Justice Connections

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Edited by

Patricia Easteal AM

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FOREWORD

LORRAINE WALKER

As a lawyer, one is sometimes asked whether one considers that our legal system delivers "justice". This begs the question, what is justice? Over a number of years in the profession, I have come to answer this question along the lines that justice is a fortuitous but uncertain by-product of our legal system.

This superficially cynical response is in fact far from cynical. It is a reflection of my conclusion, based upon experience as a military lawyer, a prosecutor, a solicitor, a barrister and a judicial officer, that the complexities of legal processes are such that there is no replicable formula for "justice". In the end, law is truly an art, not a science. Attempts to reduce legal principles to mathematical or scientific formulae are, it seems to me, doomed to failure. That is because, unlike science, the variability in legal process is infinite. The rules may remain largely unchanged but the common denominator in all legal processes is people. Often people are not entirely honest, often not entirely reliable, often not entirely thorough and never entirely predictable, and that's just the lawyers. Throw in some litigants and judges and one can readily appreciate that each legal "experiment" will have a somewhat different outcome, despite a significant commonality of factors.

Furthermore, what is perceived as justice by one player in the legal theatre may well be perceived as injustice by another. Justice is unlikely to be an absolute. Here it is to be distinguished from fairness, which is more readily capable of external validation.

It is the essence of justice that it will be applied in accordance with all the strengths and weaknesses of those whose role it is to facilitate it. And because the "experiments" are not replicable, that may cause people to question its facilitation, as indeed they should.

Some of the mystery of the professions, including law, has been exposed in recent decades, with generally higher education and a proliferation of knowledge through the internet. Perhaps this has contributed to an increasing distrust of the legal process.

Certainly there is a trend towards legislative proscription of human relationships which runs the risk, despite the best intentions, of attempting to reduce justice to a formula. There has been significant comment about one such area of concern, that of overly prescriptive sentencing legislation. Largely reflecting an effort to placate public perceptions of undue lenience perceived by some community members as "injustice", a mandated formulaic approach adopted in some jurisdictions has significantly hampered judicial officers in the art of sentencing effectively. To an extent, sentencing has become an exercise in "ticking the boxes".

That is not to suggest that public opinion is a matter of no significance to creating and implementing law. Public opinion is the very essence of effective law-making and application. Unless the law is accepted by the majority, it cannot operate to regulate human relationships and a basic pillar of civilised society will fall. So "public opinion" cannot be arrogantly disregarded.

In assessing how justice is to best be achieved in any particular legal process, therefore, community standards and expectations are an essential consideration. But these cannot be achieved by the application of a proscriptive formula. Perfect justice may not be achievable at all. But public scrutiny of the process, so readily achievable now with the available options for communication, provides the potential for more informed assessment and critique of the application of legal process. Initiatives such as "You be the Judge" on the Victorian Sentencing Advisory Council website, leading to informed comment, are positive. Publically broadcast court proceedings are likely to also assist in greater public understanding of at least judicial application of the law. Such dissemination of cases may also produce more informed feedback and, possibly a reduced need for legislative intervention in the judicial system through increased confidence in the judicial system.

The Symposium that is reflected in this book brought together participants from academia and the legal and related professions. Each of the chapters is an insightful consideration of particular aspects of our justice system. Such communal reflection provides another avenue for the necessary ongoing review of our legal system, certainly one I very much appreciated. I trust that the reader is able to absorb, dissect, analyse and continue the "justice" conversation.

PART I

JUSTICE BEHIND THE SCENES

INTRODUCTION

ROSALIND F. CROUCHER

Common Threads

This part of the Justice Connections Symposium included three papers: one on a particular amending statute in the area of sexual and violent offences; and two on sentencing — the first concerning the relevance of Aboriginality in sentencing, the second on data collection. My challenge as "discussant" was to bring the intellectual threads of the three papers together.

I was delighted to undertake such a responsibility for the first *Justice Connections Symposium* held by the University of Canberra in 2011 and the set of papers I commented upon then was similarly grouped under the heading "Justice Behind the Scenes". On that occasion I was able to point to echoes in my own work. Curiosity about how legislation gets to where it is, revealed to me how accidental, or serendipitous, much law reform can be — especially when considered outside the arena of contributions by institutional law reform bodies, such as the Australian Law Reform Commission.[1] In drawing the threads together on that occasion I spoke of the power of people in law reform. A happy coincidence was the fact that the Symposium was held on Mabo Day, 3 June — the day on which the High Court delivered its judgment in *Mabo & Ors v Qld (No 2)*,[2] upholding the continuity of Koiki Mabo's title to his land on Murray Island and, with it, signalling the end of *terra nullius* in Australia. That litigation grew out of a meeting between a gardener and a couple of academics. The gardener was Koiki or "Eddie" as he was known. In 1974 Koiki had a conversation with James Cook University academics, Professor Noel Loos and Henry Reynolds, about his land on Mer (Murray Island) that started a ball rolling that ended up in the High Court, making legal history. It was a fortuitous — serendipitous — meeting, combining principle, passion and champions.

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[1] Published in *Canberra Law Review*: Rosalind Croucher, 'Introduction: Justice Behind the Scenes' (2011) 10(2) *Canberra Law Review* 1.

[2] *Mabo & Ors v Qld (No 2)* (1992) 175 CLR 1.

Once law reform "happens", through the introduction of new laws — such as the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT)[3] — justice "behind the scenes" invites a different kind of consideration. It is now not about *how* the law happened, but rather, is it *working*? Is it *fair*?

Reflections on Justice as Fairness

To me, the linking theme in the chapters in this first part of *Justice Connections* is the idea of "fairness" in justice, interrogating it from both a subjective and objective perspective. The dominant approach is one of "reflection" — in both a practical and philosophical sense — that "justice" is improved, made fairer, by a process of reflecting; by capturing reflections as data; by critical analysis and commentary upon steps taken ostensibly to improve justice.

The chapter by Jess Kennedy and Professor Patricia Easteal, "View from the Inside: *The Sexual and Violent Offences Legislation Amendment 2008*" (Kennedy and Easteal), and that by Christina Lewis, Anthony Hopkins and Dr Lorana Bartels, "The Relevance of Aboriginality in Sentencing: The Potential of Pre-sentence Reports — Missed Opportunities in the Australian Capital Territory" (Lewis et al), focus principally upon the subjective aspect of justice and the lived experience of individuals within the justice system. For Kennedy and Easteal their reflective analysis is informed by surveys and interviews; for Lewis et al, it is through critical consideration of cases and by interviews. Each of these two chapters is concerned with justice as fairness at an individual level: to victims of sexual assault (Kennedy and Easteal); to Aboriginal accused and convicted offenders (Lewis et al).

The challenge in placing a critical lens on justice in the sense of "fairness" felt or perceived at an individual level, is to ensure that the systemic aspects of justice — the sense of a justice "system" in a wider society — also actively protect the right to a fair trial for an accused at the same time as extracting the best possible evidence from witnesses who may otherwise be at a disadvantage. The issue at a systemic level is, therefore, how to let the subjective in.

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[3] The introduction of this legislation was the focus of the paper by Jessica Kennedy and Patricia Easteal in *Justice Connections I*, published subsequently in the *Canberra Law Review* as: Patricia Easteal and Jessica Kennedy, 'The Conception, Gestation and Birth of Legislation: The *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT)' (2011) 10(2) *Canberra Law Review* 8.

The focus on the subjective aspect of justice as fairness is clearly evident in the title of the first of the chapters, by Kennedy and Easteal: "view from the inside". One of the key messages from their chapter is the importance of support for victims of sexual and violent offences.[4] As one of the participants in their study commented, "I felt I always had support with me and someone to talk to".[5] But there is also a reminder that overly protective responses, such as an almost automatic assumption that evidence will be given via CCTV, may override or fail to consider the autonomy of the victim in allowing choice as to the mode of presentation of evidence. Kennedy and Easteal refer to a victim witness who chose not to give evidence by CCTV "because she felt she had greater control and a greater presence in the courtroom". But, in such a case, a victim witness needs to be given a choice about other measures, such as the use of a screen, so that she or he does not have to see the accused. The interviews and survey, while working from a very small sample, provide some valuable suggestions as to aspects of the mode of supposedly 'protecting' witnesses that may be re-evaluated in practice.

The chapter by Lewis et al begins with the challenging question as to why Aboriginal and Torres Strait Islander offenders are overrepresented in the custodial population in Australia — 13 times higher than the general population on 30 June 2011.[6] Their work also demonstrates the power of a support person, this time in the form of a barrister or legal practitioner to

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[4] This was also a message that came through very clearly in the work the Australian Law Reform Commission did in the area of family violence: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response,* ALRC Report No 114/NSWLRC Report No 128 (2010). See especially chapter 32 of the Report. A similar conclusion was identified in a different, but analogous context, in the review of the Women's Family Law Support Service, a joint initiative of the Family Court, Sydney registry, and the NSW Women's Refuge Movement: Lesley Laing, *Women's Family Law Support Service Evaluation — "They Should Have This in Every Court*" (University of Sydney, Faculty of Education and Social Work, 2011) <ses.library.usyd.edu.au/bitstream/2123/7917/1/WRM_WFLSS%20Evaluation%202011.pdf>. I had the privilege of launching this evaluation: *"They Should Have This in Every Court" — Women's Family Law Support Service Evaluation* (2011). See <www.alrc.gov.au/news-media/2011/%E2%80%98they-should-have-every-court%E2%80%99-womens-family-law-support-service-evaluation>.

[5] Jessica Kennedy and Patricia Easteal, 'View from the Inside: The *Sexual and Violent Offences Legislation Amendment Act 2008*', footnote 43.

[6] Citing: Australian Bureau of Statistics (ABS), *Prisoners in Australia, 2011*, Cat No 4517.0) (ABS, 2012).

put the case for the individual, bringing to the consideration of sentencing relevant issues of the individual's life and circumstances — including in this case the offender's Aboriginality. The signal role that pre-sentence reports may play in this context is identified. The challenge posed by this chapter is the appropriate way in which such matters can be considered. How do you recognise the "full complexity of post-colonial Indigenous experience" and its relevance "to achieving equal justice in sentencing"?[7] Lewis et al point to the Canadian model as an example of how "culturally relevant sentencing options" may be developed.[8] The sample in this chapter was also a very small one, but the questions are still key ones for future research. Particularly crucial in such research is achieving an appropriate balance between the subjective considerations of the individual offender's circumstances in the sentencing context, understanding what a recognition of the offender's Aboriginality means and its relevance in that context, and the objective considerations of a justice system working fairly and impartially across the entire Australian community.

The objective perspective of fairness is seen most strongly in the third of the chapters in this set, by Dr Lorana Bartels, "Sentencing in the Australian Capital Territory". In its consideration of sentencing data in the ACT, this chapter acts as a bridge between the idea of fairness or justice as subjective and the broader needs of justice in an objective or systemic sense. Bartels emphasises that the availability of public sentencing data and the role of sentencing councils play a vital part in developing evidence-based sentencing policy and improving public knowledge and understanding about sentencing.

Justice and Iconography

The systemic lens is one that reflects a more objective sense of justice, one that is embodied symbolically in the image of the statue of justice that dominated the program brochure for the Symposium and was projected on the screen throughout the day's proceedings. It is the image of the Roman goddess of justice, Justitia. She holds the scales of justice in her hand, evenly balanced, and in her other she bears a sword — the ultimate image of authority of the State. This particular statue stands in front of the City

[7] Christina Lewis, Anthony Hopkins and Lorana Bartels, 'The Relevance of Aboriginality in Sentencing in the Australian Capital Territory: Missed Opportunities and the Potential of Pre-Sentence Reports'.
[8] Ibid.

Hall in Frankfurt, Germany.[9] It forms part of the Gerechtigkeitsbrunnen (Fountain of Justice) and was built in 1543.[10]

Copper engraving, Caspar Merian (1627–1686) entitled: *Curia Francofurtensis ad Moenum. cum Foro Piscario. Römer. or Town Hall of Franckfurt am Mayn. Including the Square. called the Römerberg.*[11]

[9] The complex of buildings is referred to as the "Römer" which received its name in the 14th century from "Zum Römer" ("to the Roman"), denoting its long history as the site of the coronation of Holy Roman Emperors: *Römer Information and Pictures* (2012) Go There Guide <www.gothereguide.com/romer+frankfurt-place/>.

[10] *Römerberg* (2012) A View on Cities <www.aviewoncities.com/frankfurt/romerberg.htm>.

[11] *Curia Francofurtensis ad Moenum. cum Foro Piscario. Römer. or Town Hall of Franckfurt am Mayn. Including the Square. called the Römerberg* (2012) WikiMedia <http://commons.wikimedia.org/wiki/File:Frankfurt_Am_Main-Caspar_Merian-BUAAKUCEWUCA-111_112-Curia_Francofurtensis_ad_Moenum_cum_Foro_Piscario_Roemer_oder_Rathhauss_zu_Franckfurt_am_Mayn_Sampbt_dem_Platz_der_Roemerberg_genant.jpg>.

In reflecting upon the idea of justice as fairness as a theme expressed in the three chapters in this section of *Justice Connections,* and particularly the tensions between the subjective and objective senses of fairness, I found curious resonances in this particular statue and its representation of justice. There are two particular things I found intriguing. First, it is the fact that this statue is not blindfolded, where many images of justice are. The second is the way this particular statue is facing in its physical location.

The blindfolded image of justice is clearly one that signifies objectivity: that justice should be delivered fairly to all, regardless of the standing or wealth of those who come before her. It is the classical embodiment of impartiality. Interestingly, however, Roman depictions of Justitia showed her without a blindfold,[12] and it was only from about the same time as our particular statue of Justitia was born that she appeared with her eyes covered.[13] Many representations of Justitia continue with uncovered eyes: including the statue on top of the Old Bailey courthouse in London and the statute outside the Supreme Court of Queensland, Brisbane, Queensland. While the scales are evenly balanced in all the images — blindfolded or not — I was certainly struck by the particular significance of an open-eyed representation of justice in my musings upon the themes evident in the set of chapters under consideration.

The second intriguing thing about our statue in the context of a discussion of themes is that she faces *towards* the city hall. And without a blindfold she is staring into the place where justice is meted out — a symbolic expression of the tensions between subjective and objective conceptualisations and practice of fairness. I know it may be seen as drawing a considerably long bow, but as a discussant I am accorded such licence.

Accepting That Justice is Fair

Community understanding and acceptance of the justice system as one that is fair is played out on a daily basis in response to reports of sentencing decisions. The quote of an observation by the former Chief

[12] The helpful Wikipedia entry for "Lady Justice" cites: 'The Scales of Justice as Represented in Engravings, Emblems, Reliefs and Sculptures of Early Modern Europe', in G Lamoine (ed), *Images et Representations de la Justice du XVie au XIXe Siecle* (University of Toulose-Le Mirail, 1983) 8: *Lady Justice* (2012) Wikipedia <http://en.wikipedia.org/wiki/Lady_Justice>.

[13] Ibid, with link to the statue in the Fountain of Justice in Berne: *Berner Iustitia* (2012) Wikipedia
<http://en.wikipedia.org/wiki/File:Berner_Iustitia.jpg>.

Justice of New South Wales, the Hon James Spigelman AC QC, included by Bartels in the opening section of her chapter, reflects that position acutely, namely that "sentencing engages the interest, and sometimes the passion, of the public more than anything else judges do. The public's attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice".[14] That public confidence is well expressed in the imagery of the balanced scales of Justitia. Another way of expressing this is to ask whether the decision passes the *Daily Telegraph* test — does public confidence in the fairness of the justice system, as discussed over the breakfast table and in the morning tabloid press, remain strong, notwithstanding criticism of individual decisions.

The criminal justice system is tested all the time in terms of fairness. Writing in 1983, in his collection of essays, *Reform the Law*, the Hon Michael Kirby AC CMG remarked that "the sentencing of convicted criminals is a matter about which citizens have strong opinions".[15] Professor Arie Freiberg, quoted again by Bartels, amplified such a view in saying that sentencing is "played out not only in the courts but in the broader arena of public opinion" and that it is "as much about politics as it is about law or criminology".[16]

The three chapters weave between them the subjective and objective aspects of justice as fairness. Surveys and interviews capture very directly the subjective element - the lived experience of the law. Data collection of sentencing practices provides a connection to the objective of policy formation and law reform, as well as informing judicial decision makers on a daily basis. In reflecting on the value of such approaches, Kirby remarked that, while some are "dubious about the value of opinion surveys and detailed analysis of sentencing practices and statistics", "there is room for more science":

> Inconsistency and disuniformity in the name of individual judicial discretion may be no more than lazy self-indulgence on the part of a legal profession resistant to change. The defence of the right of the judge or magistrate to have his personal idiosyncratic views, at the cost of the citizen coming before him for judicial punishment, is no longer acceptable.[17]

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[14] Lorana Bartels, 'Sentencing in the Australian Capital Territory', footnote 2.
[15] Michael Kirby, *Reform the Law* (Oxford University Press, 1983) 128.
[16] Bartels, above n 14, footnote 117
[17] Kirby, above n 15, 133.

Another metaphor to describe the common threads in the chapters is that of a mirror. The chapters reflect inwards, looking closely in the looking glass. But they also provide a challenge to turn the mirror outwards, to use the critical insights obtained to provide a basis for continuing reform of the law. Through a careful and, over time, a more extended consideration of the subjective, lived experiences of the justice system in the areas under review, those insights will increase in value and validity. Such a mirror needs to keep turning — from the inwards to the outwards view — so that the conversation continues.

With respect to sentencing and law reform, Michael Kirby reminds us that "the reform of the sentencing of convicted criminal offenders is a controversial task. The last word will never be spoken on sentencing and criminal punishment".[18]

Many words are required for improvement of the law: by academics — through critical analysis, building of data and by submissions to law reform and other bodies engaged in law reform projects; by sentencing councils and similar bodies, in continued analysis and the development of model guidance; and by law reform bodies — where appropriate Terms of Reference are given or independent research initiated. The suffragists of the late nineteeth and early twentieth centuries adopted and advocated the policy of "much speaking" in order to achieve their goals. It is a good rule of thumb in law reform and in interrogating "justice connections" — the theme and title of this book.

[18] Ibid, 152.

CHAPTER ONE

VIEW FROM THE INSIDE: *THE SEXUAL AND VIOLENT OFFENCES LEGISLATION AMENDMENT ACT 2008*

JESSICA KENNEDY
AND PATRICIA EASTEAL

Introduction

The experiences that sexual assault victims have in the criminal justice system can compound their trauma and victimisation, resulting in victims being discouraged from reporting and/or continuing with their case.[1] Indeed, research suggests that some women are so traumatised as a result of the preliminary hearing that they are either unwilling or unable to follow through with the complaint.[2] In addition there has been extensive research documenting the revictimisation of witnesses in sexual assault trials.[3]

The *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) was enacted in mid-2009 to address these issues with "the dual objectives of treating complainants in sexual and violent offence proceedings

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[1] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005) Director of Public Prosecutions <http://www.dpp.act.gov.au/pdf/DPP%20SARP%20report%20(11Feb05).pdf>.

[2] See: Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Office for Women: NSW Department of Premier and Cabinet, 1996); Patricia Easteal and Christine Feerick, 'Sexual Assault by Male Partners: Is the License Still Valid?' (2005) 8(2) *Flinders University Journal of Law Reform* 185.

[3] See: Office of the Director of Public Prosecutions and Australian Federal Police, above n 1.

and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for an accused" and were "designed to extract the 'best' evidence possible from witnesses who may otherwise suffer a disadvantage".[4] This Act amended the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) and the *Magistrates Court Act 1930* (ACT) in relation to sexual and violent offences. The committal hearing process was modified by allowing a transcript or written statement of an audio or visual recording between police and a witness to be admissible as evidence for all sexual assault victims.[5] A "pre-trial hearing" for non-disabled, adult victims of sexual assault who are especially vulnerable[6] was to be held as soon after the committal as possible and before the actual trial[7] was introduced. And, other measures to protect the victim witness such as CCTV, screening and closing the court were introduced.

The Act, however, as drafted and enacted is permeated with indeterminacy.[8] For instance, who is eligible to participate in pre-trial hearings are deemed as those likely to suffer severe emotional trauma or most likely to be intimidated or distressed. The process itself is grey with the ordering of many of the provisions only decided by the judicial officer *if* the prosecution applies. There are no clear guidelines for the prosecutors to follow. Further, there is the use of the word "may" as opposed to "must" in a number of provisions as discussed later in this chapter.

Judicial and/or prosecutorial discretion in applying and interpreting indeterminate provisions may be influenced by prevailing notions of sexuality and sexual behaviour that come from a stereotypical definition of "real" or "legitimate" rape and stereotypical constructions of the "good" victim and "reasonable" responses.[9] Sexual assault myths continue to permeate society and judicial officers and legal practitioners, as members

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[4] Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.

[5] Magistrates Court Act 1930 (ACT) ss 33, 34.

[6] Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40P(1)(c).

[7] Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 5.

[8] See: Jessica Kennedy and Patricia Easteal, 'Shades of Grey: Indeterminacy and Sexual Assault Law Reform (2011) 13(2) *Flinders Law Journal* 49.

[9] D Lievore, 'Intimate Partner Sexual Assault: The Impact of Competing Demands on Victims' Decisions to Seek Criminal Justice Solutions' (Paper presented at the Eighth Australian Institute of Family Studies Conference, Melbourne, 12–14 February 2003) 3.

of society, continue to be influenced by them.[10] In addition, balancing the rights of the accused and the victim may be somewhat problematic.[11] Therefore, our aim in this study was to identify how these indeterminate sections of the *Sexual and Violent Offences Legislation Amendment Act* are in fact being interpreted and thus assess if the Act is achieving its objectives.

Methodology

To answer our research questions, we used two targeted purposive samples to obtain the views and experiences of the implementation of the Act. The first consisted of nine legal practitioners including three of eight ACT Supreme Court judicial officers who oversee cases involving sexual assault, one ACT prosecutor and five legal barristers who had each represented a defendant in a sexual assault matter in the past five years. This represented a response rate of 31 per cent.

Three victim support workers and two victim witnesses either completed a second online survey or participated in a face-to-face interview.[12] The former were recruited using "respondent driven sampling".[13] As a result of an October 2010 story about the project in the *Canberra Times* newspaper, which included a participation invitation to victims of sexual assault who had experienced a trial, three victims of sexual assault contacted the researchers. One was not suitable since the defendant in that case plead guilty before the committal. The two victims who participated in the research gave evidence at the committal hearing (pre-reform) and at the trial (post-reform).

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[10] See: Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001); Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Routledge, 1998); VicHealth, *National Survey on Community Attitudes to Violence against Women 2009: Changing Cultures, Changing Attitudes — Preventing Violence against Women* (2010); Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008).

[11] The right to a fair trial is discussed fully in: Jessica Kennedy, Patricia Easteal and Lorana Bartels, 'How Protected is She? "Fairness" and the Rape Victim Witness in Australia' (2012) 35 *Women's Studies International Forum* 334.

[12] The University of Canberra's Committee for Ethics in Human Research approved the project on 27 October 2010. Protecting the anonymity of participants and the well-being of the victim-witnesses were the main ethical consideration in this project.

[13] Douglas Heckathorn, 'Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations' (1997) 44 *Social Problems* 174.

Each potential research participant was sent an email with a link to the particular survey on SurveyMonkey®. All instruments first asked some demographic and contact information questions. Questions for legal practitioners then asked how each of the indeterminate sections of the legislation were being interpreted in practice. The last section of the instrument sought the respondents' views on whether the changes were achieving their intended aims.

The victim support person survey was composed of questions asked of the practitioners and those asked of the victims. Participants were asked about the impact that a trial could have on sexual assault victim witnesses' wellbeing. Following this, a number of questions sought respondents' views on how the new provisions are being implemented and the effect (if any) that they have had on the experiences of victim witnesses.

Of the two victim participants, one completed an online survey using SurveyMonkey®, and the other chose to participate in a face-to-face interview using the same instrument. That interview was recorded and later transcribed. The victim witness research instrument first asked the participant to discuss her experiences of committal hearings, pre-trial hearings and trials, and how the processes had impacted on her wellbeing. Questions were then asked about the respondent's specific experiences in relation to the reforms, ie view of the accused, testifying in an open/closed court, and having a support person present.

Note that with both of these last two samples, participants were contacted by email again to clarify or expand on their answers. This method was ideal for eliminating errors and omissions in the original instrument.

Survey responses were examined qualitatively using an "open-coding" approach.[14] Due to the small number of respondents and the shortness of most answers, the process of thematic coding was informal and unstructured. The process of studying the interview transcript and each passage of every survey word-by-word and line-by-line led to the labelling of each passage with an adequate code. This process helped to identify the common themes that arose and to summarise and observe the patterns in the responses.

[14] Matthew Miles and Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd ed, 1994) 40–43.

Caveats

Due to the small sample sizes, we do not claim that the findings necessarily represent the views of all judges, lawyers, support workers and victims: it cannot be said that these few are representative of the whole. Further, due to the short research "window" the findings are preliminary. They can be used to demonstrate how the legislation is being or might be implemented and how it could affect victim witnesses' wellbeing.

View from the Inside: How are the Amendments being Applied?

New section 38C — Accused may be screened from witness in court

(1) This section applies to the complainant or a similar act witness (the "witness") giving evidence in—
  (a) a sexual offence proceeding …
(2) The court may order that the courtroom be arranged in a way that, while the witness is giving evidence, the witness cannot see—
  (a) the accused person; or
  (b) anyone else the court considers should be screened from the witness.

Research in other jurisdictions suggests that screens are rarely used in practice because of the preference for CCTV,[15] and that when screens are required, the discretionary practice is often not invoked.[16] The legal practitioners surveyed concur with none of the participants either making or observing an order made for the use of screens as all victims of sexual assault are eligible to give evidence via CCTV. [17]

[15] See: New South Wales Law Reform Commission, Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials, No 101 (2003) [5.2.21]; New South Wales Attorney-General's Department, Report of the Children's Evidence Taskforce: Taking Evidence in Court (1994); Celia O'Grady, Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Televisions and Removable Screens in Western Australia (Ministry of Justice of Western Australia, 1996) [10.3].
[16] Judith Oliver, 'The Legislation Changed, What About the Reality?' (2006) 6(1) *Queensland University of Technology Law & Justice Journal* 55.
[17] Participant no 6, legal practitioner (11 May 2011).

> I have never been asked to make orders under [section] 38C — the standard practice seems to be to rely on Divisions 4.2B and 4.3 and have the evidence given by audio-visual link from a remote witness room.[18]

> In practice all complainants give evidence remotely via video link and the accused is positioned so that the witness cannot see the accused… Because of the provisions almost mandating evidence by video link [section] 38C in my experience has never specifically arisen [19]

One judicial officer said that he "would rely particularly on any submissions from the accused or his/her counsel"[20] when deciding whether to make an order under this section.

> I interpret this section as giving the court a discretion to screen a witness from the accused in the relevant proceeding. I find it difficult to see who else should be out of sight of the witness. I would generally make an order when requested. It would really be up to the accused to justify why the measures should not be implemented.[21]

When asked to hypothesise when an order under this section would not be made, two judges responded:

> It is impossible to imagine the range of circumstances in which an order under [section] 38C would be sought, and accordingly impossible to identify any particular cases in which' such an order would be refused.[22]

> I find it difficult to imagine the circumstances. I suppose it is possible that there would be some circumstance, but I find it difficult to see it.[23]

However, others did hypothesise that "in the unusual situation where a witness is giving evidence in court rather than via CCTV",[24] an order for the use of screens would not be made if the "test [is] not satisfied"[25] or criteria not met.[26]

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[18] Participant no 2, judicial officer (27 April 2011).
[19] Participant no 5, legal practitioner (4 June 2011).
[20] Participant no 3, judicial officer (7 April 2011).
[21] Ibid.
[22] Participant no 2, judicial officer (27 April 2011).
[23] Participant no 3, judicial officer (7 April 2011).
[24] Participant no 6, legal practitioner (11 May 2011).
[25] Participant no 1, judicial officer (1 June 2011).
[26] Participant no 9, legal practitioner (10 April 2011).

Although the victim support personnel surveyed had never seen the use of screens in court, they were asked about their potential burdens and benefits. One victim support worker reported that "people who want to sit in court usually do so because they want to see the defendant: most of the people I support are entitled to use CCTV so if they are in the courtroom it is because they have chosen to be and [chosen] to be able to see the accused".[27]

Interestingly, the victim witness in our study who chose to give evidence in the courtroom was not offered screens for her protection. This victim stated that she "did not want to testify via CCTV because she felt that she had greater control and a greater presence in the courtroom", however, she did want to be screened from the accused in the courtroom.[28] She had asked the prosecution about the use of screens, and was told that "they didn't do that here — it wasn't an option".[29] It must be noted that this trial was held approximately three months after the introduction of the new legislation. Because screens were not used in this case, the victim felt "scared' because she "had to walk right past him", "anxious" while giving evidence, and she "had trouble breathing".[30] She stated that the accused and his family were "unnerving and distracting" and that the accused was "glaring at her the whole time and trying to put her off".[31] One victim support officer supported this finding, stating that if the victim is unable to see the accused, they are "able to speak with more confidence and certainty knowing they [cannot] see the accused but [knowing that the accused can] hear them tell their story".[32]

New section 38E — Witness may have support person in court

(1) The court must, on application by a party who intends to call a witness, order that the witness have a person (a *support person*) in the court close to, and within the witness's sight, while the witness gives evidence.

"An application for a support person to be present is commonly made in relation to people who are to give evidence by audio-visual link from a

[27] Participant no 10, victim support (7 June 2011).
[28] Interview with participant no 13, victim witness (28 October 2010).
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Participant no 12, victim support (31 May 2011).