

OTHER REFORMS TO TRIAL AND SENTENCING PROCEDURES FOR SEXUAL OFFENCES – NATIONAL DISCUSSIONS, SENTENCING CONSIDERATIONS, AND INSTRUCTIONS TO JURIES

The Royal Commission made a series of technical recommendations about how to reform trial procedures to ensure accurate fact finding and fairness. These recommendations involved a detailed analysis of the fundamentals of the criminal justice system and how the right of an accused person to a fair trial intersects with the pursuit of truth, and the equally important rights of survivors of sexual abuse to a fair trial. How evidence is presented of the circumstances of abuse, how courts give direction to juries in considering that evidence, and how decisions are made about sentencing were all thoroughly considered. The ACT Government's work to implement the Royal Commission will be focused on engagement with legal practitioners, both prosecuting and defending, and the community to ensure that the rules in place for trials reflect best practice in terms of arriving at a fair, impartial outcome in criminal trials.

REFORM OF TENDENCY AND COINCIDENCE

WHAT'S THE ISSUE ?

Changes to the law of evidence were recommended to ensure that as much relevant information as possible about a person accused is placed before juries and judges. The Royal Commission found that evidence laws, including the law currently in place in the ACT, could be changed to ensure more consistent and fair outcomes for the community. Following the Royal Commission's report, the ACT is joining other States and Territories in a national conversation about tendency and coincidence evidence in particular.

Tendency evidence points to the character, reputation or behaviour of a person to show they have a tendency to act or think in a particular way. For example, conviction for a previous child sexual offence might be shown as tendency evidence that the accused has a sexual interest in children and a tendency to act on that interest.

Coincidence evidence is used to show that a person acted or thought in a particular way, because of the improbability of two or more related events occurring coincidentally. For example, if multiple children allege that a person sexually assaulted them in similar circumstances, the prosecution may use coincidence evidence to highlight the improbability of a number of similar, but false, allegations being made.

Tendency and coincidence evidence is only allowed in specific circumstances, to protect the accused from prejudice, and to help juries avoid confusing one charge with another. However, the Royal Commission concluded that 'the current law needs to change to facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual abuse matters' as a matter of urgency, as the current rules are resulting in injustice to complainants and the community.¹

¹ Royal Commission, *Criminal Justice Report, Parts III-VI* (2017), 591.

WHAT'S THE CURRENT LAW IN THE ACT?

The Uniform Evidence Act (UEA), which includes provisions governing the admissibility of tendency and coincidence evidence, applies in the ACT through the *Evidence Act 2011*. The Commonwealth, NSW, Victoria, Tasmania and the NT are also UEA jurisdictions. However, in spite of having parallel legislation, differences have emerged in how the tendency and coincidence provisions are interpreted and applied by the courts in NSW and Victoria. The ACT has tended to follow the NSW approach.

WHAT'S THE POSITION IN OTHER JURISDICTIONS?

As outlined above, the Commonwealth, NSW, Victoria, Tasmania and the NT are also UEA jurisdictions, but differences have emerged in interpretation and application of tendency and coincidence provisions as between NSW and Victorian courts. Along with the ACT, Tasmania has tended to follow the NSW approach.

WHAT THE ROYAL COMMISSION RECOMMENDS

The Royal Commission recommended that all jurisdictions reform their legislation to improve admissibility and cross-admissibility of tendency and coincidence evidence, and encourage greater use of joint trials, in child sexual abuse matters.²

For child sexual offence proceedings, the Royal Commission recommended that tendency or coincidence evidence should generally be admissible, except when the court determines that 'admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant'³.

The Royal Commission acknowledges that special rules for evidence in child sexual offence proceedings will create difficulties, but said it was 'satisfied that the current injustices are such that reform must proceed now in relation to child sexual abuse offences'.⁴

NATIONAL WORK ON REFORMS TO TENDENCY AND COINCIDENCE PROVISIONS

All Australian governments are currently working together to create a set of provisions that fulfil the Royal Commission's recommendations. These provisions are being considered by a national Working Group and the ACT Government will remain engaged and consider the outcomes in formulating its criminal justice reforms.

REFORM OF JUDICIAL DIRECTIONS AND WARNINGS

WHAT'S THE ISSUE?

Judges give warnings and directions to juries. Judicial warnings and directions are intended to ensure that the accused receives a fair trial and that the jury is given the necessary information and assistance to perform its tasks. The Royal Commission's work focused on ensuring that directions do not dissuade juries from believing vulnerable witnesses.

Some current judicial directions essentially warn juries against believing witnesses who have delayed reporting their experience of sexual abuse, or who are the only witness to it.

In the light of the evidence developed by the Royal Commission about the reasons for delayed reporting by victims of sexual abuse, as well as recognition that '[t]he typical sexual assault offence takes place in private without any other witnesses', these directions are clearly no longer appropriate.⁵

² Recommendation 44, *Royal Commission, Criminal Justice Report*.

³ *Royal Commission, Criminal Justice Report, Parts III-VI (2017)*, 650.

⁴ *Royal Commission, Criminal Justice Report, Parts III-VI (2017)*, 638.

⁵ *New South Wales, Legislative Assembly, Debates, 18 October 2006, 2961 (G McBride, Minister for Gaming and Racing, and Minister for the Central Coast, on behalf of R Debus, Attorney General) quoted in Royal Commission, Criminal Justice Report, Parts VII - X and Appendices (2017) 121.*

The Royal Commission has stated: ‘we are satisfied that no state or territory should retain [these] common law directions or warnings’.⁶

The Commission’s work has also raised the question whether information should be given to every jury about the behaviour of children generally, and the behaviour of children who have been subjected to sexual abuse.

Research has shown that children’s behaviours and reactions to child sexual abuse can be counterintuitive and inconsistent with juror expectations⁷, which may lead jurors to question the child complainant’s credibility, and doubt whether the abuse has actually occurred.

Incorrect assumptions can include that:

- a victim of sexual abuse will avoid the abuser;
- children who are abused display strong emotional reactions;
- a physical examination by a doctor will almost always show whether or not a child has been sexually abused; and
- an abused child will typically cry for help and try to escape.⁸

Usually, an expert witness is used to inform the jury that children may not respond in these ways. The National Child Sexual Assault Reform Committee has recommended that mandatory judicial directions should be given instead, containing the same information.

WHAT’S THE CURRENT LAW IN THE ACT?

In the ACT judicial directions and warnings are regulated by a combination of legislation⁹ and the common law.

SPECIAL MEASURES WARNINGS

Each special measure in the ACT requires a separate mandatory warning to the jury that the jury must not draw an adverse inference to the accused from the evidence being given in that way. In the case of a child victim giving evidence the judge is required to give four separate mandatory warnings to the jury, in relation to:

- the child given evidence by CCTV from a remote location;
- a support person being in the room with the child when the child gives evidence;
- the recorded police interview with the child being played as the child’s evidence-in-chief; and
- the pre-recording of the entirety of the child’s evidence (including cross-examination) at a pre-hearing prior to the trial.

Failure to give the warnings will result in the conviction being overturned. Actual injustice does not have to be demonstrated. A miscarriage of justice is presumed from the absence of the mandatory warning.¹⁰

⁶ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 191.

⁷ A Cossins and J Goodman-Delahunty, ‘Misconceptions or expert evidence in child sexual assault trials: Enhancing justice and jurors’ “common sense”’, *Journal of Judicial Administration*, vol 22, no 4, 2013, pp 171-90, 174-7.

⁸ A Cossins, J Goodman-Delahunty and K O’Brien, ‘Uncertainty and misconceptions about child sexual abuse: Implications for the criminal justice system’, *Psychiatry, Psychology and Law*, vol 16, no 3, 2009, pp 435-52, Table 2, p 440.

⁹ Evidence Act 2011 (ACT) – Part 4.5 Warnings and Information, ss165A and 165B. Evidence (Miscellaneous Provisions) Act 1991 (ACT), Division 4.2.6 – Sexual Offence proceedings – directions and warnings to juries, ss69, 70 and 71.

¹⁰ *Thompson v The Queen [2016] ACTCA 12*.

THE MARKULESKI DIRECTION

The *Markuleski* direction is regularly given in sexual offence trials in the ACT.¹¹ It relates to the credibility of the complainant – the alleged victim in the trial.

The *Markuleski* direction sees a judge tell a jury that a reasonable doubt about the complainant's evidence on any count ought to be taken into account in its assessment of the complainant's credibility generally.

A *Markuleski* direction permits the jury to consider a complainant's credibility in relation to one count as applying to all counts. This conflicts with the traditional request of juries that they consider each count separately to avoid compounding bias from guilt on one count in relation to the others, when numerous separate charges are combined into one trial.

WHAT'S THE POSITION IN OTHER JURISDICTIONS?

The Royal Commission noted that 'through many legislative amendments responding to decisions of the appellate courts, both NSW and Victoria have arrived at a position in relation to corroboration, delay and reliability that is consistent with the social science research'.¹² The Commission continued, '...the NSW and Victorian provisions continue to ensure that the accused can receive a fair trial by allowing for relevant directions to be given where necessary to assist the jury in a particular case, without relying on broad and incorrect assumptions based on stereotypes and misconceptions about women and children and how 'real' victims of sexual offences, including child sexual abuse, will behave'.

WHAT THE ROYAL COMMISSION RECOMMENDS

The Royal Commission has recommended changes to jury directions, and that jurisdictions like the ACT should consider a better system for managing the application of directions.¹³

The Royal Commission has stated that it is satisfied that common law directions or warnings, which effectively warn against believing witnesses who have delayed reporting sexual abuse, or where they are the only witness to it, should not be retained.¹⁴

The Royal Commission has recommended that all jurisdictions should introduce legislation to abolish the *Markuleski* direction,¹⁵ as Victoria has recently done¹⁶.

The Royal Commission recommended that, in advance of any more general codification of judicial directions, each state and territory government should work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial, or to otherwise assist juries by providing them with more information about the issues in the trial. If legislation is required, state and territory governments should introduce the necessary legislation.¹⁷

¹¹ *GW v The Queen* [2015] ACTCA 15 at [127].

¹² Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices* (2017) 140

¹³ Recommendation 65, Royal Commission, *Criminal Justice Report*.

¹⁴ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices* (2017) 191.

¹⁵ Recommendation 66, Royal Commission, *Criminal Justice Report*.

¹⁶ *The Jury Directions and Other Acts Amendment Bill 2017 (Vic)* was passed on 22 August 2017 inserting section 44G (Abolition of common law rules) into the *Jury Directions Act 2015 (Vic)*.

¹⁷ Recommendation 71, Royal Commission, *Criminal Justice Report*.

SENTENCING STANDARDS IN HISTORICAL CASES

WHAT'S THE ISSUE?

Sentencing is a complex and dynamic exercise, which changes in line with community expectations about punishment, deterrence and denunciation, and understandings of rehabilitation and criminality.¹⁸ Balancing these objectives is a complex task. It is even more complex in historic child sexual abuse matters.

Many child sexual abuse cases involve lengthy periods of delay in reporting and prosecution.¹⁹ In this context, a question has arisen as to whether the sentencing standards to be applied are those at the date of the commission of the offence ('historical standards'), or those at the date of sentence ('current standards').

CHANGING ATTITUDES

Over time, child sexual abuse sentences have increasingly produced heavier sentences.

This is a recognition of the shift in attitudes towards child sexual offending. It is arguable that past sentencing practices have become increasingly irrelevant and unjust.

Sentencing offenders under historic standards could potentially have the effect of 'undermining public confidence in the judicial system'.²⁰ It could also deter complainants from coming forward in historic cases, where there is a perception that a historic crime will not be treated with the same 'seriousness' as cases that have occurred more recently.²¹

WHAT'S THE CURRENT LAW IN THE ACT?

In the ACT, the *Human Rights Act 2004* provides that '[a] penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed'.²²

Section 33(1)(za) of the *Crimes (Sentencing) Act 2005 (ACT)* provides that the court is bound to consider 'current sentencing practice'.

WHAT'S THE POSITION IN OTHER JURISDICTIONS?

Australian jurisdictions generally sentence by applying historical sentencing standards. The NSW Court of Criminal Appeal has held that where an offender is exposed to harsher punishment than that which existed at the time of the offending and reliable statistics or source material exist so as to reconstruct the previous sentencing regime, a 'sentence should be imposed that reflects the applicable statutory maxima and sentencing patterns'.²³

The Commission noted that in Victoria, legislation directs the sentencing court to have regard to the maximum penalty for the offence and also current sentencing practices, among other things.

WHAT THE ROYAL COMMISSION RECOMMENDS

The Royal Commission recommended that sentences for child sexual abuse offences should reflect the sentencing standards at the time of sentencing, but must be limited to the maximum sentence available for the offence at the time it was committed.²⁴

¹⁸ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 293.

¹⁹ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 307.

²⁰ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 315.

²¹ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 315.

²² *Human Rights Act 2004 (ACT)*, s25(2).

²³ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 308.

²⁴ Recommendation 76, Royal Commission, *Criminal Justice Report*.

The Royal Commission noted that reference to historic maximum penalties and current sentencing standards ‘represents a fair balance’ and ‘does not infringe the right of an offender to face no harsher penalty than that which would have applied at the time of the offending’.²⁵ It also accords with the purpose of sentencing which ‘recognises the harm done to the victim of the crime and the community’.²⁶

WHAT THE ACT GOVERNMENT NEEDS TO CONSIDER

Should ACT laws about evidence, and how evidence is considered by Courts and juries, be reformed with a focus on ensuring outcomes that match evidence about survivor testimony, even where this means evidence that wouldn’t normally be admitted to court gets considered?

SEND US YOUR FEEDBACK

Help the ACT Government consider the questions above by sending your feedback to:

▷ Email: JACSLPP@act.gov.au (with the subject “**Criminal justice reform**”)

▷ Post:

Child sexual abuse reform options – Submissions

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Submissions must be received by close of business on **27 April 2018**. All submissions and comments will be treated as public, and may be published, unless the author indicates that it is to be treated as confidential. All requests for the submission to be treated confidentially will be respected and dealt with in accordance with any applicable laws, including freedom of information legislation.

²⁵ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 321.

²⁶ *Crimes Sentencing Act 2005 (ACT)*, s7(1)(g).



**Justice and Community
Safety Directorate**

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