



THE UNIVERSITY OF
SYDNEY



Submission to



Royal Commission into

Institutional Responses to Child Sexual Abuse



In response to Criminal Justice Consultation Paper

November 2016



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This is a joint submission between Sydney Law School and Survivors & Mates Support Network (SAMSN) drawing on a workshop held at University of Sydney on 18 October 2016. The workshop was facilitated by Professor Judy Cashmore and Associate Professor Rita Shackel with eight SAMSN members from three different states, including NSW, Queensland and South Australia, and SAMSN's co-founders, Craig Hughes-Cashmore and Shane McNamara, and the Chair of SAMSN's Clinical Advisory Board, psychologist Mark Griffiths.

Details of the workshop (agenda, informed consent forms, discussion questions) are included in the Appendix.

Survivors & Mates Support Network (SAMSN)

SAMSN is an NGO that provides resources to male survivors of childhood sexual abuse to help them deal with the past and live a full and rewarding life. SAMSN's mission is to build an Australia-wide support network so that no man experiencing the negative impacts of childhood sexual abuse suffers in shame, silence or isolation.

Since 2011 SAMSN has employed experienced psychologists and social workers to facilitate support groups for men and their families. These 8-week groups and one-day workshops provide practical and emotional support to men and their families; 204 men have completed an 8-week group and over 130 supporters/family members have participated in our Recovery Workshops. Just over 320 professionals have attended SAMSN's Health Professionals Workshops. SAMSN works to dispel the myths that can often prevent men seeking help and provide information to make it easier for them to disclose. SAMSN also conducts day-long workshops for health professionals and professionals who have contact with male survivors.

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Experience of the male survivors

The eight men who participated in the discussion group came from three different states and had a range of experiences with the criminal justice system and the civil courts. Three had been subjected to sexual abuse by more than one perpetrator. Several had reported unsuccessfully as a child or adolescent. All had finally reported being sexually abused as children in adulthood, with some delaying their report for several decades or longer, typical for male complainants. In one case, the prospect of criminal prosecution was delayed for more than 40 years given the statute of limitation in that state.

Several had sought some redress from the institutions involved including the Catholic church, the state statutory authority, a single-sex private school and a co-educational public high school. Three had experience of both civil and criminal proceedings in different states, and had hoped that the 'criminal justice' system would restore their faith in justice after the failure of the civil redress processes; unfortunately, the 'justice' aspect of the criminal justice system for victims and survivors was not apparent to them.

Their reasonable and fundamental expectation is that the criminal justice system should provide a means for children and adult survivors who were sexually abused as children to seek justice and hold the perpetrator accountable for their offences; those reporting to police often do so also in the hope that bringing the alleged offences to the attention of the police might help to prevent other children being abused. At the very least, it is reasonable to expect that the criminal justice system should do no harm to those appearing as witness-complainants – while also protecting the reasonable rights of the accused. To achieve this, accountability and transparency are crucial.

The survivors who participated in the workshop had a mixed experience in their treatment by the police, the ODPP, and the court during the initial investigation, the prosecution process, trial and sentencing in some respects. There was, however, a great deal of commonality in these survivors' views of what helped them, what they see as important concerns, and what they believe needs to change.

There is also some commonality with the experience and concerns about child complainant-witnesses that flows from their experiences of sexual abuse and the inherent betrayal of trust by their perpetrators. The dynamics of their abuse and their disclosure, the traumatic flashbacks, and the long-term effects for many adult survivors mean that they can be subject to many of the same issues. There has also been a common perception that delayed reporting, often for many years, jeopardises the chances of any prosecution or conviction but recent research for the Royal

Commission indicates that the chances are no less and indeed in many circumstances greater than for child complainants.¹

Issues in relation to police responses

The survivors who participated in the discussions strongly support the Royal Commission's statement that their contact with police was an important factor in "determining their satisfaction with the criminal justice response and in influencing their willingness to proceed with the report and participate in a prosecution" (page 14).

The particular aspects of the initial contact with police, and the interviewing and investigative process that were important include:

- the way in which they were treated in terms of the personal response, some duty of care, and the continuity of staff
- the environment in which the interviews were conducted
- the type of information they were given including explanations of the process, of legal jargon, and of the likely timeframe and reasons for any action
- appropriate and adequate communication about the progress of the investigation.

In general terms, the participant survivors had had a mix of experiences within and across states when they reported the alleged offences to police.

'Personal' response from the police

Several survivors reported positive experiences with police officers, particularly those working within specialised sex crimes units. In some cases involving female detectives, survivors reported "a remarkably good experience" in one case, this involved two female detectives who were "fantastic and 'got it'" although the environment itself was stress-inducing. The continuity of contact, and involvement with detectives such as this was greatly appreciated in that it allowed them to develop some trust in these police officers when divulging difficult and sensitive information, often for the first time.

Several, however, were much less positive about general police in the Local Area Commands, for example, where their experience was very much according to 'the luck of the draw'. In one case, a participant survivor going to the police on the first occasion was told to "go away and think about it", a message he perceived as discouraging him from proceeding. He did not go back for 10 years.

¹ J Cashmore, A Taylor, R Shackel and P Parkinson, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016.

Should all police who may come into contact with victims or survivors be trained to have a basic understanding of complex trauma?

There was very strong support for training for police in relation to the dynamics and the long-term effects of child sexual abuse, and the development of sensitivity and skills in interviewing and ensuring that they were able to elicit and document the 'right' evidence. The key words used were respect and sensitivity. In particular, survivors discussed the importance of police – and prosecutors – understanding the trauma response to abuse and how remembering and talking about the abusive incidents may lead to adult survivors “flipping in and out of being a child”, and often a frightened child who ‘tunes out’ and may be unable to respond to questioning at some stages. Some police were reported as showing some understanding and compassion:

“The detectives in my case, and a female prosecutor, were very good in giving me time to think, giving me some options to help me express my feelings and to manage flashbacks.”

“What was so important was the respect they showed by keeping appointments; for example, even when she was sick, the detective did not cancel.”

“I felt travelling back in time to similar requests unfortunately that was the reason I was there, so to be given the same response in similar context did feel traumatising. And there was not a lot of feedback, even when it was handed on to the DPP. But things improved.”

The process of taking a statement may not be conducive to obtaining the best evidence and trying to put the complainant at ease. Detectives taking statements should have the ability to touch type or preferably to record the statement to avoid constant stopping and starting and repetition (“Sorry can you say that again, what was that?”). This prolongs the process, decreases accuracy, and undermines any sense of being able to ‘tell the story’ in a coherent manner. This is particularly difficult and stressful when recounting the intimate details of abusive incidents.

Survivors also emphasised the importance of a non-judgemental response from police when they are experiencing periods of addiction and mental health problems. One survivor said he had “no support at all” and developed substance-abuse problems during the interviewing process. The interview experience may also leave complainants in an emotional state which means that they may be at risk travelling home alone afterwards, although many men would be very reluctant to admit to such vulnerability. One spoke of his suicidal state following one interview session, one of many over several months. For this reason, these participants suggested that the police should consider their duty of care to complainants, including referring complainants to victim support services and recommending that they bring another supportive adult with them for the journey home.

The environment

Concerns about the interviewing room within the police station were common. Even where the personal response of the police was appreciated, the rooms in which the interviews occurred were seen as stress inducing, and often used on multiple occasions over some months while their statement was being prepared. For example:

“The room was like a prison cell where there were no windows and no way of looking out to ‘escape’ and gain a peaceful view to manage stress.”

“The interview room was like a bunker, and I was there about twice-weekly over two months.”

For one survivor, the interviews were conducted in a room where the printer and photocopier for the station was located, so there were constant interruptions and a lack of privacy with people coming in to pick up their printing while the victim-complainant is detailing the incidents for the police. This was very stressful and disconcerting and experienced as being insensitive and lacking understanding and compassion.

“By Police making the effort to create an atmosphere that does not consist of photo copier machines, other police officers at their desk within ear shot; also I feel that a support person should be there to support and I feel that the connection needs to be between the support and the person giving evidence beforehand, because that way they will have some familiarity and relax some. Also just the interviewing Detective who is trained in responding and recording sexual abuse claims, and a camera operator if it is ok with everyone, and in an atmosphere that is neutral, local council building, agreed upon place.”

Adequate and appropriate information and communication

Is it important to victims and survivors that police maintain regular communication with them to keep them informed of the status of their report and any investigation?

Is it important to victims and survivors that, as much as possible, the same police investigate their report so that they can talk to the same police over time?

The response to both questions was unanimous and strong.

“My main issue? Lack of communication would be high on my list. And not using terminology that is translated without context.”

“During my time giving my statement I asked about how and when I would be communicated to, and was informed that I could contact them anytime I needed to. I asked to be kept up to date with new information and how my case would progress. I felt the responding communication was treated somewhat in a

“secretive response” because you were informed not to talk to anyone about the conversations.”

The information and communication complainant survivors were seeking concerned the likelihood of any action being taken, the likely timeframe and reasons for decisions, what the interviewing and investigation process would be, and the availability of guidelines and referrals to support services.

Several were asked to engage in a pretext phone call with their alleged offender/s, but the police provided no guidance on how they should conduct such a call and they were concerned about the unnecessary level of detail that they thought would be required about times, places, and dates which did not easily fit into such a conversation.

Continuity of contacts and investigating officers is seen as important in facilitating communication, and developing trust in the process. Keeping promises in relation to feedback and communication is also very important, regardless of staff continuity.

“It was really upsetting when you were told that the detective was going to call at 10 am on Monday and he did not do so – because you are hanging out for every bit of information and needing to know where things are going.”

I know from my personal experience [that continuity] is not the case. The investigating officer I first made contact with and took my statement has now moved on in her career and has another position within police. I receive little if NO communication from the QPS and have not for a number of years now.

Decision to prosecute

Relevant research in Australia and in other jurisdictions indicates that few matters that are reported to police proceed to prosecution, as outlined in the Consultation Paper. While there are clearly a range of factors that influence police and prosecutors in their decisions as to proceed or not and with what charges, there is little guidance for those involved in the process, and particularly for complainants and their families.

Research concerning delayed reporting with adult survivors in historical matters reporting to police some years or decades after the incidents suggests that adult survivors may be a selected group who are keen to see some justice and do persist.

Some complainants said they were actively discouraged by police, with the message “we don’t want to do this, are you going to be able to hack it? What the police might see as being realistic can be experienced as a “‘whack’ or a ‘slap down’”.

Managing people’s expectations and providing information that allows them to make an informed decision is critical. This includes, as proposed, making it clear to ‘victims (and their families or support

people where the victims are children or are particularly vulnerable)’ that they retain the right to withdraw at any stage and to decline to proceed further with police and/or any prosecution.²

One survivor at the time of first reporting, and on a number of occasions during the interview process over a number of months, indicated that he wanted some feedback about the likelihood of prosecution. He sought some reassurance that if he was to continue with further interviews that it was likely to proceed; otherwise he preferred not to undergo the stress involved in giving a lengthy statement. He was distressed by questions some months later that suggested that he was perhaps engaging in fantasy in relation to some parts of his story. The police then decided to halt the investigation but provided no adequate explanation for this decision. There should be a right to complain or seek a review of such decisions, as well as police and prosecution decisions to downgrade the charges.

Possible principles to inform initial police response

As the preceding discussion and comments indicate, we strongly support the Royal Commission’s proposed principles for the initial police response.

- All police who may come into contact with victims or survivors of institutional child sexual abuse should be trained to:
 - have a basic understanding of complex trauma and how it can affect people who report to police, including those who may have difficulties dealing with institutions or persons in positions of authority (such as the police)
 - treat anyone who approaches to police to report abuse with consideration and respect.

Possible principles to inform police investigations

Similarly, we strongly support the principles in relation to police investigations concerning:

- Reasonable steps to facilitate continuity in police staffing on investigations.
- The importance of police maintaining regular communication with child victims and their families, and adult survivors to keep them informed of the status of their report and any investigation – unless they have asked not to be kept informed.
- Particularly in relation to historical allegations of institutional child sexual abuse, police who assess or provide an investigative response to allegations should be trained to:
 - be non-judgmental and recognise that many victims of child sexual abuse may develop substance abuse and mental health problems, and some may have a criminal record
 - focus on the credibility of the complaint or allegation rather than the credibility of the complainant.

² Royal Commission Consultation Paper, p 15

Possible principles to guide police charging decisions

- The correct charges should be laid as early as possible so that charges are not significantly downgraded at or close to trial. Police should ensure that care is taken, and that early prosecution advice is sought where appropriate, in laying charges.
- In making decisions about whether or not to charge, police should not:
 - expect or require corroboration where the victim or survivor's account does not suggest that there should be any corroboration available
 - rely on the absence of corroboration as a determinative factor in deciding not to charge, where the victim or survivor's account does not suggest that there should be any corroboration available, unless the prosecution service advises otherwise.

We would also add a requirement:

- that police inform the complainant about the charges that are laid
- police document the reasons for proceeding or not, and for changing the charges
- police explain to the complainant the reasons for not proceeding or for changing the charges.

Of course, while principles are an important means of sending a clear message about values and approach, they need to be backed up by training, supervision and monitoring.

"The first time I reported the crime [in 1976 as an adolescent], I was laughed out of Court and jailed for six months. The two offenders did the crime but I did the time.

The second time I reported the crime [in 2011], the Police took about a year and a half to investigate my allegations allowing the offender to die with his reputation intact.

The third time I report the crime [in 2014], I ended up discontinuing the matter as I was forced to retell and relive my experiences time and time again and the Police did not seem to be interested in investigating the matter. I just gave up.

Many of the victims of child abuse feel humiliated and ashamed about what happened to them and had no recourse because they did not know who they could trust. The actions of the State, the Churches and the Police can only justify these victims' belief that the process is badly flawed."

Child sexual abuse offences

Should the offence of persistent child sexual abuse be reformed to recognise that victims and survivors who were abused repeatedly and extensively over a period of time may not be able to identify individual occasions of abuse?

Such offences are rarely prosecuted, largely because they require the approval of the Director of Public Prosecutions and they do not overcome the difficulty of remembering and particularising specific incidents in terms of their timing and other features. Both child and adult witnesses experience difficulties in particularisation when the incidents were repeated and similar in characteristics.

Should any remaining limitation periods that prevent charges being brought for child sexual abuse offences be removed?

The statute of limitations prevented action in civil or criminal matters for several survivors in this group and was the cause of considerable stress and a very strong sense of injustice. In one case, a survivor signed a deed of release with little understanding of its impact in terms of preventing action against the organisation and against the state though he was a ward of the state at the time of the abuse and thereby owed a duty of care.

Issues in prosecution responses

Should all prosecution staff who may come into contact with victims or survivors be trained to have a basic understanding of complex trauma?

Is it important to victims and survivors that, as much as possible, the same prosecution staff stay involved in the prosecution so that they can deal with the same people over time?

Are witness assistance services important in keeping victims and families informed and putting them in contact with support services?

Should there be more specialist services, including for Aboriginal and Torres Strait Islander victims and survivors, and for victims who are still children?

A common theme, and one that is clear from the research literature, is that various aspects of the investigative and prosecution process can replicate the abuse dynamic in terms of the sense of helplessness, being disempowered and patronised, not being able to tell your story in a meaningful way, and the perpetuation of secrecy and lack of trust. In particular, survivors stress the lack of control and disempowerment;³ it is not 'their' prosecution although it is their story and credibility

³ Royal Commission's *Consultation Paper on Criminal Justice*, p. 10:

'Some survivors who have participated as complainants in prosecutions have told us that they felt almost incidental to the criminal justice system and that they had little control over matters that were very important to them.'

that are under challenge and their pain that is on display. The lack of 'say' is generally seen to be more evident in criminal than in civil proceedings. While this is clearly not intentional, it requires those involved in an official role to have some capacity to really comprehend what this means for complainants. The real indictment of the system is that many legal and other professionals who know the system best would be very reluctant to allow their own child to be subjected to the same processes. It is therefore incumbent on those in the system and with responsibility for its design and management to reform in such a way that the professionals involved would be prepared to use it if a child or member of their family was in some circumstances.

The court experience

There are a number of aspects of the court experience that are stressful for complainant witnesses, including both children and vulnerable adults in child sexual abuse matters. These include the delays in the process, confronting the accused, having to recount the intimate details about difficult and sensitive matters, and being in the adult oriented court environment that is comfortable only for legal professionals and not for those giving evidence, particularly as witness complainants.⁴ Reforms and improvements in the process for child witnesses provide for some protections in terms of their evidence in chief being presented as the recorded investigative interview, giving evidence via closed-circuit TV, and having a support person. A pilot program in New South Wales also currently allows a witness intermediary to assist in the communication process in the police interview, and in court, and also provides for the pre-recording of the whole of the child's evidence prior to trial.⁵ There are clear presumptions for these protections for child witnesses, but survivors of historical child sexual abuse may not have access to similar protections, although it is clear that many are very vulnerable and may 'flip in and out of childhood' and their persona and thinking at the time of the abuse.

Constant delays and adjournments

Prosecutions typically involve delays at a number of points: the time taken for reports to be investigated; complainants and suspects interviewed; evidence collected; decisions to be made and charges laid; referrals made to the ODPP; pleas negotiated; and court dates set. Complainants have little control over these delays and the uncertainty this causes exacerbates the stress. More difficult and stressful for complainant/witnesses are the unexpected and sometimes multiple adjournments, cases not being reached in the court list, lengthy legal argument and voir dire, and aborted trials. Such delays are emotionally and practically stressful.⁶ For example, one survivor was an out-of-town witness, which meant:

⁴ ME Lamb, DJ La Rooy, LC Malloy and C Katz (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, John Wiley & Sons, Chichester, 2011.

⁵ J Cashmore, 'Child Witnesses' in L Young, M A Kenny, and G Monahan (eds) *Children and the Law in Australia*, 2nd ed, in press.

⁶ Cashmore et al, pp 209-213.

“I had to take time off work, and use my holiday entitlements; then I had to wait around with nothing to do in a hotel room but worry until the court or the judge was free. I was told every day that a court and a judge would be available the following day but after four days, I was sent home and the trial start date was re-scheduled for four months later.”

The experience of these survivors was consistent with the discussion of delays and adjournments outlined in the Consultation Paper (Chapter 8). There was over-listing of trials so that only a few proceeded; repeated adjournments with the defence not being ready to proceed; continuing episodes of physical and mental ill-health of the accused causing further delays. Each time, child witnesses and adult survivors need to prepare for the hearing, ‘gear themselves up’, and remember and be ready to recount traumatic experiences in stressful circumstances, only to be let down by the system. This takes a heavy toll and has resulted in mental distress, suicidal thoughts and withdrawal from the process.

It is therefore very important that these matters are managed more efficiently and with greater sensitivity to the impact on the complainant witnesses involved. The recommendations in the Consultation Paper provide some useful options which clearly need to be seriously considered and tested.

- While clearly there are practical difficulties involved in providing continuity of police and prosecutors, this is likely to have a significant effect on the efficiency and effectiveness of prosecutions process since it overcomes one problem with prosecutors being allocated matters and transferred to the case very late in the process, allowing very little time for preparation and undermining the confidence of the witnesses.
- Some specialisation of judges, as is occurring for the current pilot witness intermediary program in New South Wales, is likely to be helpful in maximising the particular knowledge, experience and skill that are needed in managing these matters.
- Encouraging early guilty pleas is crucial, and as the consultation paper argues so clearly, it serves the interests of all participants in the criminal justice system. The proposals by the New South Wales Law Reform Commission, not yet responded to by the New South Wales government, provide a promising ‘blueprint for change’ (p 340) and the basis for very useful recommendations.
- In particular, a clear scheme of maximum sentence discounts for early guilty plea to reward early plea and discourage a late one is an important recommendation.
- So also are these proposals related to case management and early identification of the issues, and changes to trial listing practices, as outlined in the consultation paper (pp 341–344).

Lack of information

The survivors in this workshop emphasised the need for complainants to be very persistent with both police and prosecutors in seeking information about the progress of their matter and gaining some understanding of the charges and what was expected of them as a witness.

“Unless you’re constantly chasing them up, you get nothing, except for one prosecutor and witness support liaison officer who had been fantastic.”

“We need a simple guide that explains terms that are familiar to legal professionals, eg, what’s a mention? We need to break down the language barriers.”

“I feel communication has stopped and the police are happy to hand it over to the DPP, and again there is little communication, only when asking for information, which we know is usually limited and in legal jargon, which I struggle to understand.”

“In my case I was able to give sufficient particulars, identify his penis, identify locations on and off the property, but was informed by the DPP that these were insufficient and could be used as general knowledge. I asked that if I was able to locate these specific places (which are in bushland) that it wouldn’t be good enough for court. I was also able to identify these occasions would sometimes happen during school holidays when most of the boys would leave for holidays with friends, family or other foster families.”

Being included from consideration of the charges, the reasons for any changes in charging and other decisions including plea negotiation was stressful, and in their view, disrespectful though not necessarily seen as intentionally so.

“I think too much is just pushed over our heads without any consideration for our position – I don’t think it’s necessarily meant disrespectfully, it is just the process.”

“Respect is such an important issue – not being patronised or put off by comments such as “you don’t need to know that.”

“Being asked your opinion of what you want out of the process – “feeling that you’ve been heard.”

A number of issues were raised concerning the adequacy of preparation for the court process and in particular, for their role as a witness. Reflecting on their experience, adequate preparation should include information about strategies to increase the chances of being able to tell their story as a coherent whole and in its proper context. For witnesses, this means knowing how to ask for clarification of legal terms and how to prevent being cut-off by the defence. Survivors generally preferred face-to-face meetings because of their trust issues and needing to know who they are talking to. For legal professionals and support staff, it also means being clear about the boundary between preparation and coaching – and the question was raised about what DPP witness assistance staff constitutes ‘coaching’, and also ‘contamination’ when there is more than one complainant witness?

Trauma-informed approach

Being required to constantly go back over the evidence to retrieve incidents and the details is consistently reported by complainants as very stressful and commonly triggering flashbacks, distress and tuning out. Some understanding of complainants’ emotional reaction and the effect on their

capacity to process information and to understand challenging questions is therefore important for prosecutors, support staff, and also for judicial officers who hear these cases and need to manage the proceedings in a way that respects the rights and protections both witnesses and the accused.

A clear theme in the research literature and in the feedback from complainants and other related witnesses is the premium on a fair process with ‘a level playing field’. This, however, was generally not their experience. Particularly emphasised was a court process where they are not harassed and intimidated by the defence, are given some protection by the Crown and by judicial intervention from oppressive and humiliating questioning; there was also a preference for a more inquisitorial or specialist process, sitting around a table with the judge and lawyers. Trust in the process is crucial – this involves having confidence in the competence and sensitivity in the legal and other professionals – in order to feel safe.

One survivor in his 60s felt bullied during cross-examination without protection from the Crown or the judge; he was subjected to 4 days of cross-examination after 4 days of evidence in chief:

“During the trial I stayed in a psychiatric hospital as a safety strategy – I continue to experience nightmares and flashbacks about cross-examination.”

Survivors also wanted some debriefing after pre-hearing meetings and at the end of the trial, including referral to victims’ services counsellors and some concern about how they were faring and how they were getting home after a difficult meeting or trial days, and what the outcome of the trial might mean.

In the words of one:

“Immediately after the trial, the prosecutor just said “Well now that’s over and your job is to try to get on with your life.”

“A conviction is often regarded as a successful outcome, but it doesn’t always have positive effects – “we secured a conviction, but it wrecked my life”.

Evidence of victims and survivors

Use of recorded investigative interviews

Would it help victims and survivors to give evidence if their evidence could be pre-recorded earlier, even before the trial starts, so that they do not have to attend the trial? Would this help survivors who are adults at the time of the trial?
--

The participants in this workshop supported the view that adult survivors should also be able to have the recorded interview used as their evidence-in-chief, and available for appeals and retrials. The main reasons were that it would provide for:

- A much improved flow in the police interview/s, not having to stop and start while the statement is typed

- A more accurate and powerful account
- Its use in re-trials and appeals
- Reduced stress and possibly more efficient and more accurate testimony in court; as outlined earlier, this is based on similar arguments as for children: that having to recount the statement and talk about the abuse can cause adult survivors to ‘flip in and out of childhood’ and their persona at the time of the abuse.

“This way it gives the survivor the opportunity to tell their whole story in context and not just focus on the act. I think this process will be of value in supporting and validating and avoiding the repetitive re-traumatization of writing and typing their statement.”

“I remember my time and giving my statement was alienating for me, walking in and presenting myself I truly had no idea what was before me. I met my detective and walked into her office, I started to explain myself and my history and while for the most part I felt she was listening, because we had to keep stopping and starting so that a) she could keep up with typing in the format that is required on the computer, b) had to keep retelling and try to help the detective to write it correctly because I was bouncing around with dates while explain, c) I truly feel that I was not able to tell my complete story in context for the detective was only interested in recording facts, not the situations that was very much a part of my time of being abused as a child. That context I feel would be very useful in understanding the complexities surrounding my time as an abuse victim of both the system and processing of my whole time (10+ years) in care.”

“I am in support of video recording for I feel that having the thought that I may have to repeatedly go through this process is not only daunting but it is also high-jacking my life, when I am trying the best I can under extreme circumstances.”

The quality of these recordings then becomes a very significant issue, and requires good understanding by police in the dynamics of sexual abuse, its effects on complainants and the way they might disclose, and regular training for police conducting these interviews in appropriate questioning.

Access to witness intermediaries for other vulnerable witnesses

Should there be intermediaries available, particularly for children and people with a disability that affects communication, to help communication between the victim/survivor (on the one hand) and the court and lawyers (on the other hand)?

The language used by lawyers and judges is often difficult for adult witnesses as well as child witnesses and those not trained in and familiar with the terminology, grammar and question

construction common to ‘legal language’.⁷ Any difficulties are exacerbated when the witness is under stress.⁸ Sexual abuse victims may have suffered some educational losses and disadvantage which means that they have more difficulty understanding such unfamiliar forms of language.

The communication difficulties that child witnesses that may also be a problem for adult survivors:

- Capacity to manage anxiety, embarrassment
- Lack of knowledge of the legal system and legal ‘jargon’
- Power imbalance
- Susceptibility to leading and complex questions (*You ..., Didn’t you?*)⁹
- Susceptibility to moral judgments – *Why didn’t you get away?*
- Context dependence, especially depending on age at time of abusive incidents and ongoing nature
- Male vs female victim experience – shame and guilt arguably greater for male victims.¹⁰

Similar issues apply to many adult survivors and vulnerable witnesses who feel that the way they are questioned undermines their capacity and denies them the opportunity to tell their story. The table below summarises the conditions that are optimum for obtaining the best evidence from children and vulnerable witnesses and compares it with the practical realities and adult survivors of child sexual abuse in the criminal justice system.¹¹

Optimum	Court
Soon after event/disclosure	Months/years after disclosure
At child’s pace	To fit limits of court schedule
Aim is to elicit complete, accurate account	Aim in cross-examination is to discredit witness
Questioner trained in child development and vulnerability	Legally trained — direct, forensic approach
Rapport building	Quick focus
Supportive tone	Cross-examination often harsh and accusatory
Open-ended and age-appropriate questions	Structured and often leading questions in cross-examination
Opportunity to follow up	Limited by rules of evidence

⁷ M Brennan and R E Brennan (1988). *Strange Language: Child Victims Under Cross Examination*. Wagga Wagga, NSW: Riverina Murray Institute of Higher Education.

⁸ References to come

⁹ S J Andrews, M E Lamb, and T D Lyon (2015). Question types, responsiveness and self-contradictions when prosecutors and defense attorneys question alleged victims of child sexual abuse. *Applied Cognitive Psychology*, 29, 253-261.

¹⁰ J Cashmore and R Shackel (2014). Gender differences in the context and consequences of child sexual abuse. *Current Issues in Criminal Justice*, 26(1), 75–104.

¹¹ A Cunningham and P Hurley, *A Full and Candid Account — Book 1: Overview of Issues related to Child Testimony*, Centre for Children and Families in the Justice System, London/Ontario, 2007, p 12.

Would it help to set 'ground rules' for how a victim or survivor should be questioned before they are cross-examined to try to ensure that questions are asked in a way that is not confusing, so that they can give their best evidence?

Clearly the interests of justice demand that complainant witnesses are able to provide relevant, accurate and comprehensive evidence, and a substantial body of evidence now indicates that this is often not possible in the typical court process, with an imbalance of power, language, and familiarity with the rules of the 'game'. It is important therefore that there are some ground rules to try to provide a more level playing field which respects and protects the rights of both the complainant and the accused.¹²

Child witnesses in the evaluation of the specialist jurisdiction in New South Wales in 2006 made it very clear that they did not believe that they had been able to tell their story; there were four main reasons for this:

- Being cut off or interrupted by the lawyer
- Being told, by either the judge or the lawyer, to "just answer the question asked"
- Found questions difficult or irrelevant – 'mumbo jumbo'
- Not being able to mention certain aspects of the offences because of admissibility issues.¹³

Adult survivors have also reported that they felt they had to represent themselves in court, to prepare themselves and seek information on how to counter the routine defence strategies and tactics to ensure they could tell their story properly and in context. There are consistent research findings that many of the strategies that defence lawyers use to cross-examine children (and adult survivors) are:

- ▶ stress-inducing and re-traumatising
- ▶ developmentally inappropriate
- ▶ 'suggestive and evidentially unsafe'.¹⁴

Crown objections and judicial intervention may help to protect child witnesses and vulnerable adult survivors, but intervention is needed more often than it commonly occurs despite some recent

¹² ME Lamb, DJ La Rooy, LC Malloy and C Katz (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, John Wiley & Sons, Chichester, 2011.

¹³ J Cashmore and L Trimboli, *An Evaluation of The Child Sexual Assault Specialist Jurisdiction*, New South Wales Bureau of Crime Statistics and Research, Sydney, 2005, pp. 50–1.

¹⁴ E Henderson, 'Persuading and Controlling: The Theory of Cross-Examination in Relation to Children' in H Westcott, GM Davies and R Bull (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, John Wiley and Sons, Chichester, 2002, pp. 279–93; NW Perry et al, 'When Lawyers Question Children: Is Justice Served?' (1995) 19(6) *Law and Human Behavior*, 609; J Spencer and M Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?*, Hartford, Oxford, 2012.

legislative requirements.¹⁵ For example, s41 *Evidence Act* requires the court to disallow questions that are:

- Misleading or confusing
- Unduly annoying, intimidating, humiliating etc
- Put in a tone that is belittling, insulting or otherwise inappropriate, and
- Have no basis other than a stereotype based on sex, race, culture or ethnicity, age or mental, intellectual or physical disability ...¹⁶

.... in the opinion of the court

But this requires recognition that questioning is developmentally inappropriate, oppressive or intimidating for a child and for adult witnesses with a trauma background. There is therefore a need for judicial and legal education to assist this recognition and also, as currently piloted in New South Wales after its success in the UK, the introduction of witness intermediaries in appropriate cases for child witnesses and vulnerable adult complainants.

Tendency and coincidence evidence and joint trials

Should it be easier to have joint trials so that all allegations against a particular accused can be heard and determined in the one trial?

Separate trials increase the stress and make it very difficult to impossible for the story to be conveyed to the factfinder with any integrity and context since events are ‘chopped up’ and the connections between them are hidden.

One of the main reasons child witnesses in the evaluation of the specialist jurisdiction in New South Wales in 2006 said they did not believe that they had been able to tell their story was that they were not able to mention certain aspects of the offences because of admissibility issues, especially in relation to separate trials. As one adult survivor said:

“I do not understand why it is requested this perpetrator not be not only trialled individually but also on the scale so he is rightly and lawfully tried. This person not only violated my rights but also my life, for the way I was betrayed was someone who knew what they were doing and how to take advantage of that. I was one of many, groomed through abuse and control.”

¹⁵ Cashmore, in press.

¹⁶ Section 41 includes the following factors that the court may take into account to determine if the questions are to be disallowed. These include: age, education, gender; ethnic or cultural background, language, background; skills, level of maturity and understanding and personality.

“I truly feel if the survivor has the opportunity to present themselves and put it in context their way, the truth can only come in reference on how it happened, and in doing this I feel helping to seek justice without over traumatising or dramatizing and what I am starting to learn in my pursuit to prepare my day for trial.”

Conclusion

The views of the survivors involved in this workshop reiterate the findings of a considerable body of research concerning the main issues for both child and adult complainant-witnesses involved in the criminal justice system. The key issue is treating complainant-witnesses with sensitivity, respect and understanding of the dynamics and the impact of sexual abuse typically involving the betrayal of the child’s trust. Trauma-informed practice is important that so also is some careful evaluation of what that means so that from room for it does not become a ‘catchword’ with many varied, and perhaps on occasions, empty of meaning.

What complainants are rightfully seeking is:

- To be treated with respect, empathy and with some understanding of the stress involved as a child sexual abuse victim/survivor and the subject of and witness in criminal proceedings
- **Trust** – competence and confidence in legal and other professionals – in order to feel safe, including a sense of some teamwork between the police and legal professionals and their own role as a witness
- **Accountability and transparency**
 - Clear information and guidance as to what is required of witness-complainants, what is likely to happen and when
 - Regular communication with police and prosecutors
 - Explanation of the reasons for decisions
- **Fairness and a level playing field in the court process**
 - Access to the protections for vulnerable witnesses
 - Accurate recording of their interviews for use as evidence-in-chief in court
- **Adequate support**

The hopes and expectations are expressed in writing by several:

“I hope that by writing this I am able to work through my involvement in pursuing justice for what happened and not knowing what that was growing up in the environment I did. But also through sharing and continually educating myself to be able to express myself in a manner that can identify flaws in the system that failed me.”

“While I personally did not feel comfortable at any stage of preparing for coming forward, having the opportunity to come forward legally was a burden I was able to relieve myself of (or so I thought), but it created a whole lot more issues. Time delays within the legal arguments, time delays with unhelpful institutions (Catholic), and the apparent sneakiness of the government to piggy back into the compensation (redress) without any consultation so that released the State from any legal action against the State of Queensland.”

“I was forced to retell and relive my experiences time and time again and the psychological and physical damage that has been perpetuated on me by both the offender and equally by system leaves deep scars that may never be healed. ...

How many other victims out there that need help and counselling before they also ‘snap’ but will not be discovered while the State, the Churches, the Police and the Justice System lack credibility and ‘drag their feet’. ...

We ask that justice be done and that the State, the Churches and the Police be held accountable for their actions or lack thereof and their failure to follow set procedures and guidelines.”

WORKSHOP DOCUMENTS

AGENDA – TUESDAY, 18 OCTOBER 2016

SYDNEY UNIVERSITY LAW SCHOOL

Workshop – Criminal Justice System



TIME	WHAT	NOTES
9.15am	Arrival and coffee	
9.30am	Welcome + Introductions	Craig - SAMSUN
9.40am	Police Responses	Professor Judy Cashmore
11am	Morning tea	provided
11.15am	Prosecution Responses	Associate Professor Rita Shackel
12.45pm	Acknowledgements & Close	Craig
1pm	Lunch	provided

Thank you for agreeing to participate in SAMSUN's co-submission to the Royal Commission on the Criminal Justice System.

For our consideration:

- A.** What are the TOP three improvements you would most like to see in the criminal justice response to (institutional) child sexual abuse – including police, prosecutions and trials?
- B.** Why?
- C.** What are three things that worked well for you and why?

Thank you for agreeing to participate in SAMSN's co-submission to the Royal Commission on the Criminal Justice System. Before the workshop, please give some thought to the following questions.

QUESTIONS

A/ What are the TOP three improvements you would most like to see in the criminal justice response to institutional child sexual abuse – including police, prosecutions and trials?

B/ Why?

C/ What are three things that worked well for you and why?

The following questions are based on the content in the Royal Commission's consultation paper.

1/ Issues in police responses

- Should all police who may come into contact with victims or survivors be trained to have a basic understanding of complex trauma?
- Should police do more to encourage victims and survivors to report their abuse?
- Should police provide more information to make clear that victims and survivors can withdraw at any stage in the process?
- Should police provide more options for reporting, including by telephone and online?
- Is it important to victims and survivors that police maintain regular communication with them to keep them informed of the status of their report and any investigation?
- Is it important to victims and survivors that, as much as possible, the same police investigate their report so that they can talk to the same police over time?

2/ Police responses and institutions

- If you reported abuse to the institution or to a support service, would you want them to pass your report onto police? Would you want them to ask for your consent before they gave police your name and contact details? If the institution or support service was going to give police your name and contact details even if you did not consent, would you still report to the institution or support service? If you were willing to have your report of abuse passed onto police, why would you not make the report yourself directly to police?

3/ Child sexual abuse offences

- Should the offence of persistent child sexual abuse be reformed to recognise that victims and survivors who were abused repeatedly and extensively over a period of time may not be able to identify individual occasions of abuse?
- Should any remaining limitation periods that prevent charges being brought for child sexual abuse offences be removed?

4/ Third party offences

- Should there be offences for failing to report child sexual abuse? Should there be offences where senior people in an institution fail to intervene to protect a child from sexual abuse?

- Should there be offences where the institution itself (rather than its management or other staff) are prosecuted for failing to protect children from sexual abuse?

5/ Issues in prosecution responses

- Should all prosecution staff who may come into contact with victims or survivors be trained to have a basic understanding of complex trauma?
- Is it important to victims and survivors that, as much as possible, the same prosecution staff stay involved in the prosecution so that they can deal with the same people over time?
- Are witness assistance services important in keeping victims and families informed and putting them in contact with support services? Should there be more specialist services, including for Aboriginal and Torres Strait Islander victims and survivors, and for victims who are still children?
- Should there be a right to complain or seek a review of the prosecutor's decision to discontinue a prosecution or to withdraw charges? What about for accepting a guilty plea to lesser charges?

6/ Evidence of victims and survivors

- Would it help victims and survivors to give evidence if their evidence could be pre-recorded earlier, even before the trial starts, so that they do not have to attend the trial? Would this help survivors who are adults at the time of the trial?
- Should there be intermediaries available, particularly for children and people with a disability that affects communication, to help communication between the victim or survivor (on the one hand) and the court and lawyers (on the other hand)?
- Would it help to set 'ground rules' for how a victim or survivor should be questioned before they are cross-examined to try to ensure that questions are asked in a way that is not confusing, so that they can give their best evidence?

7/ Tendency and coincidence evidence and joint trials

- Should it be easier to have joint trials so that all allegations against a particular accused can be heard and determined in the one trial?

8/ Sentencing

- Should convicted offenders be prevented from raising their 'good character' to seek a reduced sentence if their good character helped them to commit the offences? For example, their reputation might have helped them to keep their job working with children, or might have helped parents to trust them to look after their children.
- Should convicted offenders be sentenced according to sentencing standards at the time they are sentenced, rather than the standards that applied at the time they committed the offence?

9/ Appeals

- Should a victim or survivor's evidence in a trial be recorded so that they do not have to give evidence again if there needs to be a retrial?



Royal Commission Workshop – Criminal Justice System

At SYDNEY UNIVERSITY LAW SCHOOL

with Judy Cashmore and Rita Shackel

PARTICIPANT

CONSENT

FORM

I, [PRINT NAME], agree to take part in this discussion group.

In giving my consent I state that:

- ✓ I understand that participating in this workshop is completely voluntary and that I may leave the discussion at any time if I do not wish to continue.
- ✓ I understand that the workshop discussion may be recorded to provide an accurate record for the purposes of writing the submission but that I will not be identified without my consent.

I consent to: **Audio-recording** YES NO

- ✓ I understand that any personal information about me that is collected during this process will be confidential and will only be used for purposes that I have agreed to.
- ✓ I am happy to be contacted for any follow-up or future related activities:

YES NO

- ✓ I understand that the submission may be published online, and some material may also be used in publications but it will not contain my name or any identifiable information about me unless I consent to being identified using the “Yes” checkbox below.

- Yes, I am happy to be identified.
- No, I don't want to be identified. Please keep my identity anonymous.

Would you like to receive a copy of the submission? YES NO

Please provide contact details for future correspondence: _____

.....

Signature and PRINT name

Date

