidence of past convictions should be led. When an accused has previously been found guilty of or pleaded guilty to offences admissible as tendency evidence, instead of calling the victims of the earlier offences to give evidence, the statement of facts on which the accused was previously sentenced or the transcript of the sentencing remarks referring to those facts should be admitted as proof of the facts relating to the earlier convictions. If a plea of guilty was entered to the earlier offences it is arguable that s. 178 of the Commonwealth Evidence Act would permit the admission of the sentencing remarks and the facts on which the accused was previously sentenced. If, however, the accused pleaded not guilty to the previous offences and was found guilty, s. 91 of the Act would prevent the

\footnotesize{\textit{115 ibid.} \\
\textit{116 Evidence Act 1995 (Cth), s. 97(1)(b).} \\
\textit{117 ibid., s. 101.} \\
\textit{118 (1997) 42 NSWLR 702.}}
admission of such evidence. Consideration should be given to introducing an exception to this provision in relation to child sexual assault proceedings.

7.9 Competence

The question of competence to give evidence arises in relation to the evidence of young children. At common law children were assumed to be unreliable witnesses and were permitted to give evidence against alleged offenders only if they were assessed as competent to do so, and a person was competent only if they were able to give sworn evidence. To give sworn evidence, the witness must understand the nature and significance of the oath to tell the truth. Young children were thus precluded from giving evidence.

The Commonwealth Evidence Act has reformed this area considerably. There is a general presumption of competence. Witnesses who do not understand the obligation to give truthful evidence are not competent to give sworn evidence but may give unsworn evidence if the court is satisfied that they understand the difference between the truth and a lie and that it is important to tell the truth and they state that they will not tell lies in the proceeding.

Although this provision has liberalised the competence requirements for young children giving evidence, the way a witness’s competence to give evidence is determined remains problematic. The Evidence Act provides that the court can inform itself as it thinks fit when determining competence. This allows, for example, the calling of expert evidence from a child psychologist to help the court decide whether a young child can give unsworn evidence. In the ACT expert evidence is not generally adduced. Judicial officers ask questions to ascertain whether the child understands the concept of telling the truth. This is a difficult area: failure to answer the questions correctly will lead to the witness not being able to give evidence.

Magistrates and judges are not generally experts in child psychology, and it is concerning that an assessment of a child’s capacity to understand concepts such as truth is made without specialist assistance. In a recent case in the ACT Magistrates Court a 7-year-old non–English speaking child was held not to be competent to give unsworn evidence. One would normally expect a child of that age to be competent to give such evidence. The Victorian Law Reform Commission cited an example of a Victorian judge who asked a 10-year-old child, ‘What is the truth?’ Such esoteric questioning does little to help determine whether a child understands an obligation to tell the truth, and a child’s inability to answer could disqualify them from giving evidence.

When a child is to give evidence the prosecutor should consider obtaining from a suitably qualified expert an opinion on the child’s ability to understand the criteria in s. 13(2) of the Evidence Act. Further, experts in child development should train judicial officers so that they can question a child appropriately to determine whether the child is competent to give evidence.

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120 ibid, p. 276.
121 Evidence Act 1995 (Cth), s. 12.
122 ibid., s. 13.
123 ibid., s. 13(7).
7.10 Conclusion

Evidence law is complex—and particularly so in sexual assault trials. This chapter merely touches on some of the concerns. New evidentiary questions often arise in trials. It would be useful therefore to establish within the ACT Office of the Director of Public Prosecutions a reference group, consisting of senior prosecutors, to consider evidentiary questions that arise in sexual assault prosecutions. The reference group could review the areas of evidence law discussed in this chapter and carry out a review of case law, looking at recent and current prosecutions in the ACT where these questions arise. In doing so, it could consider the application of the Commonwealth Evidence Act and the common law in the ACT and thus be better able to determine whether there is any need for clarification or broadening of the types of admissible evidence.

The ACT Government should consider whether to adopt its own Evidence Act. If it is decided not to do this, submissions on the rules of evidence as they affect sexual offence proceedings should be prepared for the review of the Commonwealth Evidence Act currently being conducted by the Australian Law Reform Commission.

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<tr>
<th>Recommendation</th>
<th>Review of sexual assault trials</th>
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<td>7.1</td>
<td>A reference group within the ACT Office of the Director of Public Prosecutions should be established to conduct a review of sexual offence trials—particularly those involving child victims—to examine evidentiary questions that arise, with a view to making a submission to the ACT Government or the Australian Law Reform Commission inquiry in relation to possible changes to the laws of evidence as they affect sexual offence proceedings.</td>
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8 Sexual offence provisions in the ACT

The ACT Government has been reconsidering and reforming the Territory’s criminal laws, using as a basis the work of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General. The Committee has developed a Model Criminal Code covering all criminal offences, with the aim of its being adopted by all the states and territories. The ACT Government has already enacted Chapters 2, 3 and 4 of the Model Code in the Criminal Code 2002. The Chapters cover the following:

- general principles of criminal responsibility—Chapter 2
- theft, fraud, bribery and related offences—Chapter 3
- property damage and computer offences—Chapter 4.

The Government is now looking at the Model Code’s provisions dealing with offences against the person; this includes sexual offences.\(^1\) In its consideration of the sexual offence provisions the Government is taking into account the 2001 ACT Law Reform Commission’s report on sexual offences.\(^2\) In August 2003 Attorney-General Jon Stanhope circulated the government response to the Commission’s report and the Model Code report on sexual offences. The response considers both the report and the Code in detail and identifies the legislation the Government intends to introduce.\(^3\)

This chapter does not retrace the matters dealt with by those comprehensive reports and the response to them. Rather, it identifies some important aspects of sexual offence prosecutions the Government might take into account when considering the Model Code provisions.

8.1 Proposals for change in the ACT

The Government’s response to the Model Criminal Code and the Law Reform Commission’s report says it will adopt most of the Model Code’s sexual offence provisions, with some modifications. The main features of the provisions the Government proposes to adopt are as follows:

- The definition of ‘sexual intercourse’ will be expanded to include penetration of a person’s genitalia, as well as the penis coming into contact with any part of a person’s mouth.\(^4\)
- The term ‘sexual penetration’ will be used in place of ‘sexual intercourse’.

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\(^4\) The current definition of ‘sexual intercourse’ in s. 50 of the *Crimes ACT 1900* (ACT) refers to penetration of the vagina or anus.
The current four categories of sexual assault (and four further categories of aggravated offence) will be replaced with the following offences:

- sexual penetration without consent
- assault with intent to engage in unlawful sexual penetration.\(^5\)

Circumstances in which there are aggravating features will no longer constitute separate offences but will carry a greater maximum penalty. Such circumstances will include the use of a weapon or where there is more than one offender.

The offence of ‘act of indecency’ is to be replaced by the offence of ‘indecent touching’, defined to mean indecent according to the standards of ordinary people. Penalties will be increased for aggravated offences.

A positive consent standard is to be inserted, with consent taken to mean consent freely and voluntarily given in the knowledge of the nature of the act in question and the identity of the other person involved.

In relation to offences committed on children aged less than 16 years, the government response proposes the following changes:

- The ‘age of no defence’ will be increased from 10 years to 12 years.\(^6\)
- Penalties will increase.
- The current offence of maintaining a sexual relationship with a young person will be replaced by the proposed Code offence of ‘persistent sexual abuse of a child’.
- There will no longer be a separate offence of incest for victims aged less than 16 years. The general provisions relating to child victims will be relied on, with a family-related offence being an aggravating feature and incurring higher penalties.
- There will be a new offence to cover the incitement of a young person to engage in an act of a sexual nature by showing pornographic material to that person.
- There is in-principle agreement to provisions preventing suspect persons from loitering near places frequented by children.

A new range of offences specifically dealing with sexual acts committed with or upon mentally incapable people by people charged with their care will be created. It will be an offence for a carer to sexually penetrate or indecently touch a mentally impaired person. Consent will be a defence only where the giving of that consent was not unduly influenced by the fact that the person was responsible for the care of the person with the mental impairment.

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\(^5\) This will be in the part of the Code dealing with assault and will be treated as an aggravated assault.

\(^6\) The ‘age of no defence’ is currently set at 10 years. This is the age below which there is no defence to sexual intercourse. Between the ages of 10 and 16 years there are currently two defences available: if the person believed on reasonable grounds that the child was above the age of 16 years, or at the time of the offence there was no more than two years’ difference in age between the offender and the child. In either of those circumstances, if the child consented to the sexual intercourse, the statutory defence will be available—*Crimes Act 1900* (ACT), s. 55.
A higher age of consent—18 years—will apply to sexual contact between a young person and a person in a position of authority, such as step-parents and teachers.

The SARP team supports the proposed initiatives but suggests that some minor changes could be legislated for in advance of the major overhaul. For example, the child pornography provisions could be amended to include a person showing a child a pornographic image such as a photo, film or video. Such an act is not covered under the current child pornography provisions, despite it being an offence to show a child pornographic material using email, internet or mobile phone messages.\(^7\)

The main aspect of the proposed provisions the SARP team is concerned about is the offence of unlawful sexual penetration, which is currently the offence of sexual intercourse without consent. In the ACT the majority of prosecutions for sexual assault offences committed on adults are for this offence. The particular issues are the definition of consent and the requisite intention on the part of the accused.

8.2 Unlawful sexual penetration

Section 54(1) of the ACT *Crimes Act 1900* provides as follows:

A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, is guilty of an offence.

The proposed Model Code provision the Government has supported is as follows:

5.2.6 Unlawful sexual penetration

(1) A person who sexually penetrates another person:

(a) without the other person’s consent; and

(b) knowing about or being reckless as to the lack of consent, is guilty of an offence.

(2) A person who is sexually penetrated by another person:

(a) without the other person’s consent; and

(b) knowing about or being reckless as to the lack of consent, is guilty of an offence.

(3) For the purposes of this section, being reckless as to a lack of consent to sexual penetration includes not giving any thought to whether or not the other person is consenting to sexual penetration.\(^8\)

\(^7\) *Crimes Act 1900* (ACT), s. 66.

\(^8\) Model Criminal Code Officers Committee, *Model Criminal Code*, Chapter 5, ‘Sexual offences against the person’, p. 84.
In both cases the prosecution must prove the following:

- that sexual intercourse (or sexual penetration) took place between the accused and the complainant
- that it took place without the consent of the complainant
- that the accused knew the complainant was not consenting or was reckless as to whether the complainant was consenting.

### 8.2.1 Consent

In the current ACT provision ‘consent’ is not defined. Rather, s. 67 of the ACT Crimes Act provides a list of circumstances that negate the victim’s consent, among them the following:

- the infliction of violence on or the threat of violence to the victim, a third person who is present or nearby, or another person
- a threat to use extortion against the victim or a third person
- a threat to publicly humiliate or disgrace or to physically or mentally harass the victim or a third person
- the effect of intoxication
- a mistaken belief as to the identity of the other person
- a fraudulent misrepresentation
- the abuse of authority over or professional or other trust in relation to the victim
- the victim’s physical helplessness
- unlawful detention of the victim.10

A person is deemed to know that the other person does not consent to the sexual intercourse or the act of indecency if it is established that the person knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means listed in s. 67(1).11 The provision further provides that a person who does not physically resist shall not, by reason only of that fact, be regarded as consenting to sexual intercourse.12

In its 2001 report on sexual offences the ACT Law Reform Commission expressed the view that s. 67 was ambiguous and offered little real guidance as to what is envisaged by the term ‘consent’: ‘Any provision that refers to consent only by reference to the absence of certain factors is likely to be at best confusing and at worst misleading’.13 The

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9 This approach was modelled on reforms that first emerged in Michigan in the United States in 1974—known as the Michigan reforms.
10 Crimes Act 1900 (ACT), s. 67(1).
11 ibid., s. 67(3).
12 ibid., s. 67(2).
13 ACT Law Reform Commission, Sexual Assault, Report no. 17, p. 66.
Commission argued that the statutory definition of ‘consent’ needed modification, and the ACT Government agreed with this in its response. The Commission’s recommendation was that s. 67 be repealed and replaced with the following positive definition of consent: ‘For the purposes of this Part “consent” should be taken to mean a consent freely given with knowledge of the nature of the act in question and the identity of the other person or persons involved’.15

The positive consent model has been adopted in Victoria, with consent being defined as ‘free agreement’16 and situations where free agreement is deemed not to be present being listed.17 In addition, judges are required, when appropriate, to direct the jury that the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person’s free agreement.18 Further, a person is not to be regarded as having freely agreed to a sexual act simply because there was no physical resistance or no physical injury or because on an earlier occasion there was consent.19 Inactivity or passivity on the part of the victim prima facie means consent was not given. In this way the mandatory jury direction is meant to reinforce the positive consent standard.

When introduced in Victoria in 1991, the positive definition of ‘consent’ was intended to advocate a ‘communicative’, as opposed to a ‘penetrative/coercive’, model of sexuality, seeing women as agents of their own sexuality rather than simply conforming to a male version of sexual pleasure.20 The positive definition is now found in Tasmania, Western Australia and the Northern Territory.21 The Model Criminal Code similarly adopts a positive definition of consent: ‘… consent means free and voluntary agreement’.22

The ACT Law Reform Commission recommended that the list of factors negating consent be removed because they would be unnecessary with a positive consent standard.23 In contrast with the Commission, the Model Criminal Code Officers Committee maintains that a list of factors negating consent remains essential. The ACT Government supported the Committee’s approach in its response.24 The Model Code lists the circumstances in which a person does not consent.25 The list is not exhaustive, and unlisted circumstances may be considered.26 The factors negating consent include the use of force or threats of force, where the person is asleep, unconscious or affected by drugs or alcohol, and where the person is incapable of understanding the nature of the act.

In its deliberations the Committee took account of s. 67 of the ACT Crimes Act, which provides the most comprehensive list of factors negating consent in Australia.27 The

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15 ibid., p. 71.
16 *Crimes Act 1958* (Vic), s. 36.
17 ibid., ss. 36(a)–36(g).
18 ibid., s. 37. This direction has existed in the ACT since 30 April 2004—Evidence (Miscellaneous Provisions) Act 1991 (ACT), s. 72.
19 *Crimes Act 1958* (Vic), s. 37.
21 *Criminal Code Act 1924* (Tas), s. 2A; *Criminal Code Act 1913* (WA), s. 319; *Criminal Code Act* (NT), s. 192.
23 ibid., p. 71.
25 ibid.
26 ibid., p. 41.
27 ibid., p. 45.
Committee thought the list was too detailed; for example, it thought it inappropriate that fraudulent conduct or a threat of being dismissed from a job should automatically negate consent. The Committee was of the view that consent should be negated only where the person has no choice and considered that in the case of the latter example the victim did have a choice, albeit an unpalatable one.28

As in Victoria, the Model Code provides for a mandatory jury direction on consent, requiring the jury to be directed that simply because a person did not say or do anything to indicate that he or she did not consent, did not protest or physically resist, did not sustain physical injury, or had consented on another occasion does not mean he or she consented.29

The Government should give careful consideration to the question of substantially reducing the factors that negate consent, as proposed in the Model Code. The role such legislation can fulfil is to indicate to the community the sort of conduct that is unacceptable; it asserts that unwarranted abuse of power over others in order to commit sexual acts on them is a criminal offence. To water down the legislation is a major step that should not be taken lightly.

8.2.2 The mental element: knowledge or recklessness

The mental element, or mens rea, the prosecution must prove is that the accused knew the complainant was not consenting to sexual intercourse or was reckless as to that consent. This reflects the House of Lords decision in DPP v Morgan30, which held that, even where it is proved the victim did not consent, the accused cannot be found guilty if he held an honest belief that the victim did consent. The accused’s belief does not have to be reasonable.

In Queensland, Tasmania and Western Australia31 the mental element the prosecution must prove is simply that the accused intended to have sexual intercourse. It is not necessary for the prosecution to prove the accused knew of the victim’s lack of consent or was reckless as to the lack of consent. The accused can then raise a defence of an honest and reasonable belief in consent. Once the defence is raised, the prosecution must prove beyond reasonable doubt that the accused did not have an honest and reasonable belief in the victim’s consent.

In contrast with the common law jurisdictions, including the ACT, mistaken belief in consent must be honest and reasonable. In Western Australia reasonableness is determined by the standards of a reasonable person of the same age, background and level of intellectual functioning as the accused. Significantly, in comparison with the ACT, the ‘reasonable person’ has been held in Western Australia to be a sober person.32 This is

28 ibid., p. 47.
29 ibid., p. 262. This has been enacted in the ACT—s. 72 of the Evidence (Miscellaneous Provisions) Act 1991.
31 Criminal Code Act 1899 (Qld), s. 349; Criminal Code Act 1924 (Tas) s. 185; Criminal Code Act 1913 (WA), s. 325. These states, along with the Northern Territory, have codified their criminal laws. The remaining Australian jurisdictions have criminal laws based on common law.
32 Daniels v The Queen (1990) 1 WAR 435. Section 24 of the Criminal Code 1913 Act (WA) states, ‘A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist’.
unlike the situation in the ACT, New South Wales, Victoria\textsuperscript{33} and South Australia, where
the intoxication of the accused is a factor to be taken into account in determining whether
the belief in consent was held honestly by the accused. The absence of a further
requirement of reasonableness in those jurisdictions means that a belief held honestly—no
matter how unreasonable on objective standards—will suffice.

In its final report on sexual offences the Victorian Law Reform Commission criticises the
current subjective mental element as it applies in Victoria:

> The present subjective approach does not provide adequate protection to women
> and children. It supports the attitude that a person is entitled to have sex, unless
> the other person actively indicates they do not wish to do so. This places the onus
> on a person approached for sex to indicate lack of consent, instead of requiring
> the initiator to ascertain whether the other person is consenting ...

> A mental element of rape in which an accused can be acquitted where he held an
> honest belief in the consent runs the real risk of affirming and legitimising …
> myths and stereotypes.\textsuperscript{34}

A move towards the position in the Code jurisdictions of Queensland, Tasmania and
Western Australia would support a communicative model of sexual relations—that is, one
where, as stated by Lord Simon in the House of Lords decision in \textit{DPP v Morgan}, consent
is expressly communicated:

> It can be argued with force that it is only fair to the woman and not in the least
> unfair to the man that he take care to ascertain that she is consenting to the
> intercourse and be at risk of a prosecution if he fails to take care.\textsuperscript{35}

The ACT Law Reform Commission recommended that no change be made to the common
law position that an accused person cannot be found guilty of sexual assault if he or she
held an honest, if mistaken, belief that the victim consented to the sexual activity.\textsuperscript{36} The
Commission considered that introducing an objective standard of reasonableness would
mean people would be made morally culpable for actions they did not know were wrong.
The Commission feared that people with low intellect, disordered thinking or poor
judgment would be at risk of being unfairly convicted. It also held that a settled position
on what is reasonable could not be found, observing that the concept of ‘reasonable’ is
contested in feminist circles. Further, it thought that if a person was convicted on an
objective standard of reasonableness there would be no justification for a substantial
sentence.

\textit{Recklessness}

In common law jurisdictions such as the ACT, if a person is to be criminally liable for
sexual assault or indecent assault that person must have known the victim was not
consenting or have been reckless as to whether the victim was consenting. Since the
decision of \textit{Morgan}, English courts have held that to be reckless the accused must have

\textsuperscript{33} In Victoria a jury direction must be given, if relevant, that, in considering the accused’s belief in
consent, the jury may take into account whether the belief was reasonable in all the relevant
circumstances—\textit{Crimes Act 1958} (Vic), s. 37(1). This has applied in the ACT since 30 April
\textsuperscript{35} [1976] AC 182 at 203.
\textsuperscript{36} ACT Law Reform Commission, \textit{Sexual Assault}, Report no. 17, p. 82.
appreciated the risk that the victim was not consenting. As with mistaken belief in consent, this reflects a subjective approach, and it is not enough for the prosecution to show that the risk would have been appreciable to the ordinary person.

In New South Wales an accused who failed to consider the question of whether there was consent or not has been held to be reckless. The Model Code provision takes this approach. Recklessness as to the lack of consent to sexual penetration specifically includes not giving any thought to whether or not the other person is consenting to the act.

**Intoxication**

The effect of the intoxication provisions in Chapter 2 of the Model Code, now adopted in the ACT, is that self-induced intoxication can be taken into account in assessing the knowledge or recklessness of an accused. The drunken accused will thus be able to rely on his intoxication if such intoxication led him to an honest belief in consent. This is in contrast with the situation in Western Australia. Is it appropriate that a person who has induced their own intoxication can rely on that intoxication to establish an honest, but objectively unreasonable, belief in consent?

**Other approaches**

The Model Code states of Western Australia, Queensland and Tasmania, as well as Canada and New Zealand, have adopted an objective component of reasonableness in relation to the mens rea for sexual assault. Likewise, the United Kingdom took an interesting approach in introducing a more objective test in 2003, after an extensive review of sexual offences.

In a comprehensive discussion of the matter, the Victorian Law Reform Commission recommended that an objective test be introduced in Victoria and canvassed a number of options. Before adopting the Model Code provisions on sexual assault, the ACT Government should consider the Commission’s detailed exposition, as well as provisions in the jurisdictions where an objective standard applies. It should examine the policy and rationale behind such provisions with a view to deciding whether it would be wiser to adopt an objective approach to the fault element.

It would be helpful if an analysis of prosecutions for sexual intercourse without consent were carried out, to provide information about how the questions of consent, knowledge and recklessness are approached in trials. This would inform discussions leading to the enactment of the Model Criminal Code provisions. The proposed reference group within the Office of the Director of Public Prosecutions (as recommended in Chapter 7) could take on this role.

39 Model Criminal Code Officers Committee, Model Criminal Code, Chapter 5, ‘Sexual offences’, p. 54, cl 5.2.6(3).
40 Daniels v The Queen (1990) 1 WAR 435.
41 Crimes Act 1961 NZ, s. 128.
42 Sexual Offences Act 2003 (UK), ss. 74–75.
<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Review of the impact of the rules of evidence in sexual assault trials in the ACT</th>
</tr>
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<tbody>
<tr>
<td>8.1</td>
<td>The proposed reference group within the ACT Office of the Director of Public Prosecutions should conduct a review of ACT Supreme Court trials involving sexual intercourse without consent, to examine the elements of consent and the mens rea of the offence, with a view to making a submission to the ACT Government in relation to changes to the substantive law of sexual offences.</td>
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9 Court practices, procedures and facilities

Chapters 6 and 7 discuss ways of making the criminal justice system less daunting for victims of sexual offences by changing the way evidence is taken. This chapter deals with some practical aspects of the court process:

- the delay between the instigation of proceedings and the trial
- waiting at court to give evidence
- facilities at the court
- support people in court
- closing the court
- the role of court personnel
- the wearing of wigs and robes by judges and counsel.

9.1 The delay between the instigation of proceedings and the trial

The delay between reporting an offence to police and giving evidence at trial is a longstanding problem in criminal matters and is particularly problematic for children and victims of sexual offences. Numerous reports have documented the impact of delays on child victims. Delays are detrimental to children’s evidence, prompting children to refuse to testify or to be less impressive in the witness box than they would otherwise be. Psychological research shows that young children’s memories can become less reliable as time passes.¹

The Wood Royal Commission noted that it was unsatisfactory for a young child to have the prospect of a court attendance looming for 12 to 18 months after the alleged offender is charged and that this itself is a contributor to the abuse of children since it is important that they be allowed to resume their lives and recover from the event as quickly as possible. It also noted the risk that justice will not be done for a child if there is a substantial delay between complaint and trial because:

- of the risk of distortion or loss of memory over the intervening period, which may lead to an apparent inconsistency between the earlier disclosures and the evidence;
- the child giving evidence will have developed, become more knowledgeable and may have a totally different appearance and manner to that at the time of the abuse;
- gathering stress and anger over the intervening period may cause a child to give a most unfavourable impression in the witness box, particularly if there has been an acrimonious family breakup and loss of support;

• accumulating pressure from other members of the family, associated with the matter last mentioned, may bring about a retraction of the complaint, even though it is true.2

Eastwood and Patton gave detailed attention to the impact of delays on children.3 They found that the length of time between reporting and trial ranged from eight to 36 months in the three jurisdictions studied. In Queensland the average wait was 20.8 months, in New South Wales it was 16.4 months, and in Western Australia it was 17.5 months. In Queensland children waited an average of 7.2 months for committal proceedings and in New South Wales the wait was 9.4 months; in Western Australia children are not required to appear at committal.

Eastwood and Patton noted that, despite the recommendations in the 1997 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission report on the evidence of children, there has been little or no improvement:

The waiting time endured by most children in the current research prevents the children from being able to move on with their lives, and leaves many feeling that it is never going to be over. At a crucial stage of their emotional, social and cognitive development the disruption caused by an eighteen-month wait may have significant consequences for their psychological well-being. One and a half years spent ‘waiting and worrying’ represents a significant proportion of a child’s life at a crucial stage of their development.4

Child victims of sexual offences who had gone through the court process were asked their suggestions for reform. In all three states the children most often cited the amount of time the process took as the area most in need of reform.

The Wood Royal Commission recommended that all child sexual assault trials begin within six months of charges being laid.5 This matter was also considered in 2002 by the New South Wales Legislative Council’s Standing Committee on Law and Justice. The Committee was not confident that the time frame suggested by the Royal Commission could be met under current court processes. It recommended pre-trial recording of evidence as going some way towards limiting delays.6

The Western Australian experience is interesting because witnesses are not called in committal hearings and pre-trial recording occurs, but Eastwood and Patton found that there are still significant delays. It should be noted that only 30 per cent of the Western Australian children interviewed for the study gave pre-recorded evidence. The state has a serious problem with delays in the criminal justice system: it often takes more than two years from charge to trial.

9.1.1 Time frames in the ACT

The SARP team’s review of ACT DPP files for sexual offence prosecutions finalised in the ACT Supreme Court in 2002–03 revealed that the average time between reporting an

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2 Wood Royal Commission, p. 1100.
3 Eastwood & Patton, The Experiences of Child Complainants, p. 49.
4 ibid., p. 115.
5 Wood Royal Commission, p. 1101.
incident to police and the beginning of the trial was 506 days. This can be broken down further:

- time between report to police and charge or summons—73 days
- time between charge or summons and first court appearance—26 days
- time between first court date and committal—143 days
- time between committal and trial—264 days.

In relation to delays between committal and trial, one matter took over two years and another took 18 months. In two matters 300 days elapsed between the first court date and the committal hearing. The shortest period between the first court date and the committal was 45 days for two matters, both of which involved full committal hearings. For one of the matters, 18 months passed between the committal and the trial; it was almost a year from committal to trial for the other matter. The minimum period between committal and trial was 120 days.

For the time between when a person is charged or summonsed and the first court date, the minimum period was zero days—where the defendant had been arrested, which occurred in three of the 11 cases reviewed—and the maximum was 60 days. For the time between reporting an incident and charging or summoning, the period ranged from zero or one (in three cases) to 240 days.

The SARP team also reviewed a sample of 11 ACT DPP files where sexual offences were dealt with in the Magistrates Court in 2002. The period between the date of reporting an incident to police and the first court appearance ranged from one day to 150 days. In four of the matters it was one day (where there was an arrest); in one matter it was five days; in another it was 15 days; in another it was 40 days; and in the other three matters it was 150 days.

9.1.2 Reducing delays in the ACT: the Magistrates Court

The delay between reporting an incident and the start of proceedings

Without going into individual case circumstances, it is not possible to analyse in detail the reasons for delays between reporting and the commencement of proceedings since this is largely a police process. It would be useful if SACAT were to carry such out an analysis.

The delay between instituting proceedings and the first court date

In relation to the period between arrest or the issue of a summons to attend court and the first court date, the method of instituting proceedings in the ACT—whereby preference is given to summoning offenders in all but a small minority of cases—delays the commencement of proceedings. The SARP team’s review of the 11 matters for which trials were held showed that the average time was 26 days between the initiating process and the first appearance in the Magistrates Court. If the matters where the offender was arrested and taken to court immediately or on the following day are excluded, however, the average delay is 35 days.

ACT Policing’s use of its powers of arrest, as provided for in the Crimes Act 1990, is discussed in Chapter 3, where it is proposed that in the majority of sexual offence proceedings the best way to proceed is by arrest and the consideration of bail conditions that protect the victim from any contact with the offender. If that procedure were adopted
in the majority of cases, defendants charged with sexual offences would be before the
court within days of arrest. In some cases summonses might be appropriate—for example,
if the offence is not recent, the victim does not reside in the ACT, and there is no concern
that further offences might be committed.

The delay between the first court date and committal

There are significant delays between the first court date and the committal hearing. In the
Magistrates Court sample the SARP team examined, only two matters were able to
proceed to committal within 45 days of the first court date. In both these cases the alleged
offender was in custody, which means that the normal case management hearing process is
circumvented.

If the SARP team’s recommendation that victims not be required to attend committal
hearings were adopted (see Chapter 6) there would be significant reductions in the period
between the first court date and committal to the Supreme Court. In some cases committal
hearings would still need to be conducted so that witnesses other than the victim can
attend to give evidence, so some delays could continue to be experienced.

Fast-tracking of cases dealing with sexual offences is another option. This is already done
informally in the Magistrates Court, but some sort of fast-tracking system could be
formalised. It would require the commitment of the court, the police, the ACT DPP and
defence lawyers. The police would need to have a brief virtually ready, if not at the time of
charge or summons then very soon afterwards. The prosecutor would need to become
familiar with the brief early in the proceedings.

Case management is important here. The Family Violence List in the ACT Magistrates
Court works well. There are not as many sexual offence matters in the Court, but
consideration could nevertheless be given to a special weekly list. It might take no longer
than an hour a week to process the matters, although this would need to be monitored. The
magistrate’s role would be similar to that for the Family Violence List, with a particular
emphasis on ensuring that matters proceed through the court as speedily as possible. If the
list were managed weekly by a specific magistrate, the defence and prosecutors could be
encouraged to ensure that the matters are ready to proceed. Data could be collected in the
same way as occurs with the Family Violence List; it could thus be seen how these matters
proceed through the court system and what factors impede their progress.

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<tr>
<th>Recommendation</th>
<th>Listing of sexual offence proceedings in the Magistrates Court</th>
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<tr>
<td>9.1</td>
<td>A special weekly list for all sexual offences that do not fall within the Family Violence List should be established in the ACT Magistrates Court. Sexual offence matters should proceed through the Magistrates Court as quickly as possible, and a record-keeping system should be established to monitor their progress. Police, prosecutors and defence lawyers should be encouraged to facilitate the fast-tracking of such matters. Court time should be allocated in advance for hearings in sexual offence matters, to ensure that they proceed as quickly as possible.</td>
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9.1.3 Investigation and delays: forensic results

Reliance on scientific evidence is a feature of much of today’s policing. In sexual offence
proceedings DNA analysis is often crucial to identifying the offender or confirming the
involvement of a suspect. Delays in completing forensic analysis can further delay the
court process. A typical scenario is one where an alleged offender has been arrested but
has made no admissions to the police. Analysis of samples taken from the victim, the
victim’s clothing and the crime scene might confirm or preclude the involvement of the alleged offender. But the analysis takes time: it takes at least two weeks for a DNA profile to be developed from a sample in a straightforward case; in cases where there is a small sample or there are numerous samples, the results can take several weeks. Police forensic services throughout Australia and internationally are under considerable workload pressure, and delays occur. Sexual offences are given high priority, but the complexity of the analysis in particular cases can cause delays.

An added factor within AFP Forensic Services is that it provides forensic services not only for ACT Policing but also for the AFP generally. When the Bali bombings occurred, for example, several members of the Forensic Services team spent some weeks in Bali and subsequently worked on analysis for months. This created a backlog in ACT Policing. Incidents such as the Bali bombings are impossible to predict, but they can exacerbate delays for all ACT criminal matters where DNA analysis is required.

Apart from AFP Forensic Services receiving additional funding, delays could be reduced if members of ACT Policing were more strategic in their selection of items to be submitted for analysis. This is discussed in Chapter 3.

9.1.4 Reducing delays in the ACT: the Supreme Court

Following committals, the Magistrates Court now delivers files to the Supreme Court within seven days. The pre-arraignment conference system seems to be working well, keeping track of cases and ensuring that they are listed promptly. But prosecutors are not always seeking early hearing dates for sexual offence trials and cases involving child witnesses. Delays in matters coming on for trial could be better managed if the Supreme Court were to give priority to sexual offence matters and aim to have them listed as quickly as possible. Personnel who manage the listing of such matters should be brought into the process, and prosecutors and defence lawyers should be encouraged to have matters ready as soon as possible. In this respect, the DPP needs to be a model litigant and should aim to keep to a minimum delays resulting from prosecution applications for adjournment.

If pre-trial recording of evidence is implemented for child witnesses (as recommended in Chapter 6) and if it is to have any real impact on delays, the court will need to make available at least half a day of hearing time for a child victim to give evidence in advance of the trial.

9.2 Waiting at court to give evidence

All the children Eastwood and Patton interviewed spoke of delays in giving evidence in court, at both committal and trial. Most of them said that waiting in the precincts of the court was nerve-racking and difficult. In addition to the pressure already affecting the children, inadequate facilities and hours of waiting heightened their stress. Children reported waiting at court up to five days before giving evidence. Typically, they were waiting in witness rooms that were windowless and furnished with nothing more than a table or a chair. They reported having to walk past the accused when they needed to use the bathroom. They also complained about not knowing what was going on while they were waiting. Witnesses waiting at the ACT Supreme Court have similar difficulties: the witness rooms are windowless and have only minimal furniture, and witnesses often have

7 Eastwood & Patton, The Experiences of Child Complainants, pp. 52–3.
to walk directly past the accused when they need to use the bathroom and other basic facilities, which can be distressing.

The problem of delays before trials and committal hearings begin was apparent when the Child Sexual Assault Court was established at Parramatta. In the first trial conducted there the child had to wait a number of days before giving evidence: fortunately, they were able to wait in child-friendly surroundings in the remote witness room. But waiting for days to give evidence is boring and anxiety provoking, no matter where it happens.

The Child Sexual Assault Court made efforts to resolve the problem by not requiring child victims to attend until the third day of the trial, leaving the first two days for the sorting out of preliminary matters such as the admissibility of videotaped evidence. In New Zealand the admissibility of videotaped evidence-in-chief is dealt with by pre-trial applications, which are provided for in legislation. Special measures directions are also dealt with at those applications.

The ACT has a system of pre-trial directions hearings, which are designed to deal with preliminary matters. Delays could be reduced if legislation were introduced to allow for pre-trial determination of the admissibility of evidence and, in particular, questions to do with pre-recorded evidence. In addition, a practice direction from the Supreme Court, stating that witnesses in sexual assault proceedings are not required to attend court at 10 am on the first day of trial and adopting the New South Wales practice of having such witnesses attend some time after the trial begins, would alleviate the situation. Witnesses in the ACT are usually no more than half an hour’s drive from the Court: they could wait at home provided transport is not a problem.

Witnesses should at all times be kept informed of how long they must wait and why. Although it is not always possible to give a precise time, giving them some indication of what is happening would help allay their anxiety. Prosecutors and the judiciary should always be mindful that for sexual assault victims—children or adults—waiting to give evidence is very stressful. Everything possible should be done to give them some certainty about when they will be required to appear.

In its listing arrangements the ACT has an advantage over other states. In Sydney metropolitan courts, for example, a number of trials are listed to begin on a particular day—more than there are courts available to hear them. Priority is given to sexual assault trials, but often these matters do not proceed on the first listing date. In the ACT the listing arrangements in the Supreme Court and the Magistrates Court are such that the trial or hearing generally does begin on the day it is listed.

<table>
<thead>
<tr>
<th>Recommendation Waiting at court to give evidence</th>
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<tbody>
<tr>
<td>9.2 As far as possible, there should be pre-trial determinations on the admissibility of evidence or any other matters that could delay the start of a trial or hearing. Pre-trial hearings could determine the time the victim should attend court to give evidence, and the parties and the court should make every effort to ensure that the victim gives evidence on the agreed day at the agreed time. The Magistrates Court and the Supreme Court should develop practices whereby victims in sexual offence proceedings are not required to wait in the precincts of the court before giving evidence.</td>
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8 *Crimes Act 1961* (NZ), s. 344A.
9 The new Child Sexual Assault Court has a separate listing arrangement, with only one trial listed at a time.
9.3 Court facilities

The facilities for waiting in the Magistrates Court and the Supreme Court are inadequate. Each building has a limited number of entrances, and many victims fear they will see the offender—a fear that is not academic. The closed-circuit television provisions aim to protect the victim from having to see the accused, but the court facilities do not support the provisions. Construction of a new Supreme Court building is some years away; in the interim, consideration should be given to creating comfortable waiting facilities for child witnesses and sexual assault victims and their families at both courts.

A central feature of the New South Wales Child Sexual Assault Court is the location of witness facilities away from the Court. This was done in response to one of Eastwood and Patton’s findings that most child witnesses in sexual offence proceedings fear coming into contact with the accused.\(^{10}\)

The current arrangements in the ACT Supreme Court and the Magistrates Court make it difficult to guarantee that witnesses using the closed-circuit television facilities will not see the accused. In fact, in the Supreme Court it is impossible for the witness to avoid seeing the accused because entry to the witness waiting facilities is via the court foyer, where the accused waits. And, as noted, a witness wanting to use the bathroom must walk straight past the place where the accused often waits outside the courtroom.

Having a remote room is thus not a luxury in the context of the ACT Supreme Court: it is a necessity if victims are to avoid contact with the accused. This situation needs to be rectified well before the new building is approved.

Installation of video-conferencing facilities in both the Supreme Court and the Magistrates Court, allowing witnesses to give evidence from a location away from the court complexes, would help. Consideration should be given to locating waiting facilities for witnesses near, but separate from, both court complexes. Failing that, consideration should be given to adequate and private waiting facilities for both adult and child witnesses. Waiting facilities for child witnesses and their families should be separate from those for adult victims. Further, victims giving evidence in sexual offence proceedings need privacy. There might be scope for incorporating a waiting room in the Magistrates Court building: that would ensure that witnesses are nearby but not cooped up in the inadequate waiting rooms of the Supreme Court.

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<th>Recommendation</th>
<th>Waiting facilities at court</th>
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<tr>
<td>9.3</td>
<td>A waiting area for child victims of sexual offences and their families should be established, and separate waiting facilities for adult victims should be provided. These facilities should be situated away from both court complexes, in a location that is not known to the general public. Witnesses could give their evidence from these locations, linked to the court by video-conferencing facilities. Alternatively, urgent consideration should be given to establishing, for witnesses attending the Supreme Court and the Magistrates Court, separate waiting facilities for adult and child witnesses and their families in the Magistrates Court. The facilities should have their own entrance, so that witnesses do not come into contact with the alleged offender.</td>
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\(^{10}\) Eastwood & Patton, *The Experiences of Child Complainants*, p. 117.
9.4 A support person in court

The concept of having a support person sitting close to the victim while they give evidence is not as straightforward as it might seem, and in some jurisdictions it has been necessary to legislate to ensure that such support is available. In the absence of specific legislation, the victim is like any other witness and must give evidence from the witness box—without anyone nearby.

In the ACT the provisions in the *Evidence (Miscellaneous Provisions) Act 1991* allowing complainants\(^\text{11}\) and child witnesses to give evidence by closed-circuit television also allow the court to make orders specifying who may be present with the witness when they give evidence. There are, however, no specific provisions allowing a support person to sit near complainants and children who give evidence in court.

In Western Australia a child aged less than 16 years is entitled to have a support person nearby in any proceedings.\(^\text{12}\) In New South Wales witnesses aged less than 16 years have a right to the presence of a support person, and the court has no discretion to refuse the support person\(^\text{13}\); the child is entitled to have the person nearby and within sight.

At the time of the Eastwood and Patton study the Queensland provision was to the effect that the court might allow a support person for a child aged less than 12 years, although this was discretionary.\(^\text{14}\) The majority of Western Australian children interviewed for the study gave evidence via closed-circuit television and the support person was therefore nearby. In New South Wales and Queensland, however, the support person was often some distance from the child, sitting in the body of the court. Eastwood and Patton were of the view that, for meaningful support to be given, the support person should be as close as possible to the child or witness.

In Queensland recent legislative changes have inserted a provision in the *Evidence Act 1977* to allow a witness aged less than 16 years, in specified proceedings, to have a support person in close proximity and within sight while the child is giving evidence.\(^\text{15}\) The support person must be approved by the court on application by the party proposing to call the child.\(^\text{16}\) The child can waive the right to a support person, but the court must not agree to this if it considers the waiver is not in the best interests of the child.\(^\text{17}\)

In the ACT s. 39 of the *Evidence (Miscellaneous Provisions) Act 1991* provides that when a complainant gives evidence in a sexual offence proceeding, the court may order that the court be closed to the public while all or part of that evidence is given. Where the complainant gives evidence in a closed court, a person they nominate is entitled to be present. There are no provisions allowing the support person to sit near the complainant: they generally sit in the body of the court.

The presence of a support person seated near the witness should not necessarily prejudice the jury’s attitude towards the accused. Any possible prejudicial effect could be countered by the issuing of a mandatory jury warning that such a procedure is standard in sexual offence cases. It is recommended that the legislation be amended to permit a support

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\(^{11}\) The term ‘complainant’ is used here instead of ‘victim’ to reflect the terminology used in the Act.

\(^{12}\) *Evidence Act 1906 (WA)*, s. 106E(1).

\(^{13}\) *Evidence (Children) Act 1997 (NSW)*, s. 27(2).

\(^{14}\) *Evidence Act 1977 (Qld)*, s. 21A(2)(d).

\(^{15}\) ibid., s. 21AV.

\(^{16}\) ibid., s. 21AV(2).

\(^{17}\) ibid., s. 21AV(5).
person approved by the court to sit near the victim in sexual offence proceedings. Such a provision should also apply to all child witnesses.

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<tr>
<th>Recommendation</th>
<th>A support person in court</th>
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<tr>
<td>9.4</td>
<td>Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness. For children, this right could be waived only if in the opinion of the court that is in the child’s best interests.</td>
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### 9.5 Closing the court

Section 7 of the ACT’s Evidence (Miscellaneous Provisions) Act 1991 provides that a court may order that the court be closed to the public while all or part of a complainant’s evidence is given. This provision is designed to reduce the embarrassment a complainant might feel while giving evidence of highly personal details. It is incumbent on prosecutors to be aware of this provision. Unless the complainant does not wish the court to be closed, prosecutors should make such applications in all sexual offence cases.

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<th>Recommendation</th>
<th>Applications to close the court</th>
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<tr>
<td>9.5</td>
<td>Unless the victim opposes it, prosecutors should make applications pursuant to the ACT’s Evidence (Miscellaneous Provisions) Act 1991 for the court to be closed while a victim is giving evidence in sexual offence proceedings.</td>
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### 9.6 Court personnel

Court personnel help victims of sexual offences and child witnesses in a number of ways. Sheriff’s officers and other personnel accompany them to the remote rooms in the Supreme Court and the Magistrates Court from which evidence is given by closed-circuit television. Those officers remain there during the giving of evidence and are the means by which communication occurs between the remote room and the courtroom. It is thus essential that personnel with this role are not only sensitive to the needs of such witnesses but also properly trained in how to deal with victims of sexual offences and child witnesses. A small number of court officers working in the Perth court complex have received training in how to deal with child witnesses. They stay with the child in the remote room and can inform the court when a child is too distressed to carry on and when they need a break. These officers have been selected on the basis of their rapport with children; no other court officers have contact with children in the court precincts.

The ACT should adopt a similar approach. A pool of court or sheriff’s officers in both courts who have an interest in and aptitude for working with victims of sexual offences and child witnesses should be selected and trained in dealing sensitively with such witnesses. In addition, to improve the overall sensitivity of all court personnel, some general training on the special needs of these witnesses could be provided.
Recommendations  Increasing the responsiveness of court personnel

9.6 Selected court and sheriff’s officers should receive training in dealing with victims of sexual offences and child witnesses in the court environment. Once that training is completed, those officers should be allocated to accompany all victims and child witnesses while they give their evidence by closed-circuit television.

9.7 All court staff, in both the Magistrates Court and the Supreme Court, should receive general training on the special needs of victims of sexual offences and child witnesses when they attend court.

9.7 Wigs and robes

It seems difficult to argue against a change to robing practices in cases involving child witnesses. Children find court processes intimidating enough without the addition of devices that increase the solemnity of the proceedings and the forbidding nature of the court. It must be distracting to a child to be asked serious questions by someone in ‘dress-ups’.

The Wood Royal Commission recommended ‘removal of the requirement for robes by judges and barristers during the examination of child witnesses in sexual assault trials, and adoption of measures to otherwise reduce unnecessary formality in such proceedings’. ¹⁸

ACT Supreme Court judges have discarded wigs in all cases. In civil cases counsel no longer wear wigs. The Bar Association has chosen to retain wigs in criminal cases. The Bar Association should consider allowing its members to appear without wigs when a child witness is giving evidence. Further, judges of the Supreme Court should direct counsel to appear without robes when a child witness is giving evidence.

Recommendation  Wearing of wigs and robes by judges and counsel

9.8 The Bar Association should allow its members to appear without wigs in the Supreme Court when a child witness is giving evidence. Further, judges of the Supreme Court should direct counsel to appear without robes when a child witness is giving evidence.

¹⁸ Wood Royal Commission, p. 1125.
10 Support for victims during investigation and prosecution

Many jurisdictions have tried to reduce the alienation of victims in contact with the criminal justice system by providing support services, both within the system and external to it. It is now well recognised that support for victims of sexual offences during the investigation and prosecutorial phases is essential if the detrimental effects on them of reporting the offence and participating in the prosecution are to be diminished. Comprehensive and prompt support allows victims of these offences to feel more confident about giving evidence. It can also help reduce the number of victims who opt out of the criminal justice system before the matter in which they are a witness is brought to trial.

This chapter discusses the role of victim support services generally and why they are so important for victims of sexual offences. It focuses on witness assistance services in state and territory offices of directors of public prosecutions as well as services located in justice agencies. It provides an overview of the current specialist services for victims of sexual offences in the ACT and in other Australian jurisdictions. Most states have developed a range of witness support services. In particular, the Child Witness Service in Western Australia and the Witness Assistance Service in the New South Wales Office of the Director of Public Prosecutions deliver high-quality support to child witnesses and victims of crime. There are opportunities to incorporate features of these two services in a service in the ACT, to provide comprehensive, prompt and meaningful support for victims of sexual offences as they traverse the criminal justice system.

Finally, the chapter considers separate legal representation for victims of sexual offences. In contrast with a number of European civil law jurisdictions, where victims of crime are entitled to be legally represented in some criminal proceedings, there is no history of separate legal representation for victims of crime in common law jurisdictions. Provision of legal representation appears to increase the satisfaction levels of victims of sexual offences in their interaction with the prosecution process. On the other hand, instead of having their own legal representation, would victims feel more involved in the process if they were better informed and there was better support for them during criminal proceedings?

10.1 The criminal justice system and the rights of victims of crime

The criminal justice system has at its centre the accused and the state. For centuries victims of crime have had the status of Crown witness, rather than being a party to the proceedings. In the late 1970s and early 1980s the position of the victim in the criminal justice system began to attract attention. Those decades saw reforms to sexual offences legislation and the introduction of restraining and other protective orders, victim compensation schemes, and legislation enshrining victims’ rights.

In 1985 the United Nations passed the Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power. Since then all Australian jurisdictions have moved to implement the Declaration. In the ACT the Basic Principles were given effect through the Victims of Crime Act 1994. In essence, the legislation provides a set of minimum standards of service from people involved in the administration of justice. The standards cover the provision of information to victims and provide various protections for victims.
The provisions in the Act implicitly recognise a victim’s right to be fully informed throughout the process and acknowledge that the victim occupies a position well beyond that of a disinterested witness in the criminal justice system. In addition, pursuant to the ACT’s Human Rights Act 2004, the Basic Principles can be relied on to assert a human right.1

In many Australian jurisdictions support services have been established in agencies such as offices of directors of public prosecutions, courts and police services to provide for victims of crime support to help them participate in the criminal justice system. Many state DPPs now have witness assistance services, for example. In the ACT support is provided by victim liaison officers in ACT Policing, the DPP witness assistant, and the victim liaison officer in the Sentence Administration Board. There is also a Victims of Crime Coordinator, which is a statutory position responsible for promoting victims’ rights, monitoring the implementation of the provisions contained in the Victims of Crime Act, and investigating complaints of breach of those principles.

Although considerable advances have been made in the ACT, the current services’ ability to provide comprehensive support for victims of crime, and in particular victims of sexual offences, is open to question. Witness support services for victims of crime involved in the prosecution process are inadequate. In addition, there is a lack of integration of support services for victims of sexual assault.

10.2 Why are victim support services necessary?

Reporting sexual offences to police and giving evidence in court can be difficult for victims. The need for support services has long been recognised2, but the need for specific witness support and liaison services in justice agencies such as police services and DPPs has only recently been recognised.

There is ample evidence that an investment in support services in the police, DPPs and courts is likely to improve victims’ experience of the criminal justice system. A 1996 US study of women who were victims of sexual offences and whose cases went to trial found that those who were able to build an effective support network felt more capable of giving their best evidence in court.3 Two kinds of support were found to be necessary—emotional support and advice about legal procedures. The latter was often provided by rape crisis or sexual assault centres, whereas the emotional support came more often from the women’s own informal networks. The researchers concluded that victim advocates have a vital role but that these people need to be well informed about the legal process as well as understanding the realities and impact of sexual crime. Other US studies of family violence—another offence area where victims are vulnerable—have made similar findings. Goodman, Bennett and Dutton, for example, found that victims who receive support are twice as likely to remain engaged with the prosecution process.4

A number of recent Australian reports dealing with child witnesses and child sexual assault prosecutions highlight the benefits of a comprehensive, well-resourced witness

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1 Section 7 of the Act provides that the Act is not exhaustive of the rights an individual may have under international and domestic law, citing as an example rights under international conventions.
3 ibid., p. 30.
service for children. The Wood Royal Commission recognised the need for counselling to prepare child witnesses for the experience of giving evidence and to support them while proceedings are pending. The need for court support services for children was stressed by Eastwood and Patton, who studied the experiences of child victims of sexual offences who gave evidence in criminal proceedings in Western Australia, New South Wales and Queensland. All three states provide some court support, but the service offered by the Western Australian Child Witness Service is the most comprehensive. When the children were asked if they would report further offences again, the Western Australian children were far more likely to answer in the affirmative compared with the New South Wales and Queensland children.

10.3 Types of support needed

Support services for victims of sexual offences fall into two broad categories. First, there are victim support services, which provide counselling and psychological therapy to assist in victims’ recovery; this includes crisis counselling and long-term counselling. Second, there are witness assistance services, which support a victim during the investigation and prosecution of the alleged offence, providing information about court processes and supporting the victim in their participation in the criminal justice system.

The following sorts of services are ideally provided to victims of sexual offences in these two broad groupings:

- **victim support services**
  - crisis counselling
  - long-term counselling
  - mental health services
  - advocacy and case management for practical needs—housing, medical, and so on

- **witness assistance services**
  - information about the progress of the investigation, charges and bail
  - information and support in relation to personal safety—including protection orders
  - information about the criminal justice system, the rights of witnesses, and other key players
  - non-evidentiary preparation for court
  - information about the progress of the case
  - support during the court proceedings
  - assistance with victim impact statements
  - assistance with contacting other relevant justice agencies
  - debriefing after court.

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5 Wood Royal Commission, p. 1112.
7 Many Australian DPPs have witness assistance services. The term ‘witness assistance services’ is used generically here to describe a range of services provided within the criminal justice system.
The needs of individual victims vary greatly. Children, young people and adults have differing needs for support; Indigenous women and children and people from particular cultural backgrounds have differing needs. Some victims have mental health or drug and substance abuse problems; others have physical impairments. Research shows that if the structures and systems in operation provide comprehensive support for victims of sexual assault and are readily accessible the process of reporting sexual offences and giving evidence can be improved. Furthermore, if the services concerned are not coordinated and integrated there is a danger that victims will fall through the cracks.

Most Australian jurisdictions have both forms of support for victims—victim support in the form of counselling services and witness assistance services relevant to the administration of justice.

10.4 Witness assistance services in DPP offices

There are now witness assistance services in DPP offices in New South Wales, Victoria, South Australia, the Northern Territory, Queensland and the ACT. The witness assistants often have a background in social work or counselling. At an early stage in the process they provide information about the criminal justice system and procedures; then they prepare witnesses for court, telling them what it looks like, who will be there and what their roles are and showing them the court facilities (including remote witness facilities) before the trial or hearing. They also liaise between witnesses and prosecutors or other agencies with whom the victim must deal.

The nature of the assistance given and the types of witnesses each particular service gives priority to differ.

10.5 Victim support services in the ACT

In the ACT a number of services provide support to victims of crime generally. The Victim Services Scheme is a government agency that is responsible for delivering support to victims of crime through financial assistance and private counselling. There are also specialist services for victims of sexual assault—for example, the Canberra Rape Crisis Centre and the Service Assisting Male Survivors of Sexual Assault, both of which are described in Chapter 2. As noted, victim liaison officers are located in ACT Policing, with a victim liaison officer attached to the Sexual Assault and Child Abuse Team, and the ACT DPP has a witness assistant. A number of other services that do not have victims of sexual offences as their primary focus regularly come into contact with such victims; an example is the Domestic Violence Crisis Service.

The challenge for the ACT is ensuring a comprehensive, continuous service to victims of sexual assault, who may need the services of a number of agencies while waiting for their case to progress though the criminal justice system. Coordination and integration of the various agencies that deal with victims of sexual offences could be improved, so that victims receive services that meet their particular needs.

10.5.1 The Domestic Violence Crisis Service

The Domestic Violence Crisis Service provides crisis services for women who are victims of domestic violence. Pursuant to an agreement with ACT Policing, the Service is contacted by police and attends in all cases of domestic violence. If sexual assault is
revealed as part of the violence, the Service continues to support the victim through the initial stages—such as attending the police station to give a statement. It also provides telephone advice and counselling and court support for victims of domestic violence.

10.5.2 The Victim Services Scheme

The Victim Services Scheme was established pursuant to the *Victims of Crime Act 1994*. It offers assistance to victims of crime, providing information by telephone 24 hours a day and arranging counselling for a set number of hours (depending on the case) through referrals to private agencies.

10.5.3 The Victims of Crime Assistance League

The Victims of Crime Assistance League—more commonly referred to as VOCAL—is a non-government organisation that provides counselling and court support for victims of crime. It is staffed mostly by volunteers, who complete a training program before starting to work with victims.

10.5.4 Support services generally

It is beyond the scope of this report to consider victim support services other than those that support victims as participants in the criminal justice system. The following documents provide information about the provision of services for victims of sexual offences in the ACT:

- *A Review of ACT Services for Adults Who Have Experienced Sexual Violence and Proposals for the Future* (ACT Department of Health and Community Care, Canberra, March 1996)
- ‘Developing a Strong Interagency Approach to Sexual Assault Services for Children and Young People in the ACT: a report to the ACT Department of Education and Community Services’ (Morgan Disney & Associates, Canberra, December 2001)
- ‘Sexual assault services for adults’ in the *ACT Strategic Plan 1999–2001*.

Those documents highlight substantial gaps in the provision of adequate support services for victims of sexual offences. Consultations for this report revealed a lack of counselling and mental health services for children and young people who are victims of sexual offences. Long-term counselling services for adults are stretched. As noted, the Canberra Rape Crisis Centre is under considerable pressure, with a long waiting list for long term-counselling. Victims of sexual offences who have drug and alcohol problems or mental health problems are not specifically catered for in the ACT.

If adopted, the recommendations in this report would go some way towards making the criminal justice system more responsive to the needs of victims. Lodging a complaint of a sexual offence with the police and giving evidence if necessary might help some victims towards their recovery, but that is only part of the recovery process. Long-term counselling and therapeutic services are the key for many victims. Again, it is beyond the scope of this report to make specific recommendations in this regard; suffice it to note that the documents just listed should be revisited and their recommendations reconsidered.
10.6 **Witness assistance in the ACT**

Although some of the agencies discussed in the preceding section are able to provide support at the time of court proceedings, primary responsibility for support of victims of sexual offences throughout the criminal justice process lies with ACT Policing and the DPP.

10.6.1 **The Sexual Assault and Child Abuse Team’s victim liaison officer**

The ACT Victims of Crime Coordinator noted in her 2002 review of ACT Policing’s responses to sexual offences that victims of sexual assault and abuse require contact at higher levels than perhaps any other crime victim and suggested that ACT Policing consider appointing a victim liaison officer within SACAT.\(^8\) Such an officer was appointed in 2002, with the following responsibilities.

- maintain contact with victims—or caregivers, in the case of children—to keep them informed of the status of the investigation
- act as a point of contact for external agencies involved with victims
- prepare and distribute to victims a package of information
- provide training on the role of SACAT to internal and external agencies
- represent SACAT at internal and external meetings
- provide policy input into written agreements such as memorandums of understanding and protocols with external agencies
- help victims submit applications for financial assistance pursuant to the *Victims of Crime (Financial Assistance) Act 1983*
- help victims complete victim impact statements for use in sentencing proceedings
- accompany victims to court to provide support during proceedings.

The information package distributed by the victim liaison officer contains information about the role and functions of SACAT and the role of the investigator, an outline of the criminal justice system, and details of support agencies in the ACT. SACAT members provide to the victim liaison officer details of victims with whom they have had contact; the officer then sends a package of material relevant to the needs of the victim. The existence of the victim liaison officer provides a clearer distinction within SACAT between the role of investigator and that of victim support.

10.6.2 **The DPP witness assistant**

Following the creation of witness assistance services in DPPs in New South Wales, Victoria, South Australia and the Northern Territory in the 1990s, a witness assistant position was created in the ACT DPP in 2000. Creation of the position was part of a package of measures associated with reform of the criminal injuries compensation scheme that were introduced by the ACT Government in 1999.\(^9\) The position’s main focus is

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\(^8\) Holder, *Sexual Offences: the response of ACT Policing*.

victims of family violence, and it forms an integral part of the DPP’s contribution to the Family Violence Intervention Program.

The priorities and responsibilities of the ACT witness assistant differ quite markedly from those of the counterpart positions in other DPPs. This is partly because of the model adopted. Other DPP witness assistance services have a social work emphasis, with the assistants having qualifications and experience in psychology or counselling. The ACT model is that of a victim liaison officer, and one of the witness assistant’s primary tasks is contacting victims of family violence to inform them about court proceedings. The current witness assistant has a psychology background, and the emphasis is changing from a victim liaison role to a more comprehensive support service along the lines of witness assistance services in other DPPs. This change of emphasis is, however, being inhibited somewhat by resource constraints.

The ACT DPP witness assistant helps witnesses in a number of ways. Apart from working with victims of family violence, the role now involves work with victims of sexual offences, including children, relatives of the deceased in homicide cases, and child witnesses. The witness assistant currently performs the following tasks:

- court familiarisation
- liaising with family violence victims in relation to bail conditions
- advising family violence victims of the result of court matters after each court appearance
- sitting in on proofing of victims of family violence and sexual offences before court
- attending court and supporting victims and witnesses during proceedings
- post-court debriefing with victims and witnesses
- seeing victims to explain why the DPP has decided not to proceed with a matter
- seeing victims who are required to give evidence but are reluctant to do so
- attending interagency meetings on family violence.

At present there is no document that clearly sets out the duties of the witness assistant and which witnesses should have priority. Policy documents are, however, being prepared in order to redress the situation, in keeping with other DPP witness assistance services.

The witness assistant’s current workload is such that the services just listed cannot be delivered to all victims of crime. The focus is firmly on victims of family violence, and there are serious limitations on delivering services to many high-priority witnesses, including victims of sexual offences. There has been an abnormally high number of homicide cases in the ACT recently: in some of these cases members of victims’ families have needed support from the witness assistant, and this limits the amount of work the witness assistant can do with other victims of violence.

Elsewhere in Australia DPPs are able to offer a more comprehensive service. Assistance is provided to a much broader range of witnesses and at a much earlier stage in the proceedings than is possible at the moment in the ACT DPP.

There are also inconsistencies in referring matters to the ACT witness assistant because there is no formal referral policy. Some prosecutors do not refer at all to the witness assistant.
assistant or refer only when the witness becomes distraught. Very late referrals just before the court date are another problem. This is in contrast to the New South Wales Office of the DPP, where the Witness Assistance Service receives referrals automatically when the files arrive in the Office.

Within the ACT DPP there is some disagreement among prosecutors about whether the witness assistant should be present during the proofing of witnesses. This will be resolved once the role and procedures of the witness assistant are clarified.

Despite the challenges, the ACT witness assistant has been highly effective in helping the Office of the DPP meet some of its obligations under the Victims of Crime Act 1994 and improving the experience of victims of crime during their involvement with the criminal justice system. If there were additional witness assistants there would be much greater scope for providing services specific to the needs of child and adult victims of sexual offences.

10.7 Witness assistance services elsewhere in Australasia

As noted, there are witness assistance services in a number of Australian jurisdictions. Most states also have a number of other agencies delivering assistance in various forms, complementing the services provided by DPP witness assistants.

10.7.1 Western Australia

Children

The Western Australian Child Witness Service is part of Courts Administration, within the Western Australian Department of Justice, and is located at the central court complex in Perth, which houses the Local Court and the District Court. It is available for all witnesses aged up to 17 years but not for defendants. Although being mainly for child witnesses, the Service also sees vulnerable adult witnesses who have, for example, a mental illness or a developmental delay. Referrals are made to the Service electronically by the police in the case of prosecution witnesses and directly by defence lawyers for defence witnesses. On receipt of a referral, the Service makes contact with the child’s caregiver in the early stages of proceedings and keeps the child and their family informed of the progress of the matter. When a hearing a child needs to attend to give evidence is approaching, the Service provides non-evidentiary preparation for up to six one-hour sessions. It also liaises between the victim and their family and services such as the DPP. Children are referred to other agencies for continuing counselling.

As noted in Chapter 6, the remote room where children give evidence via closed-circuit television is in the Child Witness Service’s premises. Service staff generally do not sit in with child witnesses while they give evidence, but they provide support for the child during breaks in proceedings and after the child has completed their evidence. Pre-hearing and pre-trial conferences between prosecutors and child witnesses take place at the Service’s premises.

Non-evidentiary preparation aims to give child witnesses the information and skills to cope better with the court experience. Beyond the nature of the charges, the facts of the case are not known to the Service and are not discussed with witnesses. The witnesses are

10 Few referrals are received from defence lawyers.
told about what it will be like in court. The preparation gives them the confidence to say when they do not understand questions and to ask for breaks. Children prepared in this way are more relaxed witnesses, and more relaxed witnesses are known to give better and more complete evidence.

A report prepared by the Western Australian Office of the Director of Public Prosecutions expressed concern about the extent of the Service’s contact with children and asked whether repeated contact with the Service results in children having excessive contact with the criminal justice system. Nevertheless, participants in the Western Australian criminal justice system consider that the Service is the key to the success of reforms designed to improve the experience of child witnesses.

**Adults**

The Victim Support Service provides support for all adult victims of crime. Like the Child Witness Service, it comes within the Department of Justice, and this gives it ready access to court information. The Victim Support Service is staffed by four full-time counsellors and 66 volunteers. Details of all victims of violent crime—anything from assault occasioning actual bodily harm to the most serious violent offences—are electronically forwarded to the Service by the police. Volunteer support workers contact victims by telephone and provide information about the available assistance. Victims can meet the full-time counsellors for one or two sessions. The counsellors have a therapeutic role, although referrals are made for ongoing counselling. The volunteers provide support by way of court familiarisation before court and accompany victims to court when they give evidence.

Victims of recent sexual assaults are referred to the Sexual Assault Resource Centre for court support. The Victim Support Service sees victims of less serious sexual matters, such as indecent assaults, and victims of historical sexual assaults. The Service has no special procedures or personnel for dealing with these victims.

**10.7.2 New South Wales**

Unlike the Child Witness Service and the Victim Support Service in Western Australia, the Witness Assistance Service in New South Wales comes within the Office of the Director of Public Prosecutions. There are now 34 witness assistants statewide. The Service is available for all prosecution witnesses but gives priority to child victims of sexual abuse (and adult victims in historical matters), child victims of physical abuse, adult victims of sexual assault, relatives of deceased persons in offences involving death, victims of domestic violence and victims of serious violence.

Matters are automatically referred to the Service when files arrive at the Office. The witness assistants thus do not have to depend on prosecutors notifying them of a witness

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13 See Chapter 3 for a discussion of the Sexual Assault Resource Centre in Perth.
they might need to contact. Early referral allows the assistants to make prompt contact with victims and give them information about the court process.

Priority is also given to members of vulnerable and special-needs groups:

- children and young people aged less than 18 years and their carers
- people with disabilities
- older people
- Aboriginal and Torres Strait Islander people
- victims of crime who are experiencing severe trauma
- people with language or cultural difficulties
- people experiencing other disadvantage or hardship.¹⁴

Among the services provided are the following:

- information about the legal process, the rights and entitlements of victims, and the services available
- referral to other agencies for continuing counselling
- liaison and consultation with lawyers
- interagency liaison
- advocacy in relation to special needs or circumstances
- court preparation, including court familiarisation
- coordination of court support
- provision of court support for more vulnerable witnesses
- crisis counselling and support in relation to the legal process
- debriefing in relation to the legal process and outcomes
- community education and training.¹⁵

The Service uses books and videos that relate directly to New South Wales to help prepare victims for court, primarily the following:

- *Nothing but the Truth*—a manual for adults, children and carers, developed by the Education Centre Against Violence and used for preparing children for court
- *Going to Court*—a video produced by the New South Wales Attorney-General’s Department
- *About Court*—an activity book for children


¹⁵ ibid.
Child sexual assault matters receive the highest priority. Witness assistants see these children for one to three sessions and accompany them to court. Usually the witness assistants sit in on proofing of witnesses by the prosecutor only if a child is disabled or highly traumatised. If charges are to be withdrawn, they attend the conferences between the prosecutor and the victim.

In discussions with the SARP team in November and December 2003, the Director of the Service, Lee Purches, said there were definite advantages in having such a service within the DPP. It allows matters to be tracked through the prosecution process, allows the witness assistants to consult directly and regularly with solicitors and Crown prosecutors, and facilitates discussions with prosecutors about the special needs of particular children before conferences and court. The Service also contributes to policy discussions about sexual assault, assists the Director in interagency liaison, and identifies areas for legislative reform and improvement in the criminal justice system.

As a result of the recommendations of the New South Wales Legislative Council’s Standing Committee on Law and Justice, the Service recently received a substantial boost in funding. This has enabled it to increase the number of witness assistants from 16 to 34 and to provide more comprehensive support throughout the state—in particular, for child victims of sexual offences.

10.7.3 Victoria

The Victorian Office of Public Prosecutions has a Witness Assistance Service staffed by three witness assistants. When the Office receives a file, a letter is sent to the victim, providing basic information and enclosing brochures describing the Service. The Service provides before- and after-court information and assistance and support to all victims of sexual assault, homicide (family members), culpable driving, physical assault and armed robbery. Fifty per cent of its work involves victims of sexual assault. It provides support by telephone and through face-to-face contact. Post-court debriefing is seen as important.

Like their counterparts in New South Wales, the witness assistants say that being located within the Office facilitates contact with prosecutors and allows information about proceedings to be more easily obtained and passed on to witnesses.

The Service does not have the resources to accompany witnesses to court. Witness assistants do, however, attend court during plea negotiations, when their role is to explain the process to the witness on behalf of the prosecutor.

Court Network provides support in court during the proceedings. Founded 20 years ago with volunteers, it now has a paid staff of 11 and 300 trained volunteers across the state. It is housed in the same building as the Office of Public Prosecutions, thus facilitating contact with witnesses. Court Network provides court support for prosecution witnesses as well as the families of defendants and accused. Giving assistance to both prosecution witnesses and family members of defendants means Court Network is seen by the courts

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16 NSW Legislative Council Standing Committee on Law and Justice, Report on Child Sexual Assault Prosecutions.

17 Information gained from discussions with Anne O’Brien and Renee Fester, both social workers with the Witness Assistant Service, on 26 February 2004.

18 Information gained from meeting with Wendy Taylor, CEO of Court Network, on 26 February 2004.
as impartial; the service is well regarded and much used. The Network operates in all levels of courts in Victoria, including federal courts such as the Family Court.

Volunteers’ training is comprehensive, and there are stringent selection criteria. Debriefing and training are ongoing. Only specially trained volunteers are permitted to assist victims of sexual assault. The volunteers usually attend court one day a week, so a victim might have contact with more than one volunteer if the matter goes for more than a day. Exceptions are made for child witnesses: one volunteer stays with the child for the entire time he or she is at court.

10.7.4 The Northern Territory

The Northern Territory Office of the Director of Public Prosecutions has had a Witness Assistance Service since 1995. The Service’s Guidelines describe the Service’s role as follows:

(i) helping victims and witnesses understand how the courts and the legal system work;
(ii) showing victims and witnesses the court and the facilities for victims before the case;
(iii) being with victims and witnesses in court or while they are waiting to give evidence;
(iv) informing the prosecutor of any special needs victims and witnesses have;
(v) telling victims and witnesses about welfare, health, counselling and legal services available to them;
(vi) telling victims and witnesses about financial assistance available under the Northern Territory Crimes (Victims Assistance) Act;
(vii) telling victims and witnesses how to claim witness expenses;
(viii) helping victims prepare victim impact statements;
(ix) organising interpreters for victims and witnesses for whom English is not a first language;
(x) liaising between victims and witnesses and prosecutors, police and court staff;
(xi) explaining legal terms in plain English;
(xii) keeping victims and witnesses informed about the progress of the case;
(xiii) referring victims and witnesses to appropriate services;
(xiv) providing policy advice.19

10.7.5 New Zealand

In New Zealand the Victim Advisory Service operates in courts nationwide. It advises victims about the court process and informs them of the progress of the case. It does not

provide counselling; instead, it refers witnesses to other services. Officers in the Service are available to see victims of any criminal offence, but in practice most contact is face to face with victims of serious offences. For other victims, they make contact by telephone.

In 2000 the Ministry of Justice established a national program for young witnesses—Court Education for Young Witnesses. The Victim Advisory Service sends a package of brochures and booklets to all child witnesses when court proceedings begin. Videos are shown to young witnesses to prepare them for giving evidence.

An evaluation of the program was recently completed. The main points to emerge were that potential child witnesses need to be seen as soon as possible, that children and young people can become highly anxious about attending court, and that talking to someone about the court process as early as possible can do much to allay their fears. As a result of the evaluation, the information package is now sent out as soon as a matter is listed in court, and the Victim Advisory Service sees the child about three weeks before the hearing. It also sees the child after court to explain the outcome and to ensure that they are referred on to other services if necessary. Officers in the Service are comprehensively trained and have social work or counselling qualifications.

10.8 A witness assistance service for the ACT

There is an obvious need for more comprehensive witness assistance in the ACT. Ideally, any witness assistance service that is established should provide the following services:

- support for witnesses from early in the prosecution until the completion of proceedings
- pre-court non-evidentiary preparation that is comprehensive and appropriate to the age of the witness
- advocacy on behalf of the witness in relation to things such as their preferred mode of giving evidence
- liaison with agencies and organisations that have contact with victims
- for witnesses and their families, referrals to other support services
- information about the progress of a case—taking the initiative rather than waiting to be contacted
- assistance in the preparation of victim impact statements
- support during court proceedings
- post-court debriefing
- policy input in relation to services and legislation affecting sexual assault victims
- provision of advice about victims’ right to financial assistance.

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20 New Zealand Institute of Public Policy, Evaluation of the Court Education for Young Witnesses Service Pilot, Department of Courts, Wellington, 2003.
21 This finding has implications for how the ACT DPP deals with child victims. The tendency to leave conferencing until as late as possible before the hearing or trial, in order to minimise stress to the child, would seem to have the opposite effect.
The service should operate in surroundings that are child friendly and comfortable. A comprehensive service would not only prepare a witness for court but also advocate on their behalf with agencies in the criminal justice system. Therapeutic intervention should be delivered by other services that specialise in this area, but the witness service should ensure that referrals are made. A comprehensive service would also ensure that a victim’s rights under the *Victims of Crime Act 1994* are upheld.

There are several options for the delivery of such a service in the ACT:

- Two specialist independent services based on the Western Australian Child Witness Service model could be established, one for children and the other for adults. Consideration could be given to expanding the clientele of the adult service to include both victims of family violence and victims of sexual violence. The children’s service could cater for all child witnesses other than defendants.

- The DPP witness assistant’s role could be expanded to provide support services for both child and adult victims of sexual assault.

- A mix of the foregoing could be introduced, with a child witness service independent of the DPP and witness support for adults placed in the DPP.

Whether the service is situated in a justice agency, in a non-government setting or in a mix of both has implications. The advantage of having the service situated in the DPP is that it allows for easier access to prosecutors and some insight into the progress of the case. If, however, there is good communication between an external witness service and the DPP—as is the case in Western Australia—the same would apply. If the service were situated in the DPP, the separation of roles would need to be clear.

The advantages of an independent specialist service along the lines of the Child Witness Service in Western Australia are that the service would be less open to allegations of bias by defence counsel and there would thus be less risk of challenges to the integrity of the prosecution. The impartiality of any sort of service that provides non-evidentiary preparation for witnesses could be questioned—wherever the service is located—but once its independence and impartiality are established such concerns should be minimised, as is the case in Western Australia. Although offices of directors of public prosecutions in other jurisdictions have implemented a range of measures to avoid such a circumstance, having the service located externally to the DPP does ensure the perception of independence and impartiality.

The service would be able to give the courts independent expert advice on what special measures might be needed for witnesses if the choice of special measures were discretionary. Depending on their qualifications, the service’s staff could give evidence about a child’s competence to testify in legal proceedings.

Another advantage of a specialist child witness service is that it ensures that qualified staff with extensive experience of working with children provide support and prepare witnesses for court. Child development and child communication are a specialist area, and the optimum service will be delivered by people with specific qualifications and experience. The selection criteria for staff of the Western Australian Child Witness Service are that they must be a qualified social worker or psychologist and must have at least five years’ experience of working with abused children.

One potential difficulty with using the Western Australian model in the ACT concerns workloads: would there be enough work given the number of child witnesses going
through the courts in the ACT? In the absence of data on the number of witnesses aged less than 18 years who attend court to give evidence, it is difficult to answer this question. Even if the data were available, they would not reflect the full use that could be made of such a service because pre-court preparation would be done in cases that, for whatever reason, do not proceed to hearing. The Child Witness Service in Western Australia makes early contact with child witnesses and their families and maintains that contact as the case progresses: this is a role any service in the ACT could also have.

The Western Australian Child Witness Service interacts positively with the other agencies in the criminal justice system, such as the Office of the Director of Public Prosecutions. It is essential to the success of such an agency that it works closely with the DPP to develop procedures and guidelines for dealing with witnesses.

An equivalent independent service could be established for adult victims of sexual assault. The physical environment that is suitable for children is not necessarily suitable for adults; nor is the pre-court preparation service going to be the same. It would be inappropriate for a child to come into contact with distressed adults. There should be a service for each of these groups. In addition to providing support services for victims of sexual offences, the adult service could provide support for victims of family violence. This would ensure that the service was well used; it is also a way of improving witness support services for victims of family violence.

A disadvantage with the independent service model is that it requires witnesses to have contact with yet another agency. This can, however, be countered by the fact that the agency would liaise with other agencies on behalf of witnesses and become a central point of contact for them.

The second option would see an expanded witness assistance service in the ACT Office of the Director of Public Prosecutions, providing more comprehensive support for victims of sexual assault. At present the ACT DPP employs one witness assistant. If two more witness assistants were employed the DPP could provide a comprehensive service to adult victims of sexual assault and to child victims of sexual and physical abuse. The current witness assistant could continue to focus on other high-priority witnesses. When the Office receives matters, the files could be directed to the witness assistants, bypassing prosecutors who might not refer a matter to an assistant at a sufficiently early stage.

If the ACT DPP witness assistance service were supplemented, a more comprehensive service for witnesses would be available—including early contact with all victims of violent offences. The service could deal with prosecution witnesses who are not in high-priority cases but who still need support.

There are advantages to having a witness assistance service situated in the DPP, and the service in New South Wales appears to work well. Witness assistants can quickly obtain from prosecutors and the Magistrates Court database information about the progress of cases, and assistance can be delivered at a time and in a manner that is appropriate to the witness and the stage of the proceedings.

There are, however, significant advantages in having an independent service for children. On balance, the mix of an independent service for children and an expanded DPP witness assistant service for adults is the preferred model.

As a subsidiary, but nevertheless important, point, the provision of booklets and brochures to victims of crime and witnesses is something victim support services in all other jurisdictions rely on to disseminate comprehensive information about the court process.
Although brochures on various services offered in the ACT are available, there are no materials specific to the ACT that provide detailed, intelligible information about the court process. Other witness services the SARP team visited had a range of materials for all ages—adults, children and adolescents. As noted, in New Zealand a children’s activity book has been produced with the aim of explaining court to younger people, and in New South Wales the Witness Assistant Service relies on a range of books and videos to provide information and help demystify the legal process.

Although the resources of other jurisdictions can be used, the information will not necessarily be an accurate reflection of procedures in the ACT. Funding should be made available for producing a series of booklets for various age groups and in different community languages, explaining the court proceedings and the process of giving evidence. A video could be produced for adult witnesses.

### Recommendations: Witness assistance in the ACT

10.1 A child witness service modelled on the Western Australian Child Witness Service should be established in the ACT. The service should be staffed by social workers or psychologists who have experience in dealing with abused children. Alternatively, two additional witness assistant positions should be created within the ACT DPP. One of these assistants should deal specifically with child witnesses and should have qualifications in child development, child psychology or counselling as well as experience in working with children. The other assistant should provide support for adult victims of sexual offences.

10.2 The two new witness assistants should provide the following services:

- support for witnesses from early in the prosecution until the completion of proceedings
- pre-court non-evidentiary preparation that is comprehensive and appropriate to the age of the witness
- advocacy on behalf of the witness in relation to things such as their preferred mode of giving evidence
- liaison with agencies and organisations that have contact with victims
- for witnesses and their families, referrals to other support services
- information about the progress of a case—taking the initiative rather than waiting to be contacted
- assistance in the preparation of victim impact statements
- support during court proceedings
- post-court debriefing
- policy input in relation to services and legislation affecting sexual assault victims
- provision of advice about victims’ right to financial assistance.

10.3 Funding should be made available to produce an ACT-specific video and booklets designed to help prepare witnesses for attending court to give evidence. Separate booklets should be prepared for different age groups and should be available in a variety of languages.
10.9 Separate legal representation for victims

Associated with the subject of supporting victims as witnesses in criminal proceedings is the question of whether there is a role for legal representation for them. There is much literature to show that victims of sexual offences feel alienated by the court process, and proposals suggesting separate representation have been raised in the Australian context of recommendations for law reform that will benefit such victims.22 In many European countries rape victims have the right to separate legal representation—most notably in countries that have an inquisitorial system. In the United Kingdom, Ireland and some other jurisdictions there have been proposals to allocate a lawyer to represent the interests of the victim at trial or, more radically, throughout the entire legal process. Ireland has recently legislated to permit victims of sexual assault to be legally represented in trials if a defendant wants to lead evidence or cross-examine the victim about their sexual history.23

10.9.1 Separate representation for victims in overseas jurisdictions

As noted, in a number of countries with inquisitorial legal systems victims are entitled to separate legal representation.24 Historically, the victim was granted a lawyer to represent them during the compensation claim part of the trial, which in inquisitorial jurisdictions is part of the criminal trial. From this, the role of the victim’s lawyer expanded; it differs from country to country25 but now includes some or all of the following26:

- before trial
  - being with the victim during any police interview
  - giving the victim information about the investigation
  - examining the evidence
- during the trial
  - being present in court throughout the trial
  - speaking on behalf of the victim at the trial
  - applying for alternative arrangements for giving evidence
  - objecting to questions the prosecution and defence ask the victim
  - cross-examining the accused
  - making submissions on the law

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22 Bargen & Fishwick, *Sexual Assault Law Reform*, p. 103.
23 *Criminal Law (Rape) Act 1981* (Ire), s. 4A, inserted by the *Sex Offenders Act 2000* (Ire).
24 Most European Community countries have legal systems based on an inquisitorial model. In common law jurisdictions, such as the United Kingdom, Ireland, Australia, Canada, the United States and other former British colonies, legal systems are based on an adversarial model, where the two parties appear as equals, the judge is an independent and impartial arbiter and the jury makes the final decision on the facts. In an inquisitorial system the trial is an investigation of an incident with a view to establishing the truth. Parties still appear, but the judicial officer, while impartial, takes a more active role in the proceedings. Formal rules of evidence do not apply as they do in common law jurisdictions, and there is variation in the use and formation of juries. Questions of witnesses are usually asked through the judge.
26 This information is from the *Sexual Offences: law and procedure* discussion paper (Victorian Law Reform Commission, Melbourne, pp. 169–71.)
calling certain witnesses on behalf of the victim
- addressing the court in relation to the accused’s guilt or innocence, the victim’s compensation claim and the sentence.

In Belgium, for example, victims have substantial rights to representation in trials of sexual offences. They can apply for a publicly funded lawyer to represent them during the investigation phase. The lawyer can apply for information about the investigation from the prosecutor, but the prosecutor is not obliged to give it. The dossier of evidence that is produced by the examining magistrate before the trial can, however, be made available to the victim through their lawyer. The victim is entitled to have legal representation at the trial and is entitled to apply for compensation. During the trial the victim’s lawyer can do the following:

- speak on the victim’s behalf
- call witnesses on behalf of the witness
- object to questions put to the victim by the defence or the prosecutor
- cross-examine the accused
- make submissions on the law
- address the court in relation to the guilt or innocence of the defendant and in relation to compensation for the victim.

The victim’s lawyer cannot address the court in relation to sentencing. If the prosecution drops the case, the victim can, through their lawyer, ask the judge to continue it.

The Dublin Rape Crisis Centre and the Trinity College School of Law looked at a number of inquisitorial systems and the satisfaction of victims of sexual assault with the court process. They found that victims who had separate legal representation were much more satisfied with the trial process compared with those who did not.

A recent report on the investigation and prosecution of rape cases in the United Kingdom gave brief consideration to separate representation but concluded that, provided prosecution counsel act properly, a victim’s rights can be adequately protected under the current system. The report noted that, although prosecution counsel is appearing on behalf of the Crown—not on behalf of the victim—he or she is under a duty to ensure that the victim’s rights are upheld.

10.9.2 Separate legal representation in the Australian context

The Victorian Law Reform Commission considered a proposal for separate representation of victims of sexual offences in 1991. The proposal envisaged that a legal representative could be appointed following a report to the police and would be involved in the following:

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27 Dublin Rape Crisis Centre & School of Law, Trinity College, Dublin, The Legal Process and Victims of Rape, Rape Crisis Centre, Dublin, 1998, p. 182.
28 ibid., p. xii.
advising on options at each stage of the process

- communicating with police and the prosecutor’s office
- monitoring the police’s and the prosecution’s handling of the case
- representing the victim’s interests in any court proceedings
- acting for the victim in court proceedings.

The Commission concluded that victims of sexual assault should not be legally represented during court proceedings because if they were it could complicate the trial, confuse the jury, undermine the prosecution case, and possibly result in longer trials. It was also concerned that such representation might jeopardise the fairness of the trial for the accused person. The Commission found that the most cost effective option is to offer victims basic legal advice through the Centres Against Sexual Assault and that if the information flow between the police and the Office of Public Prosecutions was improved many problems would be resolved.

The 1997 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission report on children in the legal process considered separate representation for child witnesses. Some submissions had argued that a legal representative would ensure that appropriate applications were made for children who choose to proceed with a complaint and that objections could be made to improper or harassing questions asked by either the prosecutor or the defence counsel. The report noted that this argument was based on the assumption that prosecutors could not be relied on to make applications for child witnesses to give evidence using closed-circuit television or screens, to intervene to prevent objectionable cross-examination, or to be sensitive in their examination of a child witness. The Commissions’ final view was that, if other recommendations they put forward were accepted, the problem would be resolved. Those other recommendations were as follows:

- that all child witnesses give evidence by closed-circuit television or behind screens
- that prosecutors, judges and magistrates receive training in child development and language
- that judges adopt a more interventionist approach to questioning.

In the event that these recommendations were not implemented or proved unable to prevent the abuse of child witnesses during the court process, the Commissions recommended that the ‘drastic’ measure of providing all child witnesses with legal representatives who could protect their interests during the trial should be seriously considered. They further recommended that legal advice should be available to children and their families who ask for it.

With the exception of Ireland, such a departure from criminal trial procedure has not been adopted in any common law country and is controversial. There would obviously be costs involved in making the representation available. In Ireland, victims of sexual offences who

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30 Bargen & Fishwick, Sexual Assault Law Reform, p. 103.
33 ibid.
34 ibid.
are entitled to representation pursuant to the newly introduced provisions are also entitled to legal aid to fund the representation.

10.9.3 Separate legal representation for children in the ACT

ACT legislation provides for access to separate representation for child witnesses in criminal proceedings in limited circumstances. Section 11 of the Evidence (Miscellaneous Provisions) Act 1991 provides that, where a child is to give evidence by closed-circuit television and the child is not separately represented but it appears that they should be, the court may of its own initiative or on the application of any person order separate representation for the child. The provision offers no criteria for the court to exercise its discretion. It is not known whether the provision has ever been formally invoked in either the Magistrates Court or the Supreme Court.

In the Family Court orders are often made for separate representation of children in family law proceedings where the child’s interests are likely to be affected. This provides some Australian precedent for people other than the parties involved having legal representation. In coronial inquiries in the ACT people with an interest in the proceedings—such as family members of the deceased or witnesses in the inquiry—can be represented by a lawyer despite the fact that they are not parties to the proceedings. Although in neither of these situations is a criminal trial involved, they demonstrate how a legal system that is primarily adversarial in nature can adapt.

The SARP team makes no recommendation in relation to separate legal representation. Introduction of separate legal representation for child victims of sexual offences would be a radical departure from the traditional procedure followed in criminal trials, but it nevertheless warrants further discussion.

10.10 Conclusion

If prosecutors continue to see their role as including a duty to ensure that victims’ rights are upheld and remain mindful that the principle of a fair trial encompasses fairness to prosecution witnesses as well as the accused, this would help resolve the problem of victims not feeling involved in the court process and not feeling that their rights are protected.

If the ACT were to introduce a comprehensive, adequately resourced witness assistance service that is separate from the prosecutorial role, keeps witnesses fully informed about court proceedings and processes, and takes the time to listen to and respond to victims’ concerns, it might be possible to dissipate the disaffection with the criminal justice system felt by victims of sexual offences. Fewer victims will drop out before matters go to trial, and more might be willing to report sexual offences to police. Well-informed, less stressed witnesses would also lead to higher quality evidence and less damaging experiences of the criminal justice system for victims.
11 Technology

Technology is invaluable for ensuring that the court experience is less harrowing for victims of sexual offences. Big plasma screens and digital technology allow clear, large images to be beamed from a location outside the courtroom, so victims giving evidence from a remote location can be easily seen. Pre-recorded evidence of high quality in terms of sound and visual clarity can replace live evidence. Elsewhere in Australia and overseas technology offers the means by which victims—particularly children, at whom many of the legislative provisions are targeted—can participate more effectively in the criminal justice system. More cases involving child victims can be prosecuted when legislation permits the use of technology in the giving of evidence. For example, whereas previously cases involving very young victims could rarely be prosecuted because of the delay between the incident and any trial, these cases can now be heard in jurisdictions where the child’s evidence-in-chief consists of a videotape of the police interview conducted shortly after the event in question.

But technology is another area where the ACT falls behind. Although ACT legislation provides for child witnesses and victims of sexual offences to give evidence by closed-circuit television from a location outside the courtroom, the current technology in the courts is outdated, inappropriate to this purpose and unreliable. If the difficulties that beset victims of sexual offences are to be seriously tackled, overhauling the technology is a priority. To progress further and adopt some of the legislative provisions currently applying in other Australian and overseas jurisdictions (as discussed in Chapter 6), investment in the most appropriate and up-to-date technology is essential. Without a commitment to this, there is little to be gained by introducing legislation—such as legislation providing for pre-recording of evidence and admission of victims’ interviews with police as evidence-in-chief—that relies on technology to be fully effective.

11.1 Closed-circuit television in ACT courts

The ACT has had legislation providing for evidence to be given from a remote location by closed-circuit television since 1991. An assessment of the use of this technology was undertaken in 1992. It identified shortcomings—such as the small size of the television screens and the poor sound—that continue to create problems in the Magistrates Court and the Supreme Court some 12 years later.

11.1.1 The Magistrates Court

In the Magistrates Court complex there are two remote rooms from which witnesses give evidence by closed-circuit television. Each room is connected to a particular courtroom, which means there are two courtrooms that can take evidence in this way at any time. One of the remote rooms is in the Children’s Court area of the complex, and access to it is gained through an entrance other than the entrance to the Magistrates Court, although the two entrances are beside each other. The other remote room is in the main Magistrates Court complex, and it is at times difficult to prevent the victim from seeing the defendant while at court.

1 Cashmore, The Use of Closed-circuit Television for Child Witnesses in the ACT.
In both the remote rooms the angle of the camera, the lighting and the furniture are substandard. The camera shows the witness from the knees up, and it is hard to discern much facial detail because of the space taken up by the body. The SARP team visited a court in Perth and the Child Sexual Assault Court in Parramatta: in both cases only the head and shoulders of the witness are shown while they give evidence, and it is possible, from within the courtroom, to draw the camera further back if a more complete view of the witness is required.

In the remote rooms in the ACT Magistrates Court there is no table between the camera and the television, and witnesses are advised to wear trousers to avoid embarrassment. The chair the witness sits on swivels, and it is difficult for a child to sit still on it. The lighting, coupled with the camera’s capacity, is such that it is barely possible to see the facial features of a witness with dark skin.

In the Child Sexual Assault Court in Parramatta particular attention was paid to the colour of the backdrop and the lighting required to be able to pick up the facial features of witnesses with different skin types. It was decided that duck-egg blue was the best backdrop colour. Lighting immediately above a witness’s face causes shadows and makes facial features more difficult to see. There should be a backdrop immediately behind the witness, which is not possible in the ACT Magistrates Court because the room extends behind the chair the witness sits on, which is immediately in front of the television monitors. The court can also see other people in the remote room, and this can be distracting.

11.1.2 The Supreme Court

The facilities in the Supreme Court differ from those in the Magistrates Court and the shortcomings are of a different nature—but no less problematic. The witness sits at a desk in the remote room and views a television screen that is high up in a corner of the room and divided into four screens. One screen shows the judge, two show the bar table, and the remaining one shows the witness, which can be very distracting for children and can cause difficulties for them when they are giving evidence.\(^2\) Until recently, the witness could see the accused sitting between the lawyers, but court staff have now adjusted the cameras so that this no longer happens.

It is possible to turn off the part of the split screen showing the witness’s image and so avoid the distraction to the witness, but this affects the judge’s monitor: he or she can no longer see the witness. The monitors in front of counsel and the jury show only one image—that of the witness—and they are not affected.

In the courts the SARP team visited in Sydney and Perth witnesses cannot see themselves. It is difficult to understand why the technology was so arranged in the ACT Supreme Court; the situation highlights the need for thorough consultation between developers and users of the technology before spending large amounts of public money.

Another effect of the split screen in the remote room of the ACT Supreme Court is that the witness can barely see the prosecutor or defence lawyer because, as well as the screen

\(^2\) As noted in Chapter 6, in a recent Supreme Court trial a child giving evidence via CCTV said the accused hit him on a particular side of his face. The evidence he had given in committal proceedings and the interview with police and the photographs all indicated the opposite side of his face. When giving the evidence in the Supreme Court, the child could see a mirror image of himself on the split screen: this might be why he gave evidence the way he did, although there is no way of knowing. A verdict of acquittal was directed as a result of the inconsistent evidence.
being high up in the corner of the room, the images are small. It is not surprising that witnesses often seem distracted or uninterested.

A further difficulty is that the remote room doubles as an office for associates of visiting judges and contains a computer terminal, desk and other office paraphernalia. It does not give the witnesses the impression that facilities for them are considered important.

In both the Magistrates Court and the Supreme Court the equipment often malfunctions, with consequent delays to the commencement of hearings and trials and additional stress for victims. In the Supreme Court this seems to be the norm.

Further, in the Supreme Court the jury sees the witness on a television placed on a trolley that is wheeled before them. Sometimes not all members of the jury can see the witness properly because of where the trolley is placed. In a recent trial the prosecutor brought to the judge’s attention the fact that during one witness’s evidence a number of jury members could scarcely see the television and indeed appeared not to be looking at it. The prosecutor asked that the television be placed directly in front of the jury.

Another problem with the equipment is that when there is legal argument the equipment must be completely turned off in the remote room to prevent the sound carrying through from the court. Very little is explained to the witness before this happens, and they are sometimes not told how long it will be before they are again required to give evidence. This can be bewildering for adult and child witnesses alike.

11.1.3 Sound quality

Poor sound quality bedevils both the Magistrates Court and the Supreme Court. When the closed-circuit television is being used the witness is often asked to speak up: for victims describing a traumatic and highly personal experience and for quietly spoken, nervous children this can be challenging. It is not unusual for counsel to repeatedly, and sternly, ask child witnesses and sexual assault victims to raise their voice. The report of the 1992 assessment of the closed-circuit television provisions in the ACT noted that difficulty in hearing what a child is saying was a fairly common technical problem ‘but one that could be overcome by the use of a separate sound system with a sensitive lapel microphone’.

Twelve years later nothing has changed.

It was also noted in 1992 that children sitting in the remote room found it difficult to hear what was being said to them from the courtroom. This, too, remains the case today.

11.2 Why technology matters

In 1997 the Wood Royal Commission reported:

The Commission … emphasises the need for the use of technology which permits high resolution display on large screens within close proximity of the jury. Poor resolution, defective audio, or reduced images can have an adverse impact on the process and occasion injustice to the prosecution case.

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3 Cashmore, *The Use of Closed-circuit Television for Child Witnesses in the ACT*, p. 129.
4 When Cashmore’s report was written there were no CCTV facilities in the Supreme Court.
5 Wood Royal Commission, p. 1092.
The New South Wales Legislative Council inquiry into child sexual assault prosecutions received submissions and heard evidence about the inadequate size of the television screens being used in the state’s courts. The New South Wales Director of Public Prosecutions, Nicholas Cowdery QC, told the inquiry:

The size of the image of the person is important, because if the person is seen as a very small image in a large court room there are implications involved in that. The ability of the judge, the jury and counsel to see the reaction of the witness is hampered if the image is physically small and difficult to see from a distance in the courtroom.6

The final report of the inquiry described the inadequacies of the closed-circuit television equipment thus:

- inadequate monitoring of the child’s view of the closed-circuit television screens; for example, the accused being visible to the child, or the judicial officer while talking to the child not being visible to the child

- use of split screens when playing the videotape to the court—the child’s face is indistinguishable for the court because of the size of the child’s face on the screen.7

Significant resources have since gone into improving technology in courts in New South Wales, with particular attention being given to the Child Sexual Assault Court at Parramatta.

### 11.3 The Child Sexual Assault Court at Parramatta

As a result of recommendations in the New South Wales Legislative Council’s report, funding was made available for the establishment of a pilot Child Sexual Assault Court.8 Among other things, the report had recommended a specialist jurisdiction with specialist judges and prosecutors and high-quality electronic facilities for the use of special measures.9 Although the recommendation that a specialist jurisdiction be established was not taken up, a Child Sexual Assault Court was established at Parramatta District Court with state-of-the-art technology and a witness room in premises away from the Court. The first trial in the Court took place in March 2003. Campbelltown, Liverpool and Dubbo District Courts are now included in the pilot. Child witnesses attend the purpose-built remote facility in Parramatta to give evidence by video link for proceedings being conducted in Parramatta, Liverpool and Campbelltown District Courts. The witness facility is in a non-descript building, with no identifying signs, 5 minutes’ walk from Parramatta Court and just under an hour’s drive from the other two Courts. Its location is known to only a handful of people. Having the witness facility away from the Court ensures that there is no chance of contact between the witness and the accused.

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6 NSW Legislative Council Standing Committee on Law and Justice, Report on Child Sexual Assault Prosecutions, p. 169.

7 ibid., p. 168. This last problem is no longer relevant in NSW: the court is now not permitted to view the child while the tape is being played—Evidence (Children) Act 1997 (NSW), s. 11.

8 As noted, the SARP team attended the court at Parramatta. The team thanks Kevin Hill, from the NSW Attorney-General’s Department, for his assistance.

9 NSW Legislative Council Standing Committee on Law and Justice, Report on Child Sexual Assault Prosecutions, p. 208.
A substantial investment has been made in providing up-to-date equipment so that the special measures provided for in the legislation can be used. Inside the courtroom there are two large plasma screens on the wall opposite the jury box. One screen shows the witness’s head and shoulders; the other shows the remote room the witness is in. When the video of the child’s interview—which is the child’s evidence-in-chief—is being played to the court, the screen with the image of the child is blank so that the court cannot see the child watching the video, as required by the legislation. The video of the child’s interview is played on equipment in the courtroom and relayed to the remote room. Document cameras in both the courtroom and the remote room relay images of documents. Fax machines are also available for sending documents back and forth. A sound enhancer is used to improve the quality of tapes of the initial interview with police, since the sound quality of the interview is often quite poor.

Any video the witness needs to see can be relayed to the remote room. Counsel can download photographs from laptops connected to outlets at the bar table and relay them to the remote room at the same time as they are being projected onto the plasma screen in the courtroom. High-range broad-banding is required for the video-conferencing facilities; without it, it is difficult to relay videos or DVDs involving a lot of activity to the remote room.

In summary, the court contains the following equipment:

- two plasma screens
- a document camera
- a fax machine
- a scanner
- a CD player
- a DVD player
- cameras
- an infrared system to improve sound quality
- terminals on the bar table to allow laptops to download onto screens.

In the remote room there are two rooms from which witnesses can give evidence, each with two cameras and two televisions. The witness sits at a desk in front of which two televisions are placed at eye level. One screen shows the judge at all times; the other shows the bar table. The accused is out of the view of the cameras.

The technology meets the legislative requirements in New South Wales as they currently stand. The state has no legislative provisions for the pre-recording of evidence in a pre-trial hearing or for the recording of evidence given by closed-circuit television. There is thus no equipment for taping evidence given in court. In Western Australia, in contrast, the legislation provides that evidence given by closed-circuit television can be used in any retrial of the same charges. It also permits the use of pre-recorded evidence in trials. The technology is therefore configured so that any evidence given by closed-circuit television can be taped. When installing new equipment in ACT courts, it will be important to be

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10 Evidence (Children) Act 1997 (NSW), s. 11.
clear about precisely what the technology is going to have to do. Otherwise, upgrades will be needed.

The experience in New South Wales is that the technology will not be used if there are any difficulties with it, so it is essential to have on call someone who can deal with problems quickly. Sheriff’s officers are trained to operate the technology by means of a touch screen but there are often hiccups, especially because the technology is new. When problems do arise, officers from the Attorney-General’s Department are available to help.

The cost of the fit-out at Parramatta, involving two courts—a District Court courtroom and a Local Court courtroom—linked to a remote room off site, amounted to between $280 000 and $300 000. The cost would have been greatly reduced had the court been linked to a remote room in the same building, thus permitting linking by cables rather than the more expensive video-conferencing technology: this would cost about $80 000. It would, however, preclude the use of video-conferencing facilities, which can be used for a number of other purposes, and the advantages of having a remote room well away from the court complex would be lost.

11.4 Western Australia

The District Court in Western Australia has specific courtrooms set up for taking evidence by closed-circuit television and for pre-recording of evidence. One of these courts has a large projector screen; another has television screens.

The projector screen allows a much larger image to be seen, and when it is placed immediately in front of the jury all members of the jury can clearly see the witness giving evidence. Another image is screened onto the wall behind where a witness would usually sit in court to give evidence, creating the illusion of the witness’s presence in the courtroom. It is to this screen that the judge and counsel speak. The judge and counsel also have directly in front of them individual monitors showing the witness.

The projector screen in front of the jury provides a larger image than that seen on the plasma screens in the Child Sexual Assault Court at Parramatta. The plasma screens are placed on the opposite side of the courtroom from the jury. Although the image is reasonably clear—and certainly an improvement on what is seen in the ACT Supreme Court—the projected image in the Perth court is more easily seen by the jury.

When considering what new equipment is needed for the ACT courts, careful thought should be given to the size of the image and the placement of the screens.

11.5 Improving the facilities in the ACT

The problems with the current closed-circuit television technology in the ACT need urgent attention.

As noted, in the Magistrates Court the problems are as follows:

- The television screens in the courtrooms are too small and too elevated.
- The sound quality is poor—in both directions.
The camera shows almost all of the witness—not just the head and shoulders—and it is therefore difficult to discern much facial detail.

Children swing on a swivel chair whilst giving evidence.

The screens in the courtroom show people seated behind the witness while they give evidence, which is distracting.\(^{11}\)

In the Supreme Court the problems are as follows:

- The screens in the courtroom are too small.
- Too much is seen of the witness and the desk they sit at—rather than just the witness’s head and shoulders.
- The witness must look at a small television screen that is high up in a corner of the room and is split into four screens, which means the witness can barely see any particular person on the screen.
- At times witnesses have been able to see the accused seated directly behind counsel.
- The witness can see an image of herself or himself while giving evidence.

The facilities are so outmoded and difficult to use that the intent of the legislation is being undermined. There should be considerable revamping, if not replacement, of the equipment. Guidance could be sought from the New South Wales Child Sexual Assault Court.

Witnesses should be seated at a desk, with two television screens on the other side of the desk. One of the screens should show the judge and the other should show either the defence lawyer or the prosecutor, whoever is asking the question. Alternatively, counsel asking questions could do so from a position in the middle of the bar table. The lighting should be attended to, to ensure that it is adequate for all skin colours. The swivel chair in the Magistrates Court remote room should be replaced.

In the Supreme Court—as an immediate and temporary measure pending the replacement of the equipment—the television screen in the remote room should be placed at the witness’s eye level. In the Magistrates Court the camera view should be changed, if possible, to show the witness’s head and shoulders only. Ideally, cameras should be set to maximise eye contact between the witness and the person asking questions. This could be done by placing cameras directly above the screens the witness is watching: when the witness is looking at a particular screen they will be filmed looking straight on. If technology permits, inclusion of a camera in the screen would improve eye contact even more.

As a matter of urgency, the sound quality in both courts should be improved. Use of lapel microphones would be a practical and simple solution.

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\(^{11}\) The normal practice in the ACT and elsewhere is that the judicial officer has before him or her on a monitor an image of the entire remote room, so that he or she can supervise the activity in the remote room and, in particular, ensure there is no interference with the witness in the course of giving evidence. This view is not usually available to counsel or the jury.
11.6 **Video-link facilities to a remote location**

A central feature of the New South Wales Child Sexual Assault Court is the location of witness facilities away from the court. This is discussed in detail in Chapter 9, and recommendations for the ACT are made in that regard. Having a remote facility in the ACT would require the installation of video-conferencing equipment in both the Supreme Court and the Magistrates Court. It might be possible to use TransACT infrastructure, which could reduce the cost.

Apart from using video for taking evidence from a location remote from the court, the technology can be used for bail applications and mentions involving people in custody and for taking evidence from interstate and overseas witnesses. Both these uses have the potential to produce considerable cost savings for the ACT.

11.6.1 **People in custody**

In New South Wales courts there is much reliance on video links as a way of conducting proceedings involving defendants in custody. All correctional centres are linked to a number of city, suburban and regional courts by video link. Unless they specifically ask to do so, prisoners do not appear in person at mentions and bail applications in those courts that are connected. The bulk of such matters are conducted by video link, saving the state considerable resources that would otherwise be devoted to transporting prisoners.

11.6.2 **Interstate and overseas witnesses**

In Western Australia video-link facilities are used throughout the state to take evidence from, for example, specialist medical witnesses based in Perth or other cities.

Because of the lack of functional video-conferencing facilities in the ACT, evidence is generally taken in court—with the associated costs of flying in interstate and overseas witnesses and transporting ACT prisoners held in New South Wales prisons. An additional problem in the ACT is the frequent deployment of AFP members overseas. Police deployed overseas often have matters in which they are witnesses still before the courts when they leave, and further expense is incurred when they have to return to give evidence.

The ACT Magistrates Court has some facilities for taking evidence by telephone, but the facilities are so poor that taking evidence in this way is a last resort or is reserved for professional witnesses whose evidence is not crucial to the fact at issue.

The ACT’s *Evidence (Miscellaneous Provisions) Act 1991* provides for the taking of evidence by telephone or video link from interstate. It does not, however, cover the taking of evidence from overseas witnesses. The evidence of overseas witnesses can only be taken by video link if both parties agree. In any event, the courts do not have video-link facilities.

11.7 **Recording evidence**

NSW Police is considering moving from videotape to DVD for interviews with suspects and child witnesses. In the ACT interviews with suspects and child witnesses are recorded on videotape. If the ACT were to implement the SARP team’s recommendations in
relation to the admission of videotapes as the evidence-in-chief of child witnesses, it would make sense to start off with the most up to date technology, which is disc. DVD players would have to be installed in the Supreme Court and the Magistrates Court. The DPP could edit discs on PCs, although training would be necessary, as would be resident expertise in the Office.

Editing of tapes and discs does not, however, have to be done by the DPP. It would be necessary to decide whether the police or the DPP will edit. Editing often takes place shortly before the trial date or on the first day of the trial, so facilities must be available for urgent editing. If the AFP officers were to do the editing, they would have to be able to do it at very short notice. It might therefore be more convenient to have available in the DPP facilities for editing tapes or discs at short notice.

11.8 Where to from here?

To take the technology debate further, the SARP team suggests that a group of key people from the ACT visit the Child Sexual Assault Court at Parramatta. The group could consist of a Supreme Court judge, a magistrate, the manager of Courts Administration, the Director of Public Prosecutions, the Director of the Legal Aid Commission and representatives of the Bar Council and the Law Society.

In terms of assessing what technology is needed and the costs involved, a consultant could be employed to produce costings in consultation with a technology steering group. Once the various options are costed, the Government would be in a position to make a decision about which option to adopt.

In developing the costings, the cost of bringing prisoners from New South Wales goals to the ACT for mentions and bail applications should be taken into account, as should the cost of transporting prisoners from Belconnen Remand Centre. In addition, the DPP and ACT Policing could provide details of the cost of bringing overseas and interstate witnesses to the ACT to give evidence. The overall outlay would not only be associated with the protection of witnesses in sexual offence proceedings: it would have broader ramifications for the administration of justice in the ACT.

<table>
<thead>
<tr>
<th>Recommendations</th>
<th>Technology in ACT courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>11.1 The closed-circuit television equipment in the Magistrates Court and the Supreme Court should be improved as a matter of urgency by taking the following measures:</td>
<td></td>
</tr>
<tr>
<td>■ installing plasma screens in the two Magistrates Court courtrooms</td>
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</tr>
<tr>
<td>■ installing projector screens (as in Perth) in front of the jury box and monitors for the judge, lawyers and accused in Supreme Court courtrooms one and two</td>
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</tr>
<tr>
<td>■ using lapel microphones for witnesses in the remote room</td>
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<tr>
<td>■ replacing the seating for witnesses in the Magistrates Court remote room</td>
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<tr>
<td>■ placing the television screen in the Supreme Court remote room directly in front of the witness</td>
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<tr>
<td>■ improving the sound quality in both the Supreme Court and the Magistrates Court</td>
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</tr>
<tr>
<td>■ providing training for judicial officers, sheriff’s officers, court officers and associates who are to operate the new equipment</td>
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</tbody>
</table>
11.9 Recording of interviews with child witnesses

In Chapter 6 the SARP team recommends the introduction of legislation permitting the use of videotaped interviews between police and child witnesses as the witnesses’ evidence-in-chief. Such legislation has existed in New South Wales since 1997, and reviews of the provisions have cast light on the associated problems. These are discussed in Chapter 6; suffice to say here that some of the problems stem from the use of the technology, and substantial effort has gone into improving the technology and training people in its use.

Eastwood and Patton asked members of the judiciary and legal representatives to rate the quality of audio and video recordings they had seen or heard. Video recordings were rated more highly than audio recordings, and sound quality was the main problem raised by respondents who gave low ratings. Several respondents highlighted the need for clip-on microphones—particularly for young children, who tend to move around during interviews with the police, and children who mumble or put their head down during the interview. Although the visual quality of videotapes was rated as good, several respondents suggested that, because the child was some distance from the camera, it would be useful to have some close-up shots to allow the viewer to see facial expressions more clearly.

The SARP team’s discussions with various people involved in the recording of interviews or using them in the courtroom revealed that many problems with the tapes of the initial interview relate to the sound quality. The problems arise as a result of the positioning of the microphone, the microphone being covered up by clothing, or the child talking whilst behind a piece of furniture or under a table and so not being picked up by the microphone. The Child Sexual Assault Court in Parramatta has equipment that improves the quality of

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11.2 In relation to the SARP team’s recommendations in Chapter 6—such as those dealing with playing pre-recorded evidence as evidence-in-chief, pre-recording further evidence, and recording evidence taken by closed-circuit television for use in later proceedings—consideration should be given to the equipment required, training in the use of the equipment, and the provision of continuing technical support. Equipment will be required by ACT Policing, the Office for Children, Youth and Family Support, the ACT Director of Public Prosecutions, the Supreme Court and the Magistrates Court.

11.3 A consultant should be employed to develop costings for the various technology options. This should be done in consultation with a technology steering group.

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13 ibid., p. 62.
the sound, and recent legislation provides for transcripts to be given to the jury if members have difficulty hearing what is said on the tape.\textsuperscript{14}

Editing of tapes can substantially reduce the sound and picture quality of the tapes, which is why discs are a better option. In the ACT editing is done by DPP prosecutors using two VCRs. This is in stark contrast to the Victorian Office of Public Prosecutions, where a technical officer edits videotapes and audiotapes with state-of-the-art equipment. If videotapes are to be used as evidence-in-chief in the ACT, the DPP would need to invest in equipment that is far superior to what it now has.

The experience of other jurisdictions where videotaped interviews can be used as evidence-in-chief is that the recording equipment must be good, training in how to use the equipment effectively is essential, and the quality of the recording must be maintained during the editing process. Since many tapes will need to be edited before admission in criminal proceedings, good editing equipment and sufficient technical support will be needed in the ACT DPP.

Technology is a powerful tool that the ACT judiciary is eager to embrace. It offers the means by which the burden placed on victims of sexual offences who give evidence can be greatly reduced, while retaining the accused’s right to a fair trial. The other powerful tool for achieving the same end is training.

\textsuperscript{14} Evidence (Children) Act 1997, s. 15A.
The importance of training is highlighted throughout this report, and such initiatives are central to many of the recommendations put forward. This chapter discusses the training that would enable legal professionals (prosecutors, defence lawyers, judges and magistrates) and those outside the legal system who interact with it (people working in health services, counselling services and victim support services) to better accommodate the needs of victims of sexual offences.

Legal professionals must be aware of the legislation and case law applicable in sexual offence cases, including the special measures available and evidentiary provisions. But this technical knowledge, although essential, is not sufficient. Much has been written about the need for the legal profession to be better informed about the dynamics of rape and the sexual abuse of children, the experiences of victims in the criminal justice system, and the psychological impact of trauma on victims of sexual offences. If the legal profession is more ‘switched on’ to the impact the criminal justice system has on victims of sexual offences, and child victims particularly, the system might become more responsive and better at minimising the adverse impacts on individuals who find themselves tied up in it.

In Chapter 7 reference is made to the myths and assumptions that surround the commission of sexual offences and the reactions of victims. One assumption is that victims will immediately complain of the incident. This was such a common assumption in trials relating to sexual offences that it was necessary to introduce legislation to counter it. Other assumptions—for example, that victims will resist sexual assault, will cease all contact with the offender, and will give their evidence in a particular way, emotionally recounting the event—are prevalent too, both in the community and among members of the legal profession.

Although there is a role for legislation, and the calling of expert evidence where permitted, if we are to even begin to destroy these myths legal professionals involved in sexual offence prosecutions must come to an understanding of the realities of sexual assault and of how misconstruing the dynamics of sexual violence, including the sexual abuse of children, can affect the way such matters are dealt with in criminal trials.

The biases of legal professionals can directly affect how they view the cases they deal with. For example, in cases where at the time of the alleged offence the victim was dressed in a particular way, was flirtatious and was affected by drugs or alcohol, these factors can, and often do, play a role in the prosecutor’s decision to discontinue proceedings. As Lievore notes in the report of her recent study of the role of prosecutorial decision making in adult sexual assault cases in Australia, ‘There is persuasive empirical evidence that victim characteristics are influential factors in prosecutors’ assessment of the prospects of conviction and therefore in their case processing decisions’.

Communicating with child witnesses is another area where training of legal professionals is required. Without having received training in child development, ways of communicating with children of different developmental ages and the impact of sexual

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1 Freckelton, ‘Sexual offence prosecutions: a barrister’s perspective’.
2 The relevant ACT provision is s. 71 of the Evidence (Miscellaneous Provisions) Act 1991.
abuse and trauma on children, how can legal professionals guarantee that children will be able to tell their story adequately?

The SARP team’s consultations made it apparent that non-lawyers, such as doctors, child protection officers, counsellors and people working with victims, would like more information about the legal system. Those who might be witnesses—most notably medical professionals—need training in how to give evidence and how to cope with cross-examination, as well as information about court procedure and evidence. Victim support workers want to learn more about court processes so that they are better informed and thus better able to inform and help their clients.

12.1 The legal profession

A consistent message in the numerous reports examining sexual offences and the criminal justice system concerns the need for training of legal professionals. Training lawyers and the judiciary is a way of increasing the criminal justice system’s responsiveness to the needs of victims without derogating from the rights of the accused.

Noting the barriers and problems experienced by victims in the criminal justice system, the Victorian Law Reform Commission observed that, although earlier reforms were sometimes designed to redress these problems, the legislative changes have not always operated in the way that was envisaged because of attitudinal barriers in the criminal justice system. The Commission was of the view that reform will make the system more responsive to the needs of victims only if the culture and practice of the court system change and that dialogue and education that fosters cultural change are essential:

Changing the culture of the criminal justice system involves changing the distinctive customs and outlook of prosecution and defence lawyers, magistrates, judges and others involved in the process of a criminal prosecution. Lawyers, magistrates and judges are likely to be more responsive to the needs of complainants and to perform their role more effectively, if they understand the context in which sexual offences commonly occur and the psychological and social aspects of sexual offences which affect complainants.

To begin to address these cultural aspects, the Commission recommended that the Victorian Office of Public Prosecutions advise prosecutors through its continuing education program about the following matters pertaining to sexual offences:

- the emotional, psychological and social impact of sexual assault on victims—including the impact on groups who suffer discrimination, such as Indigenous women, women from a non–English speaking background, and women with mental health or developmental problems—and how this may affect them when giving evidence
- the social context in which sexual offences occur—including the outcomes of empirical research into incidence and the circumstances in which sexual assaults occur
- the use of closed-circuit television
- referral to services that can help victims

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5 ibid., p. 158.
- steps prosecutors can take to protect victims from offensive, unfair or irrelevant cross-examination.\footnote{ibid., p. 25.}

The Commission recommended that members of the judiciary also receive training in the areas just listed and be informed about the background to any legislative amendments.

The 1997 *Heroines of Fortitude* report made a number of recommendations in relation to education and training for prosecutors and the judiciary.\footnote{NSW Department of Women, *Heroines of Fortitude*, p. 6.} It recommended:

- that the New South Wales Judicial Commission provide education to judicial officers about a range of matters associated with victims and the court process

- that the Commission provide training on the content and spirit of legislation aimed at reducing the judicial system’s adverse impact on victims, appropriate language and behaviour, and the judiciary’s responsibility for managing the courtroom so as to eliminate gender-biased conduct

- that the Commission canvass the experiences of women from diverse backgrounds (with an emphasis on Indigenous women, women of non–English speaking background and women with disabilities), the need for sensitivity and privacy, the importance of a support person in sexual assault trials to reduce the trauma of giving evidence, and the difficulties experienced by victims in sexual assault matters generally

- that the Commission take steps to promote judicial discussion and education in relation to the conduct and control of cross-examination.

The report also suggested that gender bias training be provided throughout the New South Wales Law Society, the Bar Association and law schools.

The New South Wales Legislative Council Standing Committee on Law and Justice recommended that the Judicial Commission provide for judicial officers training in child development, the reliability of child witnesses and special measures provisions.\footnote{NSW Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, pp. 138, 173.} It also recommended the establishment of a child sexual assault jurisdiction, with specialist judicial officers, prosecutors and court staff who have received training in child development and aspects of child sexual assault.

The Queensland Law Reform Commission’s report on the evidence of children notes that in the legal process children face obstacles not faced by adults and stressed the need for education: ‘Unless the legal professionals who participate in cases involving child witnesses are aware of, and sensitive to, the factors which may detrimentally affect the ability of a child to give evidence, the evidence may not be forthcoming …’\footnote{Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts*, p. 467.} The overwhelming majority of the large number of submissions the Commission received identified the need for education and training.\footnote{ibid., p. 476.} The Commission noted that judicial awareness is particularly important, since judges and magistrates control the way in which court proceedings are conducted. Special measures will not benefit a child if the court is
not fully aware of those provisions, and legal professionals need to understand the disadvantages faced by children who give evidence.

The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission report on children in the legal process recommended that guidelines and training programs be developed to assist judges and magistrates in dealing with child witnesses.\(^1\) These guidelines and programs should include information on the amount of time for which children of various ages can give evidence without a break, examples of aggressive or confusing examination tactics to allow judges to recognise and prevent such questioning, and examples of age-appropriate language and grammar.\(^2\) The Commissions further recommended that all prosecution staff in contact with child witnesses receive training in the use of age-appropriate language, children’s developmental stages, and the possible effects of giving evidence on children of various ages. Implementation was to be carried out by all DPPs and, where appropriate, child witness units were to be developed in each DPP.\(^3\)

Interestingly, the Commissions’ push for training was partly the result of a number of submissions opposing the use of intermediaries in proceedings involving child witnesses.\(^4\) The thrust of those submissions was that intermediaries are a poor substitute for a requirement that judges and lawyers have training in skills for dealing with children. As the report noted, other people dealing with children—such as specialist paediatric workers—are required to have such training:

\[
\text{Specialist paediatric workers in the medical profession receive such training and so too should those in the legal profession who have regular dealings with children. This training should include not only communication skills but education about the physical and emotional capacities of children to give evidence over long periods of time.}\(^5\)
\]

The reasons prosecutors and judges need this kind of training are obvious. They need to know about children’s developmental stages, their communication skills at different ages, and how they might deal with recounting their experience in the formal setting of a court. It would also help if the legal profession were informed about aspects of child sexual abuse and children’s reactions, why many children do not complain in the first instance, why children often take more than one telling to recount the entire experience, and how trauma affects children.

A decision in an ACT judge-only trial demonstrates why judges need to understand the psychology of children when hearing children’s evidence. The case involved an 8-year-old girl and allegations of a serious act of indecency committed on her by her stepfather. In the judgment finding the accused not guilty, the trial judge stated:

\[
\text{In the present case, the complainant gave evidence in an apparently straightforward and unemotional manner. The absence of any obvious emotion seemed somewhat incongruous in view of the nature of the acts she described, the}\]

\(^2\) ibid., p. 672. The Australian Institute of Judicial Administration was to implement this. It is of note that Western Australia has for a number of years had such guidelines for judges.
\(^3\) ibid., p. 673.
\(^4\) Intermediaries are discussed in Chapter 6.
appalling betrayal of trust they involved and the breakdown in family relationships that followed.\textsuperscript{16}

And later in the judgment: ‘The accused gave evidence in a defensive and, at times, almost monosyllabic manner but, having regard to the gravity of the allegations and the potential consequences of any conviction, even an innocent person in his position may have been nervous’.\textsuperscript{17}

In this example the comment is made about the demeanour of the child when giving evidence because that was considered a relevant factor in assessing the child’s credibility. In referring to the child’s apparent lack of emotion, the judge is making a remark about her veracity.

In relation to adult victims of sexual offences, the judiciary and legal professionals would benefit from understanding the psychology of trauma, post-traumatic stress disorder and how such trauma affects a person’s ability to recall and give evidence.

Trials of sexual offences are complex. The trial directions the judge is required to give to the jury are many, coming from appellate decisions and legislation. Failure to deliver directions correctly can constitute grounds for an overturned conviction. Training in sexual assault trial directions and associated evidentiary requirements would be beneficial for prosecutors, judges and magistrates dealing with these matters.

\section*{12.2 The judiciary and the magistracy}

Training for the judiciary is not a new concept and is particularly well developed in the United States. In Europe judges train for the position from early on in their career. In the English tradition members of the judiciary are appointed from among senior practitioners from the bar. Knowledge of trial procedure and evidentiary rules used to be considered sufficient preparation for the bench, but judges and magistrates perform an increasingly difficult and complex task and this has led to a recognition in recent years that they need professional support, education and training in order to be fully conversant with the laws and social concerns they will encounter in their work. Many common law jurisdictions now have some sort of judicial training body.

\subsection*{12.2.1 Training in Australia}

Unlike larger jurisdictions such as New South Wales and Victoria, the ACT does not have its own judicial training body. There are, however, a number of national bodies that could provide training for the judiciary and the magistracy in the ACT.

The National Judicial College of Australia

The National Judicial College of Australia is an independent entity funded by contributions from the Commonwealth and some states and territories. Established in May 2002, its function is to provide orientation training for new judicial appointees and continuing professional development for judicial officers. Control of the College is in the hands of a council made up of members of the judiciary plus some outside representation.

\textsuperscript{16} The Queen v EG [2002] ACTSC 85 at p. 17. The complainant was giving evidence of events that occurred almost a year before. She had given evidence at the committal. Different prosecutors conducted the committal and the trial, and it can be assumed that each prosecutor proofed the child.

\textsuperscript{17} ibid., p. 19.
The Chief Magistrate of the ACT Magistrates Court is an alternate member, as is the Secretary of the ACT Department of Justice and Community Safety. There is provision for the organisation of local chapters in regions. The College ran the Phoenix Magistrates Program in Canberra over five days in August 2003, and members of the ACT judiciary and magistracy participated. This could be an avenue for providing training for judicial officers in the ACT.

**The Judicial Conference of Australia**

The Judicial Conference of Australia was established in 1993, and membership is open to all judges and magistrates. It holds a symposium each year and organises workshops.

**The Australian Institute of Judicial Administration**

The Australian Institute of Judicial Administration is a research and education institute connected to Monash University. It develops and conducts educational programs—including courses in gender awareness—for judicial officers, court administrators and other members of the legal profession. In July 2004 it held a one-day conference on child witnesses, ‘Child Witnesses—best practice’, with emphasis on special measures available in the various Australian jurisdictions. The conference was attended by judicial officers from every Australian jurisdiction other than the ACT, prosecutors and defence lawyers (including lawyers from the ACT DPP and ACT Legal Aid), as well as others from the Family Court and New Zealand.

**The New South Wales Judicial Commission**

The New South Wales Judicial Commission was established in 1986 and receives funding of $4.2 million a year. In response to the New South Wales Legislative Council’s report on child sexual assault prosecutions, the Attorney-General’s Department set up the Child Sexual Assault Jurisdiction Team Education Working Group to consider training and education of the judiciary and magistracy in New South Wales. The Working Group consists of representatives of the judiciary, the magistracy, the DPP, the Attorney-General’s Department, the Judicial Commission, the Department of Community Services, NSW Health, NSW Police, Legal Aid, the Law Society and the Bar Association.

In consultation with the Working Group, the Judicial Commission has prepared a reference resource on child sexual assault, which has been distributed to all judges and magistrates in the state. It is a folder of material providing practical guides to the interviewing and examination of sexual abuse victims by police officers, lawyers, judges and professionals generally. It also discusses evidentiary matters such as the credibility of child witnesses, the use of electronically recorded evidence, and expert testimony. Various academic articles included in the folder deal with the relationship between intellectual disability and sexual assault, whether the characteristics of a child or their family increase the risk of sexual assault, and the way in which child victims disclose incidents of sexual assault. A summary of the specialist child sexual assault jurisdiction established in western Sydney in March 2003 is also included. The Commission’s Education Officer has said the information folder could be made available to judicial officers in the ACT.

In 2003 the Judicial Commission held several seminars on child sexual assault. Justice James Wood presented a paper entitled ‘The admissibility of evidence in child sexual assault cases’ and Dr Jean Edwards delivered one on the role of medical evidence in child sexual assault cases. Claire L’Heureux Dube, a retired justice of the Supreme Court of Canada, delivered a presentation on sexual assault.
The Judicial College of Victoria

The Judicial College of Victoria was established in 2003. It held a one-day workshop on children as witnesses in November 2003 and a workshop on sexual offences in 2004.18

12.2.2 Training in other countries

As noted, judicial training is well established internationally, and many of the bodies surveyed offer courses dealing with sexual offences.

Canada

The National Judicial Institute and the Canadian Judicial Council both provide training for judges. The following courses conducted by the National Judicial Institute are of interest:

- Enhancing Judicial Skills in Cases of Violence and Abuse in Intimate Relationships
- Children as Witnesses
- Using Child Development Research to Resolve Difficult and High Conflict Access Issues.19

The United Kingdom

The Judicial Studies Board in the United Kingdom provides training and instruction for judges and magistrates and holds seminars on serious sexual offences. The seminars are directed at all judges authorised to hear cases of rape and serious sexual offences, including those involving children; they are compulsory for newly authorised judges.

The United States

The National Judicial College in the United States provides training for judicial officers throughout the nation and runs a six-day course entitled Handling Sex-related Cases in Court.20

12.2.3 Summary

There is a movement towards more judicial education and training generally. All the bodies discussed see training related to sexual assault and child witnesses as areas worthy of particular attention.

The collaborative approach in New South Wales, where a range of materials for judges and magistrates has been developed in consultation with a number of relevant agencies, could be successful in the ACT. The difficulty, however, is that in the ACT there is no specific body with responsibility for organising judicial training. Advantage should be taken of the location of the National Judicial College in Canberra.

Although the independence of the judiciary demands that the judges and magistrates themselves direct any training programs, administrative support, as well as background research into relevant topics and sources of information, would be useful in the absence of a judicial training body.

There is a need for a comprehensive, well-planned training program for prosecutors who practice in the area of sexual offences, and it is recommended that a position be created within the ACT DPP to coordinate that training. The position could have a role in helping judges and magistrates organise training. Another role would be to research in depth what courses are offered elsewhere, ascertain the needs of the potential recipients of the training, and then organise speakers. This should be done in consultation with a committee consisting of members of the judiciary and the magistracy, the Director of Public Prosecutions, representatives of the Bar Association and the Law Society, and other participants if necessary. The judiciary’s independence must be respected at all times.

**Recommendation Training for the judiciary and magistracy**

12.1 A working group should be established in the ACT—along the lines of the Child Sexual Assault Jurisdiction Team Education Working Group in New South Wales—with representatives of the judiciary and magistracy, the Director of Public Prosecutions, Legal Aid, the Bar Association, the Law Society and other relevant organisations to discuss and plan training for judges and magistrates on legal and other aspects of sexual offences and child witnesses. The working group should consider adopting the New South Wales Judicial Commission’s *Child Sexual Assault Manual* and circulating it to all members of the ACT judiciary and magistracy.

12.3 **Prosecutors**

The foregoing remarks about the need for judges and magistrates to become familiar with the law and practice and the socio-psychological factors associated with child and adult victims of sexual assault apply equally to prosecutors.

ACT DPP prosecutors regularly present seminars as part of the Continuing Legal Education program. One seminar delivered in 2002 discussed the legal aspects of prosecuting historical sexual assault matters. Dr Martine Powell, a child psychologist who provides training in interviewing children, also spoke to prosecutors in 2002.

Apart from these initiatives, no specific training related to sexual assault or child witnesses has been provided for prosecutors. In 2003 a prosecutor attended a two-day course on interviewing children, conducted by Dr Martine Powell at the AFP Training College as part of the Sexual Offences Investigator Program, and found it very beneficial. It would be helpful if as many prosecutors as possible were to participate in such a program.

The overwhelming view in the various interstate reports is that training of prosecutors is vital to improving the criminal justice system for child and adult sexual assault complainants. This is recognised by the New South Wales Director of Public Prosecutions and the Victorian Office of Public Prosecutions, where prosecutors are encouraged to attend seminars dealing with law, evidence, special measures, child communication and psychology and, more broadly, the social context of sexual abuse. The Victorian OPP sexual assault prosecutors recently attended a one-day workshop on child witnesses with Dr Powell.
<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Training for prosecutors</th>
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<tbody>
<tr>
<td>12.2</td>
<td>It is recommended that the ACT Director of Public Prosecutions develop a training program that covers the following areas:</td>
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<td>-</td>
<td>aspects of sexual assault trials</td>
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<td>trial directions</td>
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<td>tendency, relationship evidence and uncharged acts</td>
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<td>consent</td>
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<td>complaint evidence</td>
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<td>cross-examination—the role of the DPP in protecting the victim from harassing and offensive cross-examination</td>
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<td>-</td>
<td>special measures</td>
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<td>-</td>
<td>current measures—closed-circuit television and closed court</td>
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<td>-</td>
<td>proposed measures—justification and substance as they are implemented</td>
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<td>-</td>
<td>understanding victims and the dynamics of sexual assault</td>
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<tr>
<td>-</td>
<td>statistical overview</td>
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<td>trauma and responses to it—immediate and long term</td>
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<td>-</td>
<td>child victims of abuse and their responses to it—why they don't tell</td>
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<td>the experience of sexual assault and of participating in the criminal justice system from a victim’s perspective</td>
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<td>-</td>
<td>the role of the DPP witness assistant</td>
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<td>-</td>
<td>children as witnesses</td>
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<td>-</td>
<td>basic child development information</td>
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<td>-</td>
<td>communicating with children</td>
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<td>communicating with teenagers</td>
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<td>-</td>
<td>children's responses to trauma</td>
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<td>-</td>
<td>special-needs groups</td>
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<td>-</td>
<td>Indigenous women and children</td>
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<td>-</td>
<td>mentally impaired women and children</td>
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<td>-</td>
<td>physically disabled women and children</td>
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<td>-</td>
<td>non–English speaking women and children</td>
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<tr>
<td>-</td>
<td>other agencies—what they do and how they operate</td>
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<td>-</td>
<td>overview of services in the ACT</td>
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<td>-</td>
<td>the Sexual Assault and Child Abuse Team</td>
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<td>-</td>
<td>ACT Policing general duties officers</td>
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<td>the Canberra Rape Crisis Centre</td>
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<td>the Service Assisting Male Survivors of Sexual Assault</td>
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21 New Zealand and Victoria Police both offer sessions given by victims of sexual assault on their experience of the offence and the court process. The SARP team was told these are the most powerful training sessions of all and are very well received by the police.
Ideally, all prosecutors would attend such training. At the very least, prosecutors dealing with sexual offences and child sexual and physical abuse should attend. The training could be provided as an intensive course or it could be provided over a number of months. Prosecutors who regularly deal with sexual assault matters should be encouraged to attend as much of the training as possible, and other prosecutors should attend if they are available. If there was any difficulty with voluntary attendance, attendance could be a pre-condition for prosecuting sexual offences.

SACAT officers would also benefit from some of the training program and could be invited to attend. This would help nurture a closer relationship between the DPP and SACAT.

12.4 Defence lawyers

The way a defence lawyer cross-examines a victim in court can have a huge impact on the victim. Our adversarial system encourages a style of cross-examination that is often referred to as ‘robust’ in legal circles but in reality can be aggressive and demeaning to the witness. Not all lawyers operate this way, but our legal system does tolerate styles of questioning that assert the superiority of the questioner over the questioned and are intimidatory. Effective cross-examination can be done without bullying. Exposure to other ways of eliciting information could give lawyers additional skills.

Defence lawyers could benefit from training related to the impact of sexual offences on victims, the impact of the legal process on victims, and aspects of dealing with child witnesses—such as communication and the developmental stages of children, as well as children’s reactions to trauma. Many lawyers might welcome the opportunity to become better informed.

The training offered to prosecutors could also be made available to defence lawyers through their professional bodies, the Bar Association and the Law Society, and through the ACT Legal Aid Office. The Legal Aid Office might have some sway in encouraging defence lawyers to undergo training as a pre-condition to being allocated cases dealing with sexual offences or child witnesses. The Bar Association and the Law Society should be encouraged to provide training for their members as part of Continuing Legal Education. It might also be possible to run some courses in conjunction with the DPP.

22 In a one-hour session given by Kay Bussey, a child psychologist at Macquarie University, it was apparent that an hour gives one an overview of the issues but does not in any way arm one with skills. It is suggested that there be some liaison with Ms Bussey about the delivery of more comprehensive training for prosecutors dealing with child sexual assault matters.
12.3 Defence lawyers should be offered training similar to that offered to prosecutors. This could be arranged through the Bar Association, the Law Society and the ACT Legal Aid Office. Consideration could be given to the Legal Aid Office requiring lawyers in the private profession who are seeking legal aid work to have completed such training before being allocated cases involving sexual offences and child sexual offences. The Bar Association and the Law Society should be encouraged to provide training as part of Continuing Legal Education for their members.

12.5 People working in a support role

Agencies referred to in this report—such as the Office for Children, Youth and Family Support; the Child at Risk Assessment Unit; the Forensic and Medical Sexual Assault Service; the Canberra Rape Crisis Centre; and the Service Assisting Male Survivors of Sexual Assault—all conduct and participate in training, both to train their own employees and to deliver training to relevant agencies. This section does not detail those training regimes; instead, it looks at gaps in training in terms of the agencies’ understanding of the criminal justice process and its relationship to victims of sexual offences. Training for Office for Children, Youth and Family Services officers investigating allegations of child abuse is not canvassed in any detail here: it is beyond the scope of this report. Chapter 4 refers briefly to training in this context, but the Office’s training needs, in its role in investigating child abuse, are not the subject of this report.

The clear message from the SARP team’s discussions with people working in relevant agencies in the ACT is that they want to know about the investigation and prosecution process. They want to know what happens at court and would like some basic information about procedure. To have confidence in the system, they need to know why the DPP makes the decisions it does in sexual offence matters: this would be made clearer if they understood something about the court process. Professional witnesses such as doctors and counsellors also want the opportunity to practise being cross-examined, rather than learn in court.

The DPP should develop a PowerPoint presentation dealing with sexual offences, court procedure, rules of evidence that frequently arise in sexual offence matters, the role of the DPP, and prosecution guidelines. Outside agencies—such as the police; the Canberra Rape Crisis Centre; the Service Assisting Male Survivors of Sexual Assault; the Domestic Violence Crisis Service; the Office for Children, Youth and Family Support; the Child at Risk Assessment Unit and the Forensic and Medical Sexual Assault Service—should be invited to attend information sessions.

Workshops on giving evidence should be developed for doctors from the Child at Risk Assessment Unit and the Forensic and Medical Sexual Assault Service; the workshops should be conducted by senior prosecutors. Less experienced prosecutors could attend to observe the leading of evidence from experts, and the defence bar should be invited to participate.23

Prosecutors providing training should develop the sessions in consultation with the intended recipients and be sensitive to the perspectives and needs of these organisations.

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23 In NSW the Department of Health’s Education Centre against Violence runs a one-day workshop for health professionals. It is conducted by two defence lawyers and covers report writing for court and giving evidence.
Agencies involved with victims, such as Canberra Rape Crisis Centre, would like their workers to receive more training that is not just about the criminal justice system but is more broadly relevant to their work. They are, however, constrained by their funding. There are two bodies that can deliver a range of relevant training—the NSW Health Education Centre against Violence and the Centre for Community Welfare Training. Both these bodies are based in New South Wales but will deliver training in the ACT. It might be advantageous to link up with these organisations, which have been providing training for many years, and have some of it delivered in the ACT for a number of agencies. Much of the training could be relevant to a number of government and non-government agencies.

At present there are limits on the training that can be bought by agencies such as the Canberra Rape Crisis Centre. To assess training needs and coordinate the delivery of such training, a working group should be established. It should have representation from the various non-government and government organisations involved with victims of sexual offences and child abuse, and its task should be to plan training initiatives and obtain government funding for them. Government funding could be sought through a coordinating agency such as the Victims of Crime Coordinator.

### Recommendations

#### Training for people working in a support role

12.4 The ACT Director of Public Prosecutions should develop a PowerPoint presentation on the prosecution of sexual offences, providing information about the law, court procedure and rules of evidence relating to sexual offences, as well as the role of the DPP in such proceedings. The presentation should be directed at people working in agencies involved with victims of sexual offences and child abuse.

12.5 The DPP should develop a Giving Evidence workshop for doctors from the Forensic and Medical Sexual Assault Centre and the Child at Risk Assessment Unit.

12.6 A working group on the training needs of agencies involved in sexual offences and child abuse should be established to discuss and organise training. Funding for the training should be made available after a needs assessment and should be administered through one of the government agencies dealing with victims of crime.

#### Court staff

12.7 Magistrates Court and Supreme Court staff who deal with and accompany witnesses to the closed-circuit television rooms should receive training in how to deal sensitively with vulnerable witnesses.
12.7 The Police

12.7.1 Current AFP training

The Sexual Offences Investigator Program is a three-week course conducted at the AFP Training College at Barton in Canberra. It is held twice every 18 months, and about 20 officers from ACT Policing attend each course. Participants are a mix of SACAT members, Territory Investigations Group investigators and general duties officers. There appears to be no structured process for selecting officers to attend the course: it seems to be a matter of individual officers’ availability. Some of the course participants do not intend to work in SACAT but see the course as a ‘tick in the box’ to bolster future transfer applications. In addition, course participants who during the course are found to have an aptitude for investigation of sexual assault and child abuse can be overlooked when new members are transferred to SACAT.

The course covers sexual offences committed on adult victims and sexual and physical abuse of children. In this way it differs from courses in some other states, where training in relation to offences involving children is conducted separately. The course is organised by officers at the Training College and is not coordinated through the SACAT team leaders. In some cases this has led to duplication of training. The objectives of the course are as follows:

- to provide specialised training for police officers in the investigation of sexual assault and child abuse
- to increase awareness of all aspects of the investigation of sexual assault and child abuse
- to define the roles and responsibilities of police and other interested parties
- to improve coordination, cooperation and communication between police and other interested parties.

The following topics are covered:

- interviewing techniques for victims, witnesses and offenders
- the Management of Serious Crime methodology
- forensic medical examinations and the use of the sexual assault investigation kit
- criminal profiling
- serial sex offenders and paedophiles
- internet-related crime
- DNA evidence
- drug-facilitated sexual assault
- search warrant preparation
- dealing with people with intellectual disabilities
the roles of the Office for Children, Youth and Family Support; the Child at Risk Assessment Unit; the Canberra Rape Crisis Centre; the Forensic and Medical Sexual Assault Centre; and the Service Assisting Male Survivors of Sexual Assault

- shaken baby syndrome
- interviewing children.

The primary teaching method is lectures given by experienced police officers and guest speakers from government and non-government agencies; other sessions deal with the day-to-day work of SACAT. The structure and content of the Program need to be improved significantly, in line with training programs in other jurisdictions.

12.7.2 Training for a joint investigation team

In Chapter 4 the SARP team recommends that SACAT and the Office for Children, Youth and Family Support move towards a joint investigation model for dealing with sexual and physical abuse of children. A thorough investigation is the key to successful prosecution and child protection in child abuse matters. Such investigations call for skill, adequate time and resources, and recognition of the uniqueness of child abuse. Joint training offers four main benefits:

- increased cooperation between police and child protection services though networking
- a greater understanding of the practices and procedures of both agencies
- better decision making
- cost-effective delivery of training.

Police and child protection services in a number of other Australian jurisdictions are involved in the joint interviewing of children, and there are many forms of joint training in Australia and overseas. The ICARE (Interviewing Children and Recording Evidence) Program in Queensland is recognised nationally and internationally as an innovative training process and would be a good program on which to model training for ACT Policing and the Office for Children, Youth and Family Support. The course was developed in 1990 by the Coordinating Committee on Child Abuse in response to demand for a training program on the interviewing of child abuse victims. In developing the training, the Committee was mindful of the following:

- the need to develop best-practice interviewing strategies, with the interests of the child the paramount consideration
- the need to develop a coordinated child protection practice
- the need to adapt court processes to better accommodate the special needs of child witnesses.

The ICARE training package covers interviewing children, legal considerations, communicating with children, and working in teams. ACT Policing and the Office for Children, Youth and Family Support should work together to develop a training package on the investigation of allegations of child abuse and the interviewing of children.
12.7.3 Training for SACAT Child Abuse Team members

Even in the absence of joint training for SACAT officers in the Child Abuse Team, there should be a stronger focus on training that is specific to the interviewing of children and the investigation of child abuse. As discussed in Chapter 4, training in the interviewing of children is a two-day component of the current Sexual Offences Investigator Program. This is in contrast with the three weeks of such training offered in the Queensland ICARE course. In New Zealand the course on interviewing children and investigating offences committed on children runs for 10 days, and there is a separate course on the investigation of adult sexual assault. In New South Wales Joint Investigative Response Team members receive training that is specific to their role as investigators of offences against children.

The current AFP Sexual Offences Investigators Program does not adequately cover the interviewing of children and the investigation of offences committed on them. The part of the course relating to children should be reviewed, with a view to ensuring that it provides comprehensive training in the interviewing of children and the investigation of allegations of sexual and physical abuse of children. This should be done by researching the content of courses in use in other states and overseas. The Sexual Offences Investigator Program should be divided into two courses—one dealing with child victims and the other dealing with adult victims. Until the course is restructured, members of the Child Abuse Team in SACAT should attend the ICARE course in Queensland.

12.7.4 Training for the Adult Sexual Assault Team

The base training for all members of SACAT is the Sexual Offences Investigator Program. Some SACAT members do, however, undergo training and attend conferences run by other policing services. Two courses that have impressed SACAT members are run by Victoria Police.

The Sexual Offences and Child Abuse Unit Course is available to members of the Sexual Offences and Child Abuse Units, the Criminal Investigation Units, and interstate police services. It covers all aspects of dealing with victims of sexual and physical assault, relevant legislation, protocols, interviewing and investigative techniques, and the Code of Practice. It also incorporates the Video and Taping of Evidence course, which is mandatory for Sexual Offences and Child Abuse Unit members.

The Sexual Assault Seminar held by the Victorian Sexual Crime Squad is also available to members of the Sexual Offences and Child Abuse Units, the Criminal Investigation Units, and interstate police. The five-day course covers all aspects of sexual assault investigation:

- the role of Sexual Offences and Child Abuse Units
- videotaping of interviews
- pretext telephone call evidence
- stalking, rape, propensity and particularisation legislation
- the role of the Victorian Institute of Forensic Medicine
- behavioural analysis
- DNA legislation and practices
- ethnocentric sexual assault
During the course, participants hear victims of sexual assault and child abuse speak about their experiences with the criminal justice system.

It is from these Victorian courses that the New Zealand Police Adult Sexual Assault Investigators Course was developed. Careful consideration was given to the structure and content of the Course, and it could be used as a benchmark in the development of a course for ACT Policing. The Course follows the normal structure of a police investigation—from the initial report through to the court process—and covers the following:

- rape—history, myths and perceptions
- dealing with victims
- rape trauma syndrome and post-traumatic stress disorder
- medical examinations
- drug rape
- initial inquiries
- DNA and forensics
- scene examination
- victim interviews
- criminal profiling and the use of information
- offenders
- the Crown Solicitor’s perspective
- victim impact statements
- reviews and debriefings
- stress awareness.

ACT Policing should develop a training package dealing with the investigation of sexual assault; it should be based on the New Zealand and Victorian training packages and on the results of research into training courses offered in other Australian states and other countries.
### Recommendations: Training for SACAT members

<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.8</td>
<td>The current Sexual Offences Investigator Program should be divided into two courses—one dealing with the investigation of offences against children, including the interviewing of child witnesses, and the other dealing with adults.</td>
</tr>
<tr>
<td>12.9</td>
<td>Training for SACAT members should be reviewed with the aim of providing comprehensive training in interviewing child witnesses. Guidance should be sought from the ICARE course in Queensland, the Evidential Video Unit training in New Zealand, and the NSW Police course on interviewing children. Members of the Child Abuse Team in SACAT should be required to attend one of those courses until a comprehensive course is available in the ACT.</td>
</tr>
<tr>
<td>12.10</td>
<td>If joint interviewing is adopted in the ACT, ACT Policing and the Office for Children, Youth and Family Support should work together to develop a training package covering the investigation of allegations of child abuse and the interviewing of children.</td>
</tr>
<tr>
<td>12.11</td>
<td>The Australian Federal Police should develop a comprehensive training package dealing with the investigation of sexual offences. The package should be based on the New Zealand and Victorian training packages.</td>
</tr>
</tbody>
</table>

### 12.7.5 Training for recruits and general duties officers

AFP recruits are required to attend a 16-week course at the AFP Training College, during which time they must complete the Diploma of Public Safety (Policing). This Diploma involves 14 competencies designed to give participants the theoretical knowledge and technical skills to perform the functions of a police officer.

The rudimentary training in responding to victims of sexual offences and child abuse is led by members of SACAT for approximately two hours. Four subjects are covered:

- the background to SACAT
- the SACAT investigational guidelines
- the first response to matters involving sexual assault and child abuse—including crime scene management
- child pornography.

The Canberra Rape Crisis Centre presents a session on victim sensitivity before the presentation of the SACAT component.

In view of the significant impact the first-response police officer has on both the victim and the preservation and collection of forensic material, it is vital that all officers undergo effective training. The Territory Investigations Group’s policy and reception officer structure—whereby the first response to reports of sexual offences is provided by general duties officers, rather than SACAT members—makes such training even more important.

General duties officers’ training in the first response in sexual offences needs to be substantially restructured and expanded. All recruits and general duties officers should receive the training described in recommendation 3.11. As it is also recommended in Chapter 3, the training should be delivered in the same way that family violence training is delivered, over three days.
Recommendation  Training for recruits and general duties officers

12.12 All ACT Policing recruits and general duties officers who might have contact with victims of sexual offence should receive the training described in recommendation 3.11. It should be delivered using the model of the Family Violence Intervention Program.
Appendix A  Part 2 of the ACT Victims of Crime Act

Part 2 of the ACT Victims of Crime Act 1994 gives effect to the UN Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, as follows:

Part 2  Treatment of victims of crime

4  Governing principles

In the administration of justice, the following principles are to, as far as practicable and appropriate, govern the treatment of victims:

(a)  a victim should be dealt with at all times in a sympathetic, constructive and reassuring way and with appropriate regard to his or her personal situation, rights and dignity;

(b)  a victim should be told at reasonable intervals (generally not more than 1 month) of the progress of police investigations about the relevant offence, except if the disclosure might jeopardise the investigation, and, in that case, the victim should be told accordingly;

(c)  a victim should be told about the charges laid against the accused and of any modification of the charges;

(d)  a victim should be told about any decision concerning the accused to accept a plea of guilty to a lesser charge or a guilty plea in return for a recommendation of leniency in sentencing;

(e)  a victim should be told about any decision not to proceed with a charge against the accused;

(f)  if any victim’s property is held by the Territory for the purposes of investigation or evidence—inconvenience to the victim should be minimised and the property returned promptly;

(g)  a victim should be told about the trial process and of the rights and responsibilities of witnesses;

(h)  a victim should be protected from unnecessary contact with the accused and defence witnesses during the course of the trial;

(i)  a victim’s residential address should be withheld unless the court directs otherwise;

(j)  a victim should not have to appear at preliminary hearings or committal proceedings unless the court directs the victim to appear;

(k)  a victim should be given an explanation of the outcome of criminal proceedings and of any sentence and its implications;
(i) a victim who is known to have expressed concern about the need for protection from an offender should be told about the offender’s impending release from custody.

5 Compliance with principles

A person who exercises a function in the administration of justice must have regard to the governing principles mentioned in section 4, as well as other relevant matters.
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