

Article

Teaching an old dog new tricks: Using courthouse facility dogs in Australia

Ellen Wood  and Paul Harpur

TC Beirne School of Law at the University of Queensland, Australia

Nancy Pachana

School of Psychology within the Faculty of Health and Behavioural Sciences, University of Queensland, Australia

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Abstract

Courthouse facility dogs are increasingly used to support child witnesses and complainants during testimony in courtrooms across the globe. Although already commonplace in the United States, this practice has been largely unexplored in the Australian context. This paper puts forward the case for courthouse facility dogs in Australia and offers some insight into striking the delicate balance between protecting defendants' rights to a fair trial, and improving the efficiency and quality of the legal system for vulnerable witnesses and victims.

Keywords

Children, access to the law, courts, criminal justice, criminal law, evidence/proof, judicial remedies

'Courthouse facility dogs' are a modern phenomenon increasingly evidenced in courtrooms across the globe. Most prevalent and widely documented in the United States, courthouse facility dogs are commonly known for supporting child witnesses during testimony and aiding child claimants of sexual abuse testifying against their perpetrators.¹ Until recently, the presence of dogs in Australian courtrooms was unheard of. However, on 31 January 2017, an Australian Capital Territory Supreme Court Judge made history by allowing a disability assistance dog to accompany a 15-year-old girl when she gave evidence against her father for crimes of

indecent and assault.² Furthermore, witnesses giving evidence during the hearing of Cardinal Pell were given the option of being accompanied by a support dog to sit with them as they testified.³ If Australia follows suit with other countries such as the United States, Canada and Chile, it is only a matter of time before this judicial practice becomes commonplace in the Australian courtroom.

Advocates maintain that the use of courthouse facility dogs promotes justice through improving the efficiency and quality of the legal process for vulnerable witnesses and abuse victims.⁴ This is especially relevant in cases where the testimony of the witness or complainant is

¹Sarah Bowers, 'The Use of "Therapy Dogs" in Indiana Courtrooms: Why a Dog Might Not Be a Defendant's Best Friend' (2013) 46(4) *Indiana Law Review* 1289.

²Megan Gorrey, 'ACT judge lets assistance dog accompany girl giving evidence in sex abuse case', *Canberra Times* (online), 31 January 2017 <http://www.canberratimes.com.au/act-news/act-judge-lets-assistance-dog-accompany-girl-giving-evidence-in-sex-abuse-case-20170131-gu23am.html>. It is important to note that courthouse facility dogs are not necessarily utilised to support witnesses or claimants because of a documented disability.

See Courthouse facility dogs as disability assistance animals.

³Nick Baker and Riley Morgan, 'The support dog helping witnesses during the George Pell hearing', SBS News (online), 6 March 2018 <https://www.sbs.com.au/news/the-support-dog-helping-witnesses-during-the-george-pell-hearing>.

⁴Lorie Gerkey, 'Legal Beagles, A Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom' (2016) 1 *International Journal of Therapeutic Jurisprudence* 405, 429.

Corresponding author:

- 1 cross-examination unduly and improperly upsets, confuses and/or traumatises the child;
- 2 cross-examination affects the accuracy and reliability of the

child's evidence in a way contrary to the interests of the court;

Ellen Wood, TC Beirne School of Law and School of Psychology, Faculty of Health and Behavioural Sciences, University of Queensland, Australia. Email: ellen.wood@live.com.au

critical to the prosecution's case,⁵ such as those cases involving children where 'the testimony becomes imperative in proving the guilt of the defendant'.⁶ However, opponents are concerned about the infringement of a defendant's rights to a fair trial.⁷ In particular, courthouse facility dogs incite objections based on undue prejudice before the jury, increased perceived credibility of the witness and distraction in the courtroom.⁸

This article will first examine the Australian judicial system's handling of vulnerable witnesses, concentrating the discussion on child complainants as an example. Next, it will discuss the role of courthouse facility dogs in alleviating the emotional and psychological effects connected with testifying in court. Then, this article will address some of the arguments against courthouse facility dog practices before offering several methods of reducing potential prejudice before the jury. Finally, this article will examine the potential overlap between disability discrimination legislation, disability assistance animals and psychological disorders that may result as a consequence of sexual abuse. This article will conclude by offering some insights into avenues for further research in this area.

Negative experiences associated with child testimony

The handling of child complainants has been an ongoing issue within the criminal justice system.⁹ While cross-examination is essential to the adversarial criminal trial,¹⁰ the cross-examination of child complainants and child witnesses is faced with numerous problems. Caruso and Cross identify these difficulties as:^{1 2 **}

3. cross-examination affects the credibility of the child in a way contrary to the interests of the court; and
4. the adversarial system is not conducive to the court (the

presiding judge) bearing the onus to protect the child against such improper and unhelpful cross-examination.¹¹

It is well documented that the cross-examination of children can cause them to give unreliable evidence.¹² United States Supreme Court Justices Rehnquist and Blackmun warned that

the fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: they may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.¹³

Until the early 1990s, children were considered to be 'inherently unreliable' witnesses.¹⁴ Prohibitions on judicial warnings that concern the reliability of evidence given from children demonstrate a shift in this view.¹⁵ Furthermore, over the last two decades, reforms and special measures to assist vulnerable witnesses have been implemented in all Australian jurisdictions.¹⁶ Two significant areas of reform include the easing of corroboration requirements and the introduction of specific procedures to reduce the emotional pressures of testifying.¹⁷ However, it is argued that many of these reforms have had limited practical effect, and major problems, as identified by Caruso and Cross above, remain.¹⁸ In all Australian jurisdictions, the courts have the power at both common law and through legislation to control inappropriate cross-examination.¹⁹ However, there is a general reluctance of judges to intervene, as evidenced in His Honour Justice Sleight's comment, '[i]f a Judge frequently interrupts cross-examination then the process can become disjointed, confrontational between the

⁵Marianne Dellinger, 'Using Dogs for Emotional Support of Testifying Victims of Crime' (2009) 15(2) *Animal Law Review* 171.

⁶Jessica Liebergott Hamblen and Murray Levine, 'The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses' (1997) 21 *Law and Psychology Review* 139, 141.

⁷Rena Marie Justice, 'Pets in the Courtroom: The New "Comfort Item": Animal Assistance Part 11' (National Centre for Prosecution of Child Abuse, 2007) 1-2.

⁸Casey Holder, 'All Dogs Go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant's Right to a Fair Trial' (2013) 50(4) *Houston Law Review* 1156, 1169.

⁹David Caruso and Timothy Cross, 'The Case in Australia for Further Reform to the Cross-Examination and Court Management of Child Witnesses' (2012) 16 *The International Journal of Evidence and Proof* 364, 365.

¹⁰Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37(3) *Melbourne University Law Review* 539.

¹¹Caruso and Cross, above n 9, 365.

¹²See, eg, Adrian Keane, 'Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-Professionalisation' (2012) 16(2) *International Journal of Evidence and Proof* 175, 176-80.

¹³*Coy v Iowa* 487 US 1012, 1032 (Blackmun J and Rehnquist CJ, dissenting) (1988).

¹⁴Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), 'Family Violence: A National Legal Response' (ALRC Report No 114, NSWLRC Report No 128, 2010) 1311.

¹⁵*Evidence Act 1995* (Cth) s 165A.

¹⁶Bowden, Henning and Plater, above n 10, 547, citing Annie Cossins, 'Cross-Examining the Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context' in John Spencer and Michael Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 95, 107-11.

¹⁷Judy Cashmore and Kay Bussey, 'Judicial Perceptions of Child Witness Competence' (1996) 20(3) *Law and Human Behavior* 313.

¹⁸Bowden, Henning and Plater, above n 10, 547.

¹⁹See, eg, *Evidence Act 1995* (Cth) ss 26, 29, 41, 192A and 193; *Ubke v The Queen* (2007) 230 CLR 559, 597-604 (Heydon J).

Judge and counsel and often add to the trauma of the complainant giving evidence'.⁵

Studies have found that the majority of child witnesses in sexual assault trials have found the trial process to be an entirely negative experience, lacking fairness.⁶ In relation to the cross-examination of child complainants, the Australian Law Reform Commission has reported that '[t]he contest between lawyer and child is an inherently unequal one'.⁷ Courts must strike the proper balance between protecting the defendant's rights to a fair trial and the child witness' need for a courtroom environment in which he or she will feel comfortable and will not feel intimidated when giving testimony.⁸ Moreover, causing a child to be upset and confused during cross-examination is a perception which defence counsel would want to avoid.⁹ Jury sympathies are stirred in favour of the child complainant when they present as tearful and distressed rather than calm and coherent.¹⁰

The case for courthouse facility dogs in Australia

In Australia, childhood sexual abuse is increasingly prevalent, with the Australian Institute of Criminology reporting that up to 30 per cent of children experience sexual abuse of some kind, with between 5 and 10 per cent experiencing severe sexual abuse.¹¹ Relatedly, the number of cases involving child complainants has dramatically increased in the past two decades.¹² In the courtsetting, it is clear from

the research in this area that a child's fear of the defendant and apprehension in an unfamiliar setting can severely inhibit the child's ability to testify.¹³ Thoman contends that '[a]nxiety harms children and impairs their testimony, which in turn subverts justice; therefore, any lawyer who interacts with a child witness should strive to reduce the child's anxiety'.¹⁴

Allowing a courthouse facility dog to accompany a vulnerable complainant or witness during testimony is a 'welcome step in the direction of making the court system more sensitive to its traumatic effects'.¹⁵ The presence of a dog has been shown to lower behavioural distress in children, as well as improve their physical and emotional health.¹⁶ One study has established that

with only five minutes of contact with an unfamiliar dog, 76 per cent of children studied between the ages of 7 and 15 believed that a dog knew how they felt. Another 84 per cent indicated they would confide secrets to a dog.¹⁷

A child who feels comfortable and supported during cross-examination is more likely to produce honest and reliable evidence,¹⁸ be open to and accepting of difficulties with their evidence,¹⁹ and is more likely to reveal and accede to such difficulties or inconsistencies.²⁰

Over the past decade, it is increasingly common for prosecutors in the United States to use courthouse facility

⁵Kevin Sleight, 'Managing Trials for Sexual Offences: A Western Australian Perspective' (Paper presented at the AIJA Criminal Justice in Australia and New Zealand Issues and Challenges for Judicial Administration Conference, Sydney, 7-9 September 2011).

⁶Judy Cashmere, 'The Perceptions of Child Witnesses and their Parents Concerning the Court Process: Survey for the NSW Office of the DPP' in Judy Cashmore and Kay Bussey, *The Evidence of Children* (Judicial Commission of NSW, Monograph Series No 11, 1995).

⁷Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [14.11J].

⁸Dellinger, above n 5, 14.

⁹Caruso and Cross, above n 9, 368.

Ibid citing Regina Schuller et al, 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanour, Gender, and Victim Stereotypes' 2010) 13(4) *New Criminal Law Review* 759.

James Ogloff et al, 'Child sexual abuse and subsequent offending and victimisation: a 45 year follow-up study' (Paper No 440, Australian Institute of Criminology, June 2012) citing David Fergusson and Paul Mullen, *Childhood Sexual Abuse: An Evidence Based Perspective* (SAGE Publications, 1999). Holder, above n 8, 1158 citing Sherrie Bourg Carter, *Children in the Courtroom: Challenges for Lawyers and Judges* (National Institute for Trial Advocacy, 2nd ed, 2009) 132.

¹³Holder, above n 8, 1159, citing Christine Brannon, 'Comment, The Trauma

of Testifying in Court for Child Victims of Sexual Assault v The Accused's Right to Confrontation' (1994) 18 *Law and Psychology Review* 439, 444.

¹⁴Dawn Thoman, 'Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses' (2014) 14 *Nevada Law Journal* 236, 237.

³Gerkey, above n 4, 414, citing David Crenshaw, *Guidelines for Attorneys and Judges to Recognize and Respond to Trauma Stress Reactions* (2 November 2014) Courthouse Dogs http://www.courthousedogs.org/legal_child_witnesses.html.

³Sunny Lyn Nagengast et al, 'The Effects of the Presence of a Companion Animal on Physiological Arousal and Behavioral Distress in Children during a Physical Examination' (1997) 12(6) *Journal of Pediatric Nursing* 323.

Allie Phillips and Diana McQuarrie, *Therapy Animals Supporting Kids (TASK): Program Manual* (28 August 2010) American Humane Association <https://www.americanhumane.org/app/uploads/2016/08/therapy-animals-supporting-kids.pdf>.

³Kay Bussey, 'The Competence of Child Witnesses' in G Calvert, A Ford and P Parkinson (eds), *The Practice of Child Protection: Australian Approaches* (Hale & Iremonger, 1992); Mark Brennan, 'The Battle for Credibility: Themes in the Cross-Examination of Child Victim Witnesses' (1994) 7(19) *International Journal for the Semiotics of Law* 51, 53.

³Caruso and Cross, above n 9, 365.

²⁰Ibid 369.

dogs to calm and support victims and witnesses, especially children.²¹ With this comes a growing knowledge base of literature and research in that country. However, the involvement courthouse facility dogs in the judicial process has been largely unexplored in the Australian context. It was not until the start of 2017 that an Australian court made a decision on whether to allow a dog - as a disability assistance animal — into the courtroom.²² It is imperative that the inevitable progression of courthouse facility dogs into the judicial system is approached with informed policy development and public education, rather than attempting to provide piecemeal reform. Only in this way can the interests of both the claimant and defendant be safeguarded.

Protecting the defendant

Although there are many strategies that a lawyer can employ to reduce anxiety during a child's testimony, as well as the availability of statutory and common law protections, there is a strong case in Australia for additional reform to the cross-examination and court management of child witnesses and complainants.^{23 24} Nonetheless, it can be very difficult to be cognisant of the rights of criminal defendants when their alleged crimes target the weak, especially children.²⁵ The right to a fair trial is a solid foundation of Australia's judicial system. Whether the use of courthouse facility dogs in Australian courtrooms can strike the delicate balance of maintaining the fundamental rights of the criminal accused against being sensitive to the needs of child witnesses and complainants is an area deserving of academic attention.

American case law illustrates that defendant objections to the use of courthouse facility dogs are predominantly based on the following claims:²⁶

1. The presence of the courthouse facility dog will be prejudicial because it conveys that the complainant is vulnerable and in need of protection from the defendant;

2. It is inappropriate to have a dog in the courtroom; and
3. More generally, it will affect the defendant's right to a fair trial.

American case law has also demonstrated practical and effective methods employed by the courts to deal with these common objections. In the majority of reported cases, defendants' appeals have been denied when based on the claim that the trial judge erred in its discretion to allow the use of a courthouse facility dog. When proper safeguards and practices have been implemented, American courts have found that a defendant's right to a fair trial is adequately protected. These responses include:²⁷

1. Implementing measures to conceal the courthouse facility dog from the view of the jury, including by bringing the dog into the courtroom before the jury and placing the dog at the feet of the witness behind the witness box;
2. Partaking in sufficient training and accreditation processes for all courthouse facility dogs to ensure they behave appropriately in the courtroom;
3. Using a neutral title for the dog, such as 'courthouse facility dog'; and
4. Judicial direction to the jury to take caution in drawing any inferences as to the presence of the courthouse facility dog.

Notwithstanding the implementation of reasonable safeguards, it is expected that there will be some judges who are hesitant to allow courthouse facility dogs into their courtroom. As the examination of witnesses is largely a matter residing in a judge's discretion,²⁸ some judges, especially those not particularly fond of dogs to begin with, may simply exclude this type of practice from their court.²⁹ Moreover, His Honour Justice Spector highlights some practical issues, stating that allergies, fear and delay of jury selection may be barriers to the expansion of courthouse facility dogs throughout the United States.³⁰ However, even

²¹Holder, above n 8, 1168, citing Debra Hart-Cohen, 'Canines in the Courtroom' (*GPSolo*, American Bar Association, 2009) 55-7.

²²Gorrey, above n 2.

²³Ibid 267; Thoman, above n 29. Thoman provides examples of a lawyer standing in a position that blocks the child's view of the opposing party during the child's testimony, turning the witness chair slightly away from the opposing party and instructing the child to avoid eye contact.

²⁴Caruso and Cross, above n 9, 368.

²⁵Bowers, above n 1, 1315.

²⁶ See, eg, *The People of California v James Edward Spence*, 151 Cal. Rptr. 3d 374 (2012); *State of Washington v Dye*, 309 P.3d 1192 (2013); *The People*

of New York v Tohom, 109 A.D.3d 253 (2013); *State of Connecticut v Devon.*, 90 A.3d 383 (2014); *State of Washington v Moore*, 335 P.3d 941 (2014); *People of California v Chanault*, 175 Cal. Rptr. 3d 1 (2014). For a discussion of the aforementioned cases, see Gerkey, above n 4, 419-26.

²⁷For a summary of the case law and potential responses to objections, see, eg, Gerkey, above n 4, 427-8.

²⁸See, eg, *Federal Court of Australia Act 1976* (Cth) ss 23HC(1)(a), (2)(b).

²⁹A'Dellinger, above n 5, 188.

³⁰Ibid citing Casey McNerthney, 'Dogs Give Prosecutors a Hand in Difficult Cases', *Seattle Post-Intelligencer* (online) 2 September 2007 http://seattlepi.nwsource.com/local/330093_kcdogs03.html.

those judges who have been critical of the practice have not considered the involvement of a courthouse facility dog during witness testimony to be a prejudicial error.³¹

If the court makes efforts to implement practices akin to those outlined above, this would assist in moderating the apprehension of any potentially prejudicial signals to the jury resulting from the presence of the courthouse facility dog. Ultimately, existing case law and studies have shown that, by implementing relatively straightforward legal and practical steps, concerns surrounding the use of courthouse facility dogs impacting a defendant's right to a fair trial can be alleviated.³²

Courthouse facility dogs as disability assistance animals: Impact on judicial discretion

Courthouse facility dogs are not necessarily utilised to support witnesses or claimants because of a documented disability, but are used to provide support to the witness 'to minimise the possible trauma associated with testifying'.³³ It might appear therefore that not many courthouse facility dogs will satisfy the test of disability assistance animal under anti-discrimination laws. In fact, there are a significant number of situations where courthouse facility dogs and child complainants may be regarded as being in a protected assistance dog relationship. Moreover, recent judicial interpretations and broad statutory definitions in Australia allow for substantially more animal-human relationships which are afforded protection under anti-discrimination laws.³⁴

There are significant differences in how assistance animals (some statutory regimes do not limit protection to dogs)³⁵ are defined by legislative regimes found in every

Australian jurisdiction.³⁶ Due to section 109 of the *Commonwealth of Australia Constitution Act*, no Australian law can provide less protection than the Federal *Disability Discrimination Act 1992* (Cth). Section 9(2) of the *Disability Discrimination Act / 1992* (Cth) defines an assistance animal to include those that are trained to assist a person with a disability to alleviate the effect of the disability and to meet standards of hygiene and behaviour that is appropriate for an animal in a public place.³⁷ The breadth of this provision was illustrated by the Federal Court of Australia Full Court judgment in *Mulligan v Virgin Australia Airlines Pty Ltd*.³⁸ In this case, the court held that the training requirement did not require disability specific training and that training by a generalist training organisation, here the Coffs Harbour Dog Training Club (which is a regional dog training school with no disability expertise), could provide sufficient training to assist a person who had multiple disabilities to manage those impairments.³⁹ As a consequence, Virgin Australia was found to have acted unlawfully when it refused to permit Mulligan to bring his dog into the aircraft cabin.

The probability that significant numbers of courthouse facility dogs would be classified as protected animals under anti-discrimination laws is even greater in South Australia. Sections 88 and 88A of the *Equal Opportunity Act 1984* (SA) extend protection to both assistance animals and therapeutic animals. Assistance animals are defined in this statute to include dogs that are accredited as an assistance dog under the *Dog and Cat Management Act 1995* (SA). While this accreditation process involves training and disability experts, and is only limited to dogs, recognition as a therapeutic animal is available under section 88A(3) of the *Equal Opportunity Act 1984* (SA) where a 'medical practitioner' certifies that a person requires the animal to 'assist a person as a consequence of the person's disability'.

³¹Dellinger, above n 5, i 86. In *The People v Chenault* 175 Cal Rptr 3d 1 (2014), the Court held that "the presence of a dog for a witness is not inherently prejudicial."

³²Dellinger, above n 5, 191.

³³Gerkey, above n 4, 417.

³⁴Paul Harpur et al, 'Disability Assistance Animals or Not? Problems in policy and practice workshop: Summary and scoping discussion paper' (Working Paper, University of Queensland, 2016) <http://espace.library.uq.edu.au/view/UQ:409735>.

Other animals currently used in Australia include miniature horses and birds.

³⁵Paul Harpur et al, 'Defining a Disability Assistance Animal in Disability Discrimination Laws in Australia and the US: Two Jurisdictions with Similar Approaches and Similar Confusions' (Paper presented at Animals and Living Accommodations, American Association of Law Schools, Animal Law, Co-

Sponsored by Disability Law, and Law and Mental Disability, San Francisco, 6 January 2017.

³⁶*Disability Discrimination Act 1992* (Cth) s 9(2)(c).

Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130.

³⁷It is important to note that Ellen O'Neill-Stephens, founder of Courthouse Dogs Foundation, has expressed caution with this type of training. The Courthouse Dogs Foundation is trying to limit this practice to dogs that are graduates from assistance dog organisations which are members of Assistance Dogs International. For an example of the misbehaviour of a dog that was an emotional support animal (not accredited from an organisation under Assistance Dogs International, and which ultimately violated the defendant's constitutional rights to a fair trial), see *Philip Leigh v Stote of Florida*. 4DI0 1032 (2011).

There is no requirement that the medical practitioner has any skills in certifying animals or that another party certify the animal.

The wide legislative and judicial approach to granting protected status increases the probability that a witness will be defined to have an assistance dog under anti-discrimination laws. Disability is defined widely under Australian anti-discrimination laws and includes mental and psychological conditions and disorders.⁴⁰ The definition of disability extends to impairments that are experienced for a short term and that have a minor functional impact upon a person's life. Australian anti-discrimination laws operate on the basis that the definition of disability should be read widely and that other measures in these regimes be utilised to control the operational scope of the interventions.⁴¹

The wide reading of the term 'disability' means it is possible that child complainants and witnesses who may have some form of psychiatric disorder will satisfy the definition under anti-discrimination legislation. This could involve expert testimony to establish a psychiatric disorder, a heavy burden for the prosecution, a requirement that the child be evaluated and encourage the defence to have their own psychiatrist evaluate the child for cross-examination purposes. This process in itself could be emotionally distressing to the child. The law assumes everyone is innocent until convicted. It is not possible to state that every witness has been subjected to violence at the hands of the accused as not every trial ends in a finding of guilt. It is however possible to operate on the basis that where guilt is found, then the witnesses in such trials are recounting extremely disturbing events from their lives.⁴²

Research suggests a strong link between a history of sexual abuse and the development of later psychiatric disorders. For example, Chen et al performed a comprehensive literature search of epidemiological studies of

sexual abuse and psychiatric illness.⁴³ They found a statistically significant association between sexual abuse and a lifetime diagnosis of multiple psychiatric disorders, including anxiety disorders, depression, eating disorders, post-traumatic stress disorder, sleep disorders and suicide attempts. These associations persisted regardless of the victim's gender or the age at which the abuse occurred. Similarly, Nelson et al, in a longitudinal Australian study involving nearly 2000 twin pairs, found that in twins, where one had been sexually abused and the other not, the abused twins had significantly higher rates of major depression, attempted suicide, alcohol dependence and social anxiety.⁴⁴ It is accordingly reasonable to assume that a significant percentage of victims of and witnesses to sexual violence may have a psychiatric disorder.

If a person has a psychiatric disorder, they would have a disability for the purposes of anti-discrimination laws in Australia. As the presence of a dog in the courtroom could assist child witnesses with managing their psychiatric disorder, then it is probable that this human - animal relationship would be protected as a handler and assistance animal relationship. Anti-discrimination laws only protect persons with disabilities in defined relationships, such as employer—employee and university- student.⁴⁵ Anti-discrimination laws have limited direct approach over court proceedings. Anti-discrimination laws all regulate bodies that administer Commonwealth⁴⁶ and State laws.⁴⁷ These provisions would regulate how the courts are administered, to the extent that the activities come within the administrative arm of government. Anti-discrimination laws do not regulate how trials themselves are managed by the judiciary. This means courts must permit assistance dogs to enter the court complex; however, a judge can use his or her discretion to limit a witness from using the assistance animal in court.

Despite not providing legal protection in the courtroom,

⁴⁰See, eg. *Disability Discrimination Act 1992* (Cth) s 4(f).

⁴¹This approach can be contrasted with other jurisdictions, in particular judicial and legislative developments in the US. See, eg. Paul Harpur, *Discrimination, Copyright and Equality: Opening the E-Book for the Print Disabled* (Cambridge University Press, 2017) 154.

Ellen O'Neill-Stephens, founder of Courthouse Dogs Foundation, has warned that limiting this accommodation to children with psychiatric disorders would result in fewer child complainants and witnesses benefiting from the presence of a courthouse facility dog.

⁴³Laura Chen et al, 'Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis' (2010) 85 *Mayo Clinic Proceedings* 7, 618.

⁴⁴Elliot Nelson et al, 'Association Between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results from a Twin Study' <2002> 59 *Archives of General Psychiatry* 139.

⁴⁵Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) ch 7.

⁴⁶*Disability Discrimination Act 1992* (Cth) s 29.

⁴⁷*Anti-Discrimination Act 1977* (NSW) ss 10B, 27B, 38G, 42B, 49H, 49Z, 49ZKA.; *Anti-Discrimination Act 1991* (Qld) ss 101, 102; *Equal Opportunity Act 1984* (SA) ss 5(1), 39, 61, 76, 85K, 85ZG; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Equal Opportunity Act 2010* (Vic) ss 4, 44, 73; *Equal Opportunity Act 1984* (WA) ss 4, 20, 35AL, 35Y, 46, 62, 66K, 66ZF.

arguably the special status of assistance animals in anti-discrimination and human rights laws has a considerable impact on judicial reasoning surrounding whether to permit a child complainant to be accompanied by a courthouse facility dog or not. The benefits that assistance dogs provide to persons with disabilities is recognised under international human rights laws⁴⁸ and under domestic laws, including the National Disability Insurance Scheme,⁴⁹ guide and hearing dog protection legislation⁵⁰ and under various anti-discrimination laws.⁵¹

Conclusion

The judicial practice of courthouse facility dogs is among the most recent efforts to support vulnerable witnesses and victims of crime through the court system, while lessening the secondary harm that may result from witness testimony and cross-examination. The challenges in striking a balance between the capacities of courthouse facility dogs to improve the delivery of courtroom testimony without impacting defendants' rights to a fair trial has implications for laws, policy and practice. Significant research already supports the conclusion that the 'presence of a dog can have dramatic emotional and psychological benefits' for victims discussing traumatic events.⁵² Less research is available on how the use of courthouse facility dogs unfairly prejudices criminal defendants. Although courthouse facility dogs have been used effectively in the United States for many years in various capacities, their role in the Australian courtroom, particularly in the context of a criminal trial, has been largely unexplored in legal and academic discourse. It is hoped that this article will contribute to some of the momentum in bringing about further research in this area, including both high-quality scholarly outputs as well as legal and evidence-based decision-making guidelines. Particular focus should be attributed to: determining the logistical challenges in having animals physically present in court proceedings; understanding the views of prosecutors and defence lawyers on the impact courthouse animals may have on proceedings

and more broadly upon the criminal justice system; and drawing from psychology studies to understand both the positive impact courthouse facility dogs can have upon child witnesses testifying, and their influence on jury members' perceptions of the accused's innocence.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

⁴⁸Paul Harpur, 'The Convention on the Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What happened to the legal protections for people using guide or assistance dogs?' (2010) 29 *University of Tasmania Law Review* 1, 49.

⁴⁹Pauleen Bennett, 'Reviewing Assistance Animal Effectiveness: Literature Review, Provider Survey, Assistance Animal Owner Interviews, Health Economics Analysis and Recommendations' (Final report to National Disability Insurance Agency, 30 September, 2016).

⁵⁰See, eg. *Guide, Hearing and Assistance Dogs Act 2009* (Qld); *Guide Dogs*

and Hearing Dogs Act 1967 (Tas).

⁵¹*Disability Discrimination Act 1992* (Cth) s 9; *Anti-Discrimination Act 1977* (NSW) s 49D(3); *Anti-Discrimination Act 1991* (Qld) s 85; *Equal Opportunity Act 1984* (SA) s 88; *Anti-Discrimination Act 1998* (Tas) s 3(g); *Equal Opportunity Act 2010* (Vic) ss 4, 7(4); *Equal Opportunity Act 1984* (WA) s 66(4); *Discrimination Act 1991* (ACT) s 9; *Anti-Discrimination Act* (NT) ss 4, 21.

⁵²Andrew Leaser, 'See Spot Mediate: Utilizing the Emotional and Psychological Benefits of "Dog Therapy" in Victim-Offender Mediation' (2005) 20 *Ohio State Journal on Dispute Resolution* 943, 961.

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ORCID ID

Ellen Wood © <http://orcid.org/0000-0002-0999-2486>

Ellen Wood is a recent graduate of the TC Beirne School of Law.

Paul Harpur is a Senior Lecturer in the TC Beirne School of Law, University of Queensland.

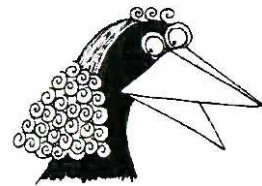
Nancy Pachana is a Professor in the School of Psychology, Faculty of Health and Behavioural Sciences, at the University of Queensland.

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