

NSW Government Submission
to the Royal Commission into Institutional
Responses to Child Sexual Abuse
Consultation Paper: Criminal Justice

October 2016

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Table of Contents

1. Introduction	3
2. The importance of a criminal justice response	3
3. Issues in police responses	4
4. Police responses and institutions	8
5. Child sexual abuse offences	10
6. Third-party offences	12
7. Issues in prosecution responses	13
8. Delays in prosecutions	13
9. Evidence of victims and survivors	15
10. Tendency and coincidence evidence and joint trials	17
11. Judicial directions and informing juries	17
12. Sentencing	17
13. Appeals	18
14. Post-sentencing issues	19
15. Juvenile offenders	21

1. Introduction

NSW welcomes the opportunity to respond to the consultation paper on criminal justice (**consultation paper**) released by the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) on 5 September 2016, which seeks feedback on a wide range of issues relating to institutional child sexual abuse and the criminal justice system.

The consultation paper demonstrates the extensive research and consultation the Royal Commission has undertaken in relation to these important issues. NSW will carefully consider the findings and final recommendations of the Royal Commission on criminal justice issues when they are made in 2017.

The following comments may assist the Royal Commission in its deliberations. The comments are structured in accordance with the chapters in the consultation paper:

- The important of a criminal justice response
- Issues in police responses
- Police responses and institution
- Child sexual abuse offences
- Third-party offences
- Issues in prosecution responses
- Delays in prosecutions
- Evidence of victims and survivors
- Tendency and coincidence evidence and joint trials
- Judicial directions and informing juries
- Sentencing
- Appeals
- Post-sentencing issues
- Juvenile offenders.

2. The importance of a criminal justice response

The Royal Commission sought submissions on issues relating to the importance of a criminal justice response, including regulatory responses in chapter 2 of the consultation paper.

The nature of institutional child sexual offending presents particular challenges for prosecutions in the criminal justice system. NSW recognises the importance of ensuring that criminal justice responses are available for all victims of institutional child sexual abuse, that those victims are properly supported, and consideration is given to the safety, health and wellbeing of the victim at all stages of the criminal justice process. NSW also recognises it is important that the criminal justice system operates in the interests of seeking justice for the whole of society, including both the complainant and the accused.

Recognition of victims

The Charter of Victims Rights, which forms part of the *Victims Rights and Support Act 2013*, governs the treatment of victims by all Government agencies in NSW, including the NSW Police Force (**NSWPF**) and the Office of the Director of Public Prosecutions (**ODPP**). The Charter of Victims Rights prescribes the level of service that must be provided to victims of crime, ensuring that victims are treated with courtesy and compassion and that their rights and dignity are maintained.

In addition, the *NSW Police Force Victims Policy Statement, Guidelines for the NSW Police Force Response to Victims of Crime* and the *Customer Service Guidelines* provide the basis of the police response and support to victims of crime.

Regulatory responses to institutional child sexual abuse

The criminal justice system is only one mechanism for responding to institutional child sexual abuse and there is a need for an effective and robust regulatory response. The effective interaction between regulatory and criminal justice responses, as well as other support services, is imperative.

NSW has a number of regulatory schemes aimed at child protection, including:

- working with children checks scheme administered by the Office of the Children's Guardian under the *Child Protection (Working with Children) Act 2012* (NSW)
- reportable conduct scheme operated by the NSW Ombudsman under the *Ombudsman Act 1974* (NSW)
- mandatory reporting obligations under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

In addition, the NSW Department of Education has its own investigative Directorate, the Employee Performance and Conduct Directorate (**EPAC**). Investigators are mandatory reporters who must make reports to the Child Protection Helpline which is operated by the Department of Family and Community Services (**FACS**). The Department of Education's policy also requires any allegations of child sexual abuse to be reported to the police, regardless of whether or not the alleged victim is willing to make a statement. EPAC liaises with the police and is guided by their advice. EPAC also undertakes preventative work, including training and advice to schools, and makes recommendations for systems improvement when investigations identify systemic issues.

3. Issues in police responses

The Royal Commission sought submissions on issues relating to police responses to child sexual abuse in chapter 3 of the consultation paper, including:

- principles and approaches to encourage reporting and inform initial police responses, investigations and interviews
- the Australian Law Reform Commission (**ALRC**) and New South Wales Law Reform Commission (**NSWLRC**) recommendations in their joint 2010 report *Family Violence: A national legal response* for reforms to protections against disclosing the identity of mandatory reporters in the context of institutional child sexual abuse
- costs imposed on police for prosecutions that do not result in convictions.

Initial police responses: Joint Investigation Response Teams

NSW recognises that a victim's first contact with police is important and may be a determinative factor when deciding whether to proceed with a report or not. The initial response is also important in relation to the safety, health, and wellbeing of the victim. It is therefore important that policing responses are coordinated with health and other support services for the victim. NSW takes a multi-disciplinary approach in responding to child sexual abuse allegations through Joint Investigative Response Teams (**JIRT**). JIRT is a joint response between the NSWPF, NSW Health and FACS and is the mechanism through which more holistic responses to the needs of children and young people who are the subject of serious abuse allegations can be achieved.

JIRT Review

NSW notes that there have been a number of reviews of the operation of JIRT. This includes:

- an internal evaluation conducted in 2002 (which predated the inclusion of NSW Health as an equal JIRT partner) cited in the literature review commissioned by the Royal Commission in 2016 *A systematic review of the efficacy of specialist police investigative units in responding to child sexual abuse*

- an internal review in 2006 cited in the 2008 *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (the Wood Inquiry)
- a high level review conducted by the NSW Ombudsman in 2012 as part of its role in auditing the implementation of the NSW Interagency Plan to Tackle Child Sexual Abuse in Aboriginal Communities which can be found in its report *Responding to Child Sexual Assault in Aboriginal Communities* (tabled in Parliament in 2013).

In addition, a further review of the operation of JIRT is currently being undertaken by the three JIRT agencies and the NSW Ombudsman. The final report is due for completion by the end of March 2017. A copy of the report will be provided to the Royal Commission when it is completed.

The terms of reference for the review specify a comprehensive evaluation of the current JIRT arrangement including processes, governance and resourcing. The review will consider the extent to which the current JIRT arrangement is meeting the needs of clients, partner agencies and other stakeholders and to identify areas for improvement. The review will examine the roles and responsibilities of each partner agency as articulated in the JIRT Memorandum of Understanding. The review will also examine key areas of interagency success and outstanding challenges/areas of contention for the JIRT partnership.

As part of the JIRT review, the NSW Ombudsman has commissioned research from Dr James Herbert and Professor Leah Bromfield, Australian Centre for Child Protection, University of South Australia, which will:

- compare the features of JIRT with the features of multi-disciplinary child abuse responses operating in comparable Australian and international jurisdictions, and
- consider the most important components of different multi-disciplinary responses, with a particular focus on models of child advocacy.

In addition, the NSW Ombudsman is consulting with partner agencies about including a possible further research study in the JIRT review which examines outcomes for children, young people and families who have been through the JIRT program.

JIRT Aboriginal Community and Culture Project

Enhanced access to JIRT services and an improved response to Aboriginal children and young people have been implemented as part of the *JIRT Aboriginal Community and Culture Project*.

The overall aim of the *JIRT Aboriginal Community and Culture Project* is to improve outcomes for Aboriginal children and young people. Specifically, actions under this project aim to provide appropriate JIRT interventions when JIRT staff are dealing with Aboriginal children, young people and families.

Prior to this project, referrals were assessed against JIRT criteria irrespective of cultural and/or community considerations. As a result, some child sexual assault referrals from vulnerable Aboriginal communities were being rejected on the grounds the disclosure was 'third hand' or not sufficiently comprehensive to meet the JIRT acceptance threshold. When considered in a cultural context, this is a consistent feature of how Aboriginal children disclose and report abuse.

The JIRT service to Aboriginal children and young people has been enhanced by:

- applying more flexibility to the assessment of Aboriginal child sexual assault referrals at the JIRT Referral Unit
- ensuring that accepted referrals are responded to in a timely manner by JIRT units
- appropriately utilising the services available via the Aboriginal Community Programs to support children, young people and their non-offending carers throughout the JIRT intervention.

Training in sexual abuse issues for police

The NSWPF delivered mandatory child protection training to all sworn police in the 2010 – 2011 training year. This training covered indicators of child abuse, dynamics of child abuse, offender behaviours, child

protection legislation and initial police response to child abuse, including appropriate questioning techniques.

At present, training on responding to child abuse is provided to police through the *Investigators Course*, the *Detective Education Program*, *Investigation and Management of Adult Sexual Assault* and *Child Interviewing Course*. The paramountcy of victim care is a key message of these courses.

The *Investigation and Management of Adult Sexual Assault Course* is open to criminal investigators who are in a position to investigate sexual assault offences. This course is designed to assist investigators to manage and investigate sexual assault offences. During the course the importance of believing victims and showing empathy towards them are explained. The course has a session presented by a Sexual Assault Counsellor and a session by a Sexual Assault Medical Practitioner.

The NSWPF has further reviewed its training to make it more relevant by developing a *Child Abuse Investigators Course* specifically designed to provide senior investigating officers with the necessary skills to carry out more thorough investigations in child abuse matters. This course is anticipated to commence in early 2017.

Investigative Interviews

The availability of training about the nature and impact of child sexual abuse as well as appropriate interviewing skills is vital for initial police and multi-disciplinary responses to victims.

Training for JIRT partners

All Health and FACS staff working within the JIRT program undertake the JIRT Foundation Skills Course which includes the interviewing of children and young people.

Training for police

All reports of child sexual abuse are investigated by the Child Abuse Squad. The *Child Interviewing Course* is the entry level course for all NSWPF officers commencing a position in the Child Abuse Squad. Child development, memory recall and questioning techniques are extensively covered in the course in accordance with current research. The course also includes subjects on interviewing children of indigenous background, managing cultural issues and using an interpreter in an interview. In addition, training is provided on the admissibility of evidence in criminal proceedings, interviewing witnesses and victims, covert and overt methodology, as well as the use of children's champions (see below at page 15 for more detail on the operation of children's champions in NSW). NSWPF is also proposing to implement biennial refresher skills training for all Child Abuse Squad staff in 2017.

The Child Abuse Squad conducts periodic quality review of child interviews. Currently Child Abuse Squad Team Leaders conduct reviews of their investigators' interviews in addition to the requirement for submission of a field interview as part of the *Child Interviewing Course*. The Child Abuse Squad proposes to implement a structured review process where each investigator will have one of their interviews reviewed annually to ensure that the interviews continue to be conducted in line with the training provided through the *Child Interviewing Course*. This will be a mandatory requirement and enforced as part of the Child Abuse Squad Command Management Framework overseen by the Child Abuse Squad Management Team. There is no legal impediment to the NSWPF providing records of interview to relevant police officers or supervisors and any person engaged by the NSWPF for a law enforcement purpose.

The NSWPF *Interviewing of Children by Local Area Command (LAC) Police Workshop* provides a base level understanding of child interviewing. It draws on some key elements from the *Child Interviewing Course* and aims to enhance the skills and knowledge of LAC police when interviewing children and vulnerable people. The workshop covers child development, how memory works and questioning techniques. This workshop is available to all police and is a mandatory requirement for criminal investigators to be designated as a Detective. NSWPF policy and procedure dictate that a complaint of sexual assault must be taken by a criminal investigator.

Review of child interviewing training

The child interviewing training delivered by the NSWPF has been reviewed including by Professor Martine Powell, Founding Director of the Centre for Investigative Interviewing, and it based on her research and developed best practice. The Child Abuse Squad has approximately two hundred investigators conducting in excess of 4,000 interviews with vulnerable children and witnesses per year covering a large geographical area. The current training regime is administered by experienced child abuse investigators with qualifications in adult education. The current practice of block face to face training with practical assessment and a post course field component is considered the most efficient and effective method of training delivery given the volume of investigators covering a large geographical area.

The NSWPF acknowledges further improvement in the form of refresher training together with the implementation of a quality assurance regime would improve the quality of child interviews.

Technical aspects of recording interviews

All Child Abuse Squad offices and co-located JIRT units have been equipped with child interviewing suites or equipment to allow video/audio recording of interviews. These suites are child friendly interview rooms equipped with discreet digital recording equipment. This equipment is regularly reviewed and maintained by the NSW Police Investigative System Support (**ISS**) Unit. The ISS Unit has implemented a digital recording review project with the ODPP, Department of Justice and Legal Aid NSW to standardise the compatibility of digital recordings used across the agencies.

In light of the evidence presented by the Royal Commission, NSWPF acknowledges there are improvements which can be made in the quality of video recorded interviews, particularly in respect to focusing on the child's face. The Child Abuse Squad will continue to examine technology to enhance the quality of interviews.

Information about mandatory reporters

The Royal Commission asked for submissions about whether it should support the ALRC and NSWLRC's recommendations in their joint report in 2010 *Family Violence: A national legal response* for reforms to the protection against disclosing the identity of mandatory reporter in the context of institutional child sexual abuse. Specifically, at recommendation 20-1, the ALRC and NSWLRC recommended that legislation should authorise a person to disclose the identity of a mandatory reporter where the disclosure is in connection with an investigation of a serious offence against a child and the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child.

NSW notes that recommendation 20-1 is based on section 29 of the NSW *Children and Young Persons (Care and Protection) Act 1998* (NSW). This provision ensures that an effective criminal justice response is activated to protect not only the child who is the victim of the alleged offence, but other children whose safety may also be at risk. The provisions in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provide an appropriate balance between encouraging reporting, the need to protect mandatory reporters and the need to ensure the police can access relevant information.

Police charging decisions

A number of processes and resources currently exist to assist police with making decisions about laying charges. These including the following:

- the NSWPF has issued guidance to police officers through its *Aspects of Sufficiency in Child Sexual Assault Matters* resource
- obligatory checks of briefs of evidence are carried out before those briefs are provided to the ODPP. These checks are carried out by team leaders who hold the rank of Sergeant.
- police officers may seek legal advice from the NSWPF with regard to charge advice and sufficiency of evidence from the Police Prosecutions Command and the Operational Legal Advice Section.

- the NSWPF may also seek advice from the ODPP on charging and the sufficiency of evidence, which is done on a case by case basis

Costs

The Royal Commission sought submissions on whether costs are imposed on police for prosecutions that do not result in convictions and whether there are any limits on those costs.

NSW has a number of legislative provisions which relate to costs for prosecutions which do not result in convictions under the *Criminal Procedure Act 1986* (NSW) and the *Costs in Criminal Cases Act 1967* (NSW).

Section 117 of the *Criminal Procedure Act 1986* (NSW) provides that costs may be awarded against a public officer (including a police officer or prosecutor) when an accused person is discharged or a matter is withdrawn, in limited circumstances. The Magistrate or Judge must be satisfied of one or more of the following:

- that the investigation into the alleged offence was conducted in an unreasonable or improper manner
- that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner
- that the prosecution unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought
- that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs.

The legislation specifies that the quantity of costs awarded must be 'just and reasonable'.

A defendant can also apply for a certificate under the *Costs in Criminal Cases Act 1967* (NSW) if they have been acquitted or discharged after the commencement of proceedings. On receipt of the certificate the defendant can make an application to the Department of Justice for payment from consolidated revenue. To grant a certificate, the Magistrate or Judge must be satisfied that:

- if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and
- any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

The quantity of costs is not set out in the certificate. It is a matter to be determined by the Secretary of the Department of Justice in accordance with the legislation.

4. Police responses and institutions

The Royal Commission sought submissions on issues in police responses specifically related to institutions in chapter 4 of the consultation paper, including:

- whether privacy and defamation laws create difficulties for institutions in communicating within the institution, or with children and parents, the broader community or the media
- police communication and advice, including the adequacy and appropriateness of the NSW Police Standard Operating Procedures (**NSW SOPS**) and NSW JIRT Local Contact Point Protocol (**LCPP**) as procedures to guide police communication and advice
- the issue of blind reporting, which is the practice of reporting to police information about an allegation of child abuse without giving the alleged victim's name or other identifying details.

NSW acknowledges that there are some features of institutional child sexual abuse which may require a different or additional police response.

Police communication and advice

NSW Police Standard Operating Procedures for Employment Related Child Abuse Allegations

The NSW SOPS forms a major point of intersection between an employer and the police in relation to the information and assistance police can provide to institutions where an allegation of child sexual abuse is made. The NSW SOPS also help to assist the employer manage the requirements of a police investigation with their reporting obligations to the NSW Ombudsman, the Office of the Children's Guardian with respect to working with children checks and as mandatory reporters under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

NSW notes the importance of ongoing cooperative and collegiate communication by the police and the relevant institution. NSW also notes the importance of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* in facilitating the exchange of information between prescribed bodies for the safety, welfare and well-being of children.

JIRT Local Contact Point Protocol

In NSW, the JIRT LCPP allows for information to be communicated to the parents of children who may be at risk. This is to ensure parents receive appropriate, accurate information about risk to their children, enabling them to take any necessary protective action to keep their children safe. The LCPP sets out the criteria for its use, how to establish a local contact point, guidelines for staff relating to the provision of information and support to parents, community members and other relevant stakeholders. The LCPP has been activated 18 times across NSW since it was implemented in March 2014.

The LCPP was first developed to be used if the person of interest in an investigation is aged over 18 years. As a result of feedback from the Royal Commission Roundtable on Multi-disciplinary and Specialist Policing Responses on 15 June 2016 and discussion around restricting its use to adults, this has now broadened to include persons of interest who are under the age of 18 years. To date, there has been one instance where the LCPP has been used in a matter involving allegations of sexual assault of a young child by older children at a school.

There has been a recent change in the way that information is provided under the LCPP to parents and people who have been directly exposed to the person of interest in a child sexual assault allegation within an institution.

Originally, the information was sent by the institution after it had been vetted by the JIRT partner agencies. After consideration by the JIRT partner agencies and the NSW Ombudsman, it was decided that the information should come directly from police, due to the privacy and defamation protections afforded to police providing information for law enforcement purposes.

NSW Health Policies

NSW has a number of relevant policies which relate to the management of child related allegations, including communication between NSW Health, employees and the police. These include:

- *Child Related Allegations, Charges and Convictions against NSW Health Staff* (the **Child Related Allegations Policy**)
- *Child Wellbeing and Child Protection Policies and Procedures for NSW Health*
- *Managing Misconduct*

The *Child Related Allegations Policy* requires all staff to notify their manager/supervisor if they become aware of any child related allegations, charges or convictions involving a NSW Health staff member. The policy also requires all staff to self-disclose any child related criminal charges and/or convictions against

them. The policy also sets out the organisation's obligations around notifications to the Office of the Children's Guardian, the NSW Ombudsman and the Australian Health Practitioner Regulation Agency.

The *Child Related Allegations Policy* also deals with concurrent FACS, NSWPF or JIRT investigations and emphasises the importance of maintaining an ongoing liaison to ensure that criminal, child protection and disciplinary investigations are coordinated effectively and that information is exchanged as required to assist in the ongoing assessment and management of risk.

Blind Reporting

NSW notes that the mandatory reporting requirements outlined in section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) mean that mandatory reporters are required, as a matter of course, to disclose the name, or description of a child, when they make a report about suspected child sexual assault. In that context, the challenges raised in the consultation paper may not be as relevant for mandatory reporters as other institutions.

Further, the NSW Health policy *Child Related Allegations, Charges and Convictions against NSW Health Staff* makes clear that if an allegation is retracted, the complaint withdrawn, or the alleged victim wants no action taken, the organisation is still required to notify the NSW Ombudsman, FACS or the NSWPF, as warranted. Whether or not the agency remains involved, the organisation is required to seek information to understand the reason for the retraction and consider this in the assessment of risk and evidence when making a finding. Where the reasons relate to concerns around personal safety, the organisation should explore with the person the different options for addressing those concerns, including the involvement of the NSWPF.

NSW notes the different views on blind reporting canvassed by the Royal Commission in the consultation paper and expressed at the public roundtable discussion on 20 April 2016. NSW will give careful consideration to the recommendations of the Royal Commission and the views expressed by victims and survivors on this issue.

Section 316 of the *Crimes Act 1900* (NSW) which makes it an offence to fail to bring information relating to a serious indictable offence to the attention of police is discussed under the heading 'Third-party offences' on page 12 below.

5. Child sexual abuse offences

The Royal Commission sought submissions on issues related to child sexual abuse offences in chapter 5 of its consultation paper, including persistent child sexual abuse offences, grooming offences, persons in position of authority offences, and limitation periods that apply to criminal prosecutions.

NSW Child Sexual Offences Review

The NSW Government, through the Department of Justice, is currently undertaking a Child Sexual Offences Review in response to recommendations made by the Parliamentary Joint Select Committee on Sentencing Child Sexual Assault Offenders (the **Joint Select Committee**) in October 2014.

The Joint Select Committee recommended that the NSW Government carry out a review of child sexual assault offences with a view to consolidating and simplifying the current framework, identifying areas where current offences could be consolidated or revised, and identifying whether any new offences should be created to fill any gaps in the existing framework.

The NSW Child Sexual Offences Review will consider a number of the issues raised by the Royal Commission, including the offence of persistent child sexual abuse, the offence of grooming, position of authority offences, limitation periods on criminal prosecutions, third party offences (see below at page 12), sentencing practices for historical offences (see below at page 18) and issues relating to juvenile offenders including a possible defence of similar age and 'sexting' (see below at page 21).

The NSW Child Sexual Offences Review is being conducted over the course of 2016 and 2017 in order to take into account the final recommendations of the Royal Commission. It will also involve extensive stakeholder consultation.

The Department of Justice is intending to release a discussion paper for public input into its Child Sexual Offences review, a copy of which will be provided to the Royal Commission.

Persistent child sexual abuse offence

Victims of child sexual abuse commonly and understandably have difficulties recalling the particular dates and details of isolated offences. This is particularly the case for those who were subject to prolonged abuse. To assist in the prosecution of such matters, a charge of persistent child sexual abuse was introduced in NSW in 1998. This offence is contained in section 66EA of the *Crimes Act 1900 (NSW)* and carries a maximum penalty of 25 years imprisonment. While the offence does not require the prosecution to establish particulars to the same extent as required for individual offences, it nevertheless requires the victim to identify three or more occasions. The offence does not apply retrospectively and does not result in a higher penalty being imposed than for individual offences.

The offence is rarely used in NSW. The NSW Bureau of Crime Statistics and Research (**BOCSAR**) reported that the offence was charged on a total of 42 occasions between April 2006 and March 2016.

As part of the NSW Child Sexual Offences Review, consideration is being given to how the offence of persistent child sexual abuse can be improved, whether it should operate retrospectively and if a course of conduct offence should be introduced in NSW.

Grooming Offence

Grooming is predatory conduct that can involve a variety of behaviours and occur over a long period of time. The NSW offence of grooming is located in section 66EB of the *Crimes Act 1900 (NSW)* and carries a maximum penalty of 12 years imprisonment where the victim is under 14 years and 10 years imprisonment in any other case. The legislation provides that it is an offence to expose a child to indecent material or provide a child with an intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity. While the offence does not cover all forms of grooming behaviour, it does cover conduct that has an implicit sexual connotation.

BOCSAR data indicates that charges for grooming were laid on 129 occasions between April 2006 and March 2016. While there has been an increase in the use of that charge in the last five years, during that time the accused was also charged with another sexual offence under a different section of the *Crimes Act 1900 (NSW)* in over 80% of matters. This is consistent with the notion that grooming behaviour may only come to light once a substantive offence is committed.

The NSW Child Sexual Offences Review is examining whether the offence of grooming can be improved, noting the risk of discouraging positive behaviours (which are important for child development) by carers, volunteers and others engaged in care of children.

Special care and position of authority offences

In NSW it is an offence under section 73 of the *Crimes Act 1900 (NSW)* for a person to have sexual intercourse with another person aged 16 or 17 years who is under their special care. The offence carries a maximum penalty of 8 years imprisonment where the victim is above 16 and under 17 years and a maximum penalty of 4 years imprisonment where the victim is above 17 and under 18 years. The legislation provides an exhaustive list of relationships which fall within the definition of 'special care'. These relationships include step-parent, guardian, foster parent, school teacher, and provider of religious, sporting or music instruction to the child.

The special care offence under section 73 should be distinguished from child sexual abuse offences where the offence is committed in circumstances of aggravation, namely where the offender is in a position of authority over the victim. The aggravating circumstance does not create a new offence; rather it increases the maximum penalty for a child sexual abuse offence. A victim is under authority of another person if the victim is in the care, or under the supervision or authority, of the other person. This element

is concerned with whether a particular relationship existed and it does not matter whether or not the accused abused their position of advantage.

As part of the NSW Child Sexual Offences Review, consideration will be given to whether the types of relationships covered by the special care offence should be extended and if the offence should apply to other forms of sexual conduct in addition to sexual intercourse.

Limitation periods

Section 78 (repealed) of the *Crimes Act 1900* (NSW) previously provided a limitation period of 12 months for the prosecution of certain child sexual assault offences if the victim was 14 or 15 years of age at the time of the offence. This limitation period applied to a range of offences that changed over time and included carnal knowledge, indecent assault with a girl and sexual intercourse with a child.

The section was repealed effective from 3 May 1992. The repeal was not retrospective. In practice, this means if the offence occurred prior to 3 May 1992 it is currently not possible to prosecute certain child sexual assault offences where the victim was 14 or 15 years at the time of the offence.

The repeal of the limitation period previously contained in section 78 of the *Crimes Act 1900* is being considered by the NSW Child Sexual Offences Review. There are no other limitation periods that apply to the prosecution of child sexual abuse offences in NSW.

6. Third-party offences

The Royal Commission sought submissions on issues related to third party offences in chapter 6 of its consultation paper, including possible offences of failure to report and failure to protect, as well as institutional offences.

Failure to report

In NSW there is no specific offence of failing to report child sexual abuse. However, as noted by the Royal Commission in its consultation paper, there is a general offence contained in section 316 of the *Crimes Act 1900* (NSW) of failing to bring information relating to a serious indictable offence to the attention of police. This offence can apply to failures to report child sexual abuse. The provision aims to encourage the community to report information about all serious offences to police, which will facilitate detection and investigation of criminal offences.

While the consideration of repeal or amendments to section 316 is beyond the scope of the NSW Child Sexual Offence Review, the Review will consider whether an offence of failure to report should be introduced which is specifically directed at child sexual offences. This will include consideration of the nature and scope (including defences and exceptions) of an offence, as well as practical implications. Importantly, an offence of failure to report will also be considered against NSW's regulatory context, including the reportable conduct scheme under the *Ombudsman Act 1974* (NSW), mandatory reporting obligations under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), and reporting obligations under the *Child Protection (Working with Children) Act 2012* (NSW).

Any criminal offence specifically directed at failure to report child sexual abuse will also be considered in the context of the recommendations of the 2008 Special Commission of Inquiry into Child Protection Services in NSW (**the Wood Inquiry**), which found that the penal consequences for failing to report resulted in over cautious reporting. Criminal penalties for failure to report/notify were removed from NSW child protection legislation in response to recommendations of the Wood Inquiry.

Failure to protect

In NSW, it is an offence under section 227 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to intentionally take action that results, or appears likely to result, in a child suffering significant harm as a result of physical injury or sexual abuse, or emotional or psychological harm. However, there is no specific offence contained in the *Crimes Act 1900* (NSW) for failure to protect a person from child sexual abuse in an institutional context.

As part of the NSW Child Sexual Offence Review, consideration will be given to whether NSW should introduce an offence of failure to protect, including any possible defences and whether the offence should apply only in an institutional context.

Offences by institutions

There is currently no offence in NSW which holds institutions criminally responsible for the commission of child sexual abuse. This is primarily because the criminal law in NSW is mainly concerned with the actions of individuals.

The NSW Child Sexual Offence Review will consider whether institutions should be liable in child sexual abuse matters, noting the complexity and variety of institutional contexts and challenges in applying criminal sanctions to institutions.

7. Issues in prosecution responses

The Royal Commission sought submissions on issues related to prosecutions responses in chapter 7 of its consultation paper, including possible ODPP complaints and oversight mechanisms.

NSW recognises the importance of adequate communication with and support for victims of child sexual assault and the need for appropriate training for prosecution staff. NSW also acknowledges that the timeliness of liaison between prosecutors and police on prosecution and charging decisions can have a significant impact on victims of sexual crimes, as well as on child protection and the ability of other institutions to take action.

The ODPP was created in 1987 by the *Director of Public Prosecutions Act 1986* (NSW) as an independent statutory body which is free from political influence. The ODPP is currently subject to a level of scrutiny through the provisions of the *Independent Commission Against Corruption Act 1988* (NSW), the *Government Information (Public Access) Act 2009* (NSW) and investigation by the NSWPF in circumstances where a crime is alleged to have been committed by the ODPP.

NSW notes that a multi-level decision making process currently operates within the ODPP and that complaints about the ODPP can be made directly to the ODPP or to the NSW Attorney General. However, NSW also recognises that transparent decision making processes and accessible complaint mechanisms are important for effective prosecution responses to victims of child sexual abuse and public confidence in decision making.

NSW notes that the ODPP is making a separate submission to the Royal Commission in response to the consultation paper.

8. Delays in prosecutions

The Royal Commission sought submissions on issues relating to delays in prosecutions in chapter 8 of its consultation paper, including options to address delays.

NSW faces a criminal trial backlog in the District Court. The NSW Government has taken a number of steps to address the backlog and reduce delays in criminal trials. These steps are expected to have an impact on delays in child sexual assault prosecutions.

Initiatives introduced in 2015 include:

- the appointment of two additional judges to the District Court to hear child sexual assault matters
- the establishment of a Working Group chaired by the Chief Judge of the District Court to address the increase in the District Court's workload
- the establishment of a designated 'Rolling List Court' in Sydney, managed by a single judge with permanently assigned staff from the Office of the Director of Public Prosecutions and the Public Defender's Office (see below for information about the impact of the Rolling Court List)
- the use of special call overs in regional areas to identify pending matters that may be suitable for earlier plea or trials (see below for information about the impact of special call overs)

- a series of coordinated special one-off call-overs and trial sittings in late 2015 at Wagga Wagga and Newcastle, and
- the District Court sat through the usual mid-year vacation in 2015 at the Sydney District Court, the Sydney West Trial Court and other selected regional courts.

In December 2015, the NSW Government announced a \$20 million package comprising the following initiatives to support the District Court:

- the appointment of two additional judges to the District Court
- additional sitting weeks in Western Sydney and regional courts through to June 2016
- the appointment of two new public defenders
- providing additional resources for the Office of the Director of Public Prosecutions and Legal Aid NSW to allow for earlier intervention in criminal cases (including initial plea discussions to identify early guilty pleas), and
- the continued use of special call overs in regional areas to identify pending matters that may be suitable for earlier plea or trials (see below for information about the impact of special call overs).

The 2016-17 NSW State Budget also included a further \$39 million funding package comprising the following additional initiatives to support the District Court:

- the appointment of three additional judges to the District Court
- the appointment of two new public defenders, and
- providing additional resources for the Office of the Director of Public Prosecutions and Legal Aid NSW for further case management initiatives, including the continuation of the Rolling List Court.

In addition, the NSW Government has created more capacity for the District Court to deal with matters such as child sexual assault trials by passing legislation (the *Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act 2016*) to allow certain property-related offences to be heard by the Local Court.

In October 2016, BOCSAR released a report on the first year of the Rolling List Court. The BOCSAR report found that the initiative is resolving trials faster and resulting in a significantly higher proportion of guilty pleas. This shows the benefits that flow from early consultation between defence and prosecution to ensure appropriate charges and to narrow down the issues in dispute.

In the past 12 months the District Court, in conjunction with the ODPP, the Legal Aid Commission of NSW and the Public Defenders' Office, has conducted targeted reviews of pending trial matters at its Wagga Wagga, Newcastle and Parramatta registries. This used very senior prosecution and defence representatives to review matters in an attempt to encourage appropriate pleas of guilty. Referred to as 'special call overs', these reviews have removed 118 trial matters from the Court's pending trial lists. A fourth special call over is scheduled to be held at Gosford in November 2016.

The Department of Justice is currently conducting a statutory review of the Pre-trial Disclosure Scheme located in the *Criminal Procedure Act 1986* in order to assess its effectiveness in reducing delay in trial matters in the District Court. The review will consider ways in which pre-trial disclosure and case management can be used to increase efficiency in the disposal of trials and to reinforce conditions which encourage appropriate pleas of guilty.

In addition, the NSW Government is currently considering the recommendations of the NSWLRC's Report 141: *Encouraging Appropriate Early Guilty Pleas*, including the early allocation of senior prosecutors, mechanisms for obtaining appropriate early guilty pleas, and the role of committal hearings and case management.

9. Evidence of victims and survivors

The Royal Commission sought submissions on the issues relating to the evidence of victims and survivors in chapter 9 of the consultation paper, including special measures to assist witnesses to give evidence in court (namely the use of witness intermediaries and the pre-recording of evidence) and interpreter services.

NSW recognises that the criminal justice system requires special measures for victims and survivors of child sexual abuse to give evidence in a clear and credible manner. NSW also recognises the difficulties facing victims, including that the process can be traumatic and challenging.

Child Sexual Offence Evidence Pilot

In 2015, the NSW Government passed the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) which established the Child Sexual Offence Evidence Pilot (**the Pilot**). The Pilot was introduced as part of the Government's response to the recommendations of the 2014 NSW Parliamentary Joint Select Committee on Sentencing Child Sexual Offenders.

The Pilot aims to reduce traumatisation of child sexual assault victims and the stress of giving evidence. The Pilot commenced on 31 March 2016 and will run for three years in the District Court at Sydney and Newcastle, and from four JIRT locations at Bankstown, Chatswood, Kogarah and Newcastle. Victims Services within the Department of Justice is responsible for the administration of the Pilot.

The Pilot has two major components:

- Firstly, eligible child victims are able to have all their evidence pre-recorded, including cross-examination and re-examination, in advance of trial and in the absence of a jury.
- Secondly, children can be supported by the appointment of a specially trained 'children's champion' (also known as a witness intermediary). The role of a children's champion is to assist child victims to communicate with the parties and the court when giving evidence, including during cross-examination. Children's champions are also available to assist with the facilitation of communication at the police interview stage. Children's champions are professionals who are impartial officers of the court with tertiary qualifications in psychology, speech pathology, social work and occupational therapy. This aspect of the Pilot is based on the Witness Intermediary Scheme in the United Kingdom.

The special measures contained in the pilot are in addition to existing measures available in Parts 5 and 6 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW). Existing special measures include the requirement for the court to be closed while the victim gives evidence, the right to give evidence from a remote location by closed-circuit television and the right to have a support person present while evidence is given.

Pilot resourcing and procedural issues

To facilitate the introduction of children's champions and pre-recorded hearings, District Court Criminal Practice Note 11 was developed and published by the Chief Judge of the District Court of NSW on 17 December 2015. This document outlines the procedures for operating the Pilot in the District Court.

Although ground rules hearings are not specifically mentioned in the practice note, they are now occurring regularly in both Sydney and Newcastle District Court Pilot matters. Ground rules hearings provide a forum for the children's champion to relay and explain their recommendations to the court and an opportunity for the court and parties to decide which recommendations will be implemented during the pre-recorded hearing. In practice, the ground rules hearing is also an opportunity for prosecution and defence counsel to discuss the formulation of cross examination questions with the children's champion.

A procedural guidance manual authored by Professor Penny Cooper, City Law School, City University London, and Victims Services outlines the procedural steps required of children's champions. The

procedural guidance manual also contains a code of practice for children's champions, who are also bound by a deed of agreement entered into with Victims Services.

The implementation of the Pilot involved a shift in practice for all agencies involved, particularly the NSWPF Child Abuse Squad, ODPP, defence counsel (including Legal Aid NSW) and the court as it requires all parties to be ready to proceed much earlier in the court process. Funding was provided to relevant agencies to allow for this shift in practice. Training was also provided to relevant agencies including District Court Judges and legal professionals.

Victims Services convene an implementation and monitoring group consisting of stakeholders who are involved with the Pilot, including the two specialist child sexual assault District Court judges. Feedback concerning how the special measures are working on the ground is regularly provided in this forum and adjustments to procedures can be made accordingly when required. For example, in response to feedback from the implementation and monitoring group, the NSW Government introduced, and Parliament passed, in October 2016 the Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016, which clarified and expanded aspects of the Pilot.

Evaluation of the Pilot

As of 16 September 2016, Victims Services had received 265 requests for a children's champion from the Child Abuse Squad pilot sites. Victims Services has matched 89% of these requests with a suitably qualified children's champion who has assessed the child's communication needs and assisted at the police interview. Victims Services has also received court orders requesting a children's champion for 18 matters involving 27 child complainants and has matched 100% of these requests with a suitably qualified children's champion.

Preliminary analysis of administrative data collected by Victims Services indicates that pre-recorded hearings are being held, on average, six months prior to the trial listing date. This allows the child complainant's cross examination to occur much closer to the date of report to police than was previously possible. It also allows the child to access counselling sooner than was previously possible due to the potential for the integrity of the child's evidence to be compromised.

Anecdotal feedback from District Court Judges involved with the Pilot, the ODPP and the Child Abuse Squad Pilot sites has indicated that the Pilot is achieving its intended aims, particularly in relation to reducing the stress and duration of court proceedings and improved evidence collection due to the assistance of the children's champion at police interviews.

An independent process interim evaluation will be undertaken in April 2017 and will consider procedural issues including:

- referral processes
- legislative and regulatory instruments
- procedural guidance
- stakeholder involvement
- children's champion training and recruitment
- stakeholder training
- technology and facilities
- services for Aboriginal and Torres Strait Islander witnesses.

A further evaluation will also be conducted at the conclusion of the Pilot. The evaluations will provide further guidance on the effectiveness of the Pilot and areas for improvement. Continuation or expansion of the Pilot will be considered after evaluation of the Pilot. If special measures are to be expanded, consideration must be given to sufficient resourcing for the relevant agencies particularly Legal Aid NSW, the NSWPF Child Abuse Squad, the Court, the ODPP and Victims Services.

Interpreters

NSW courts engage interpreters via Multicultural NSW. Interpreters are provided free of charge for prosecution witnesses and accused persons. An interpreter will be organised when a victim is either deaf, has a hearing impairment or is unable to communicate with reasonable fluency in English, and needs an interpreter to comprehend and fully participate in court proceedings.

10. Tendency and coincidence evidence and joint trials

The Royal Commission sought submissions on whether the law relating to tendency and coincidence evidence and joint trials should be reformed in chapter 10 of the consultation paper.

NSW acknowledges the range of issues raised by the Royal Commission associated with the current law on tendency and coincidence evidence and joint trials in chapter 10, particularly in relation to child sexual assault proceedings.

As canvassed by the Royal Commission, NSW is a Uniform Evidence Act jurisdiction and the law on tendency and coincidence in NSW is governed by the *Evidence Act 1995* (NSW). NSW notes that, while there is no explicit legislative presumption in favour of joint trials in child sexual assault matters in NSW, it is ultimately open for the prosecution to present an indictment seeking to try an accused in relation to two or more victims in the same trial. It is then a matter for the accused to seek to sever any counts on the indictment under section 21 of the *Criminal Procedure Act 1986* (NSW).

NSW will give close consideration to the recommendations of the Royal Commission on the issues of tendency and coincidence evidence and joint trials. Given the use of uniform evidence laws around Australia, it is best that any change to the legislation is agreed and adopted by all participating jurisdictions.

11. Judicial directions and informing juries

The Royal Commission sought submissions on issues relating to judicial directions and informing jurors about child sexual abuse in chapter 11 of the consultation paper.

As noted in the consultation paper, judicial directions in relation to sexual offences and child sexual abuse have been the subject of considerable review and research in most Australia jurisdictions, including NSW. Notwithstanding legislative reform in this area, in chapter 11 the consultation paper raises the question of whether further reforms are needed to address juror misconceptions through judicial directions, expert evidence and improved education.

These issues were considered in 2012 by the NSWLRC in Report 136: *Jury Directions*. The NSWLRC made recommendations regarding jury directions and expert evidence in child sexual abuse matters at recommendation 5.5. In particular, the NSWLRC recommended commissioning further research on the issue of juror and public misconceptions concerning the reliability of the evidence of children and their responses to sexual abuse. The Jury Reasoning Research and consultation paper explore these issues.

The NSW Government is currently considering the recommendations of the NSWLRC report, and will consider the research and any recommendations of the Royal Commission in that context.

12. Sentencing

The Royal Commission sought submissions on the sentencing issues in chapter 12 of the consultation paper, including:

- good character in sentencing for child sexual abuse offences
- a presumption in favour of cumulative sentencing for child sexual abuse offences

- whether child sexual abuse offences should be sentenced in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales.

Good character

In NSW, section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that good character or lack of previous convictions is not to be taken into account as a mitigating factor, if the court is satisfied it assisted the offender in the commission of a child sexual offence.

This provision was enacted following recommendations of the NSW Sentencing Council in its report *Penalties Relating to Sexual Assault Offences in New South Wales* in 2008. The NSWLRC's Report No 139: *Sentencing* in 2013 discussed the Sentencing Council's reasons for excluding good character as a mitigating factor and supported the retention of this exclusion.

Cumulative sentencing for child sexual abuse offences

In recommendation 3.1 of its 2013 Report No 139: *Sentencing*, the NSWLRC recommended that a statement be included in NSW sentencing legislation that requires courts to apply certain key common law sentencing principles, including the principles of totality and proportionality. These two principles underpin the idea that when a court sentences an offender for multiple offences, it should, where appropriate, make the sentences partly or wholly concurrent to ensure that the effective term of imprisonment reflects the criminality of the offending.

Section 55 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that, in the absence of a specific direction by the court, the default position is that prison sentences are to be served concurrently, with the exception of a small number of offences committed in custody by sentenced inmates and juvenile detainees. Section 55(2) provides that courts may make a specific direction that sentences are to be served cumulatively, or partly cumulatively and partly concurrently. Where an overall sentence is considered to be manifestly inadequate, the prosecution can appeal to the Court of Criminal Appeal and ask for the overall sentence to be increased.

Sentencing standards for historic matters

In NSW, section 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that if the maximum penalty for an offence is increased, the increased penalty applies only to offences committed after the date of increase.

NSW acknowledges the issues raised by the Royal Commission in relation to the current sentencing practices for historic matters. As noted above, sentencing standards for historic matters are being considered as part of the NSW Child Sexual Offences Review, which will take into account stakeholder views and any relevant recommendations of the Royal Commission.

13. Appeals

The Royal Commission sought submissions on a range of issues relating to appeals in chapter 13 of its consultation paper.

The NSWLRC's 2014 Report No 140: *Criminal Appeals* acknowledged that appeals following the conviction and sentencing of offenders for child sexual abuse offences have had significant negative impacts on survivors. Their lives remain 'on hold' while they are waiting to go to court again for a retrial following an appeal, with associated stress relating to potentially having to give evidence again.

This issue is particularly significant for child sexual assault victims, given the high proportion of appeals in such matters regarding both conviction and sentence (as reported in 2011 research by the Judicial Commission of New South Wales, which is summarised in the Royal Commission's consultation paper).

The NSWLRC's recommendations are directed at simplifying and streamlining appeal processes, including by consolidating criminal appeal provisions into a single Act and utilising modern drafting. The recommendations promote finality in the trial and appeal process, which in turn reduces delay and increases fairness to the victim and others involved in the criminal trial process.

The NSW Government is currently considering the recommendations of the NSWLRC report and will consider the research and any recommendations of the Royal Commission in that context,

14. Post-sentencing issues

The Royal Commission sought submissions on the post-sentencing issues in chapter 14 of its consultation paper, including:

- treatment for adults who have committed child sex offences
- supervision or detention orders
- risk management measures which apply on release of child sex offenders.

Programs and approaches to treatment of adult sex offenders

Corrective Services NSW

Corrective Services NSW (**CSNSW**) uses the Static-99R tool to determine a sex offender's risk of committing a further sex offence. CSNSW has also adopted the Stable and Acute 2007 tools to assess dynamic risk. The current practice is that the combined score of the Static and Stable tools informs decisions regarding treatment in custody, as well as management of sex offenders in the community.

In 2016, the CSNSW Community Corrections policy was changed following the introduction of the Sex Offender Supervision Assessment, which is effectively the combined Static and Stable score. The Sex Offender Supervision Assessment is used by supervising officers in calculating the Community Impact Assessment to determine the level of supervision sex offenders receive when on an order in the community. In addition to the custody based programs noted by the Royal Commission, CSNSW offers a community based maintenance program as well as a community based treatment program delivered in a non-custodial setting.

CSNSW does not currently separate sex offenders in treatment according to the type of sexual offending. However, therapeutic managers do give consideration to the composition of groups, and treatment staff have extensive experience working with this factor as a responsivity issue in relation to having these offenders in the same groups.

Child Sex Offender Counsellor Accreditation Scheme

The Office of the Children's Guardian administers the Child Sex Offender Counsellor Accreditation Scheme which is a voluntary accreditation scheme for counsellors who work with persons who have committed sexual offences against children.

Supervision and detention orders

Under the *Crimes (High Risk Offenders) Act 2006* (NSW), the Supreme Court can order that high risk sex offenders and high risk violent offenders be supervised or detained after their sentence has expired. The safety and protection of the community is the primary purpose of these orders. Encouraging offenders to undertake rehabilitation is a further objective.

These arrangements were first introduced in NSW in 2006 for serious sex offenders and were extended to apply to serious violent offenders in 2013. The Act is currently subject to a statutory review.

Extended supervision and continuing detention orders for sex offenders

Under the *Crimes (High Risk Offenders) Act 2006* (NSW), the Supreme Court may make an extended supervision order (**ESO**) which enables CSNSW to supervise high risk sex offenders in the community

for up to five years after their sentence expires. Breach of an ESO carries a maximum penalty of 500 penalty units or imprisonment for five years, or both. The Supreme Court may also make a continuing detention order (**CDO**) which enables an offender to be detained in a correctional centre for up to five years after their sentence expires.

As at September 2016, 97 of these orders had been made in respect of high risk sex offenders (78 ESOs and 19 CDOs) since 2006.

Interim supervision and detention orders for sex offenders

The *Crimes (High Risk Offenders) Act 2006* (NSW) also allows the Supreme Court to make orders for the interim supervision or detention of a sex offender. These orders can be made if the Court is considering an application for an ESO or CDO and the offender's current custody or supervision is going to end before those proceedings will be determined. To make an interim order, the Court needs to be satisfied that the matters alleged in the application would, if proved, justify the making of an order. The length of these orders is 28 days and can be extended for up to three months.

Emergency detention orders for sex offenders

Emergency detention orders (**EDOs**) may also be made under the *Crimes (High Risk Offenders) Act 2006* (NSW). EDOs are available for responding quickly where altered circumstances mean an offender cannot be adequately supervised in the community (such as if a breach suggests an escalation in risk). An EDO cannot exceed 120 hours from the time it is made. EDOs were introduced in 2014. To date no EDOs have been sought by the State or granted by the Supreme Court.

Availability of information about ESOs and CDOs

The NSW Department of Justice has made a fact sheet available about ESOs and CDOs at http://www.correctiveservices.justice.nsw.gov.au/Documents/CSNSW%20Fact%20Sheets/fact-sheet-5-extend-super-orders-201015-1653_accessible.pdf.

Risk Management on release

NSW notes the importance of transition of care from custodial settings to the community, given that the initial six to 12 months of community reintegration is a critical period of risk for offenders.

Child Sex Offender Register

Under the *Child Protection (Offenders Registration) Act 2000*, a registrable person (a person convicted and sentenced for a registrable offence) must keep police informed of their personal information and comply with reporting obligations. 'Registrable offences' includes sexual offences against children, including historical sexual offences.

Child Protection Prohibition Orders

In NSW, police can apply for child protection prohibition orders under the *Child Protection (Offenders Prohibition Orders) Act 2004*. Child protection prohibition orders stop registrable persons engaging in activities that pose a risk to the safety of children, such as loitering near schools and other areas where children congregate, or accessing certain websites.

NSW recognises corresponding orders made in the Australian Capital Territory, Northern Territory, Western Australia, the United Kingdom, Western Australia, Queensland and South Australia.

Following a review, the *Child Protection (Offenders Prohibition Orders) Act 2004* was amended in 2013. The maximum penalty for breaching an order was increased from two to five years imprisonment.

Child Protection Watch Teams

In NSW, an additional avenue for ongoing monitoring of sex offenders in the community is through the Child Protection Watch Teams convened by the NSWPF. Information relating to Child Protection Watch

Teams is located in the *Community Corrections Policy and Procedure*. To be eligible for management by a Child Protection Watch Team, offenders must be registrable under the *Child Protection (Offenders Registration) Act 2000*. At least one of the following criteria must be met when deciding whether to refer an offender to a Child Protection Watch Team:

- the offender has been assessed as a high risk of child sexual offending, as defined by a rating of high on the Sex Offender Supervision Assessment
- the offender has been assessed by a psychologist as having high levels of dynamic risk factors
- the offender has a conviction for an offence of violence against children
- the offender is likely to attract, or has attracted, media attention
- information or intelligence indicates that the offender poses a current risk to children, or
- changes to the offender's circumstances have resulted in an increased risk to children.

Eligible offenders must be reviewed against the above criteria at the following times:

- prior to release from custody to parole supervision or at sentence expiry
- at the commencement of community supervision
- during supervision, if the offender's circumstances change
- each time the case plan is reviewed, and
- at expiry of a supervision order (offenders do not have to be under supervision to be managed by a Child Protection Watch Team).

Working with children checks

The Working with Children Checks scheme provides a further mechanism for risk management of child sexual offenders. NSW notes two significant amendments which were made to improve the *Child Protection (Working with Children) Act 2012* which commenced with effect from 2 November 2015:

- A person who has been convicted of a specified offence and against whom a prohibition order under the *Child Protection (Offenders Prohibition Orders) Act 2004* is in force cannot appeal the refusal of a working with children check.
- Disqualifying offences under the *Child Protection (Working with Children) Act 2012* (NSW) now include all registrable offences within the meaning of the *Child Protection (Offenders Registration) Act 2000* (NSW).

15. Juvenile offenders

The Royal Commission sought submissions in relation to any issues relating to juvenile child sexual abuse offenders in chapter 15 of the consultation paper.

In NSW, juvenile offenders are dealt with the *Children (Criminal Proceedings) Act 1987* (NSW) in the Children's Court. The Children's Court has jurisdiction to hear and determine any offence committed by a child other than a serious children's indictable offence, which includes only the most serious of criminal offences.

As noted above, the Department of Justice will be considering issues relating to juvenile sex offenders as part of the NSW Child Sexual Offences Review. The review will consider whether a similar age defence for sexual offences should be enacted in NSW and how it should be framed. A similar age defence was recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals and already operates in ACT, South Australia, Victoria and Tasmania. The review will also consider the consensual sharing of sexually explicit images by young people (commonly known as 'sexting') given that this behaviour is common practice and young people who engage in this behaviour could currently be charged with offences relating to the production, dissemination or possession of child abuse material under the *Crimes Act 1900* (NSW).

NSW notes that the criminal justice system is only one mechanism for responding to institutional child sexual abuse, particularly in circumstances where sexual abuse is committed by children on other

children. Organisations responsible for children, such as the Department of Education, have a significant role to play in managing the safety and wellbeing of children who may have had contact with a child or children who have engaged in sexual abuse, as well as the child or children who have engaged in sexual abuse. There is a need to balance the needs of the victim, the alleged offender and other members of the community within the institution. For this reason, clarity of practice across institutions about what steps are appropriate and necessary is important.

In relation to working with children checks, NSW notes that recommendation 17 of the Royal Commission's Working with Children Checks report concerning a standard definition of criminal history reflects the current position in NSW. Juvenile records for offences which would automatically disqualify an applicant if committed as an adult result in a risk assessment, in accordance with Royal Commission's recommendation.

NSW supports consideration of rehabilitative sentencing options for children and notes that the Royal Commission will be considering the issue of treatment for children with harmful sexual behaviours separately. NSW looks forward to the opportunity to comment further on this issue.