ODPP
New South Wales

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper – Criminal Justice

Office of the Director of Public Prosecutions

November 2016

Contents

Introduction

The ODPP welcomes the opportunity to respond to the work of the Royal Commission in relation to criminal justice issues. The ODPP, as the independent prosecuting agency in NSW, has been proactive since its creation in 1988 in improving the experience of the criminal justice process for victims of crime, by advocating for legislative, policy and procedural reform. We believe, that in an environment where increasing numbers of child sexual abuse matters are coming before the courts, that it remains as important as ever to continue to advocate for, and, implement improvements.

Chapter 2 - Importance of a criminal justice response

We agree with the approach of the Royal Commission in relation to criminal justice reforms namely, that:

- Criminal justice responses are available for victims and survivors who are able to seek them,
- Victims and survivors are supported in seeking criminal justice responses, and
- The criminal justice system operates in the interests of seeking justice for society, including the victim and the accused.

However, at the outset of this submission we want to emphasise that despite the significant proportion of child sexual abuse offences (and other sexual offences) before the courts in NSW, we are of the firm view that changes to criminal legislation and procedure and to the ODPP's Prosecution Guidelines generally need to be generally applicable to all offences, not just child sexual abuse offences.

The number of child sexual abuse matters held by the Office has increased over the past five years.

- Child sexual abuse cases currently makes up 10% of NSW ODPP committal matters
- Summary hearings have increased from 56% to 61% of total ODPP summary hearing work.
- Child sexual abuse matters make up 18.5% of all District Court trials, in 2012 they made up 12.1% of trials, and increase of 6.4%.

Secondly, we note that in NSW there have been significant changes over the past 30 years or so which have addressed many of the issues discussed in the Consultation Paper. This submission will focus on areas, within our expertise, that in our view NSW needs to address or to further improve upon.

Finally, this submission should be understood in the context of the current pressures on the criminal justice process in NSW, which is under significant stress. This is due to a large backlog of trials in the District Court. The ODPP had advocated, through the NSW Law Reform Commission reference "Encouraging Appropriate Early Guilty Pleas"[i], for an overhaul of the criminal justice process. This Office submitted that such an overhaul was not only overdue, but imperative to both improving the efficiency of the courts and other criminal justice agencies and to improving the experience of the criminal justice process for all stakeholders, not least of all victims of crime. In our view, if recommended changes do not also address the significant structural and procedural issues in the criminal justice process, there will only be marginal improvement in a limited cohort of cases. We believe that the Royal Commission's work provides an opportunity and imprimatur to bring about the necessary change.

Chapter 5 - Child sexual abuse offences

The Consultation Paper describes the many changes to criminal offences relating to the sexual abuse of children across jurisdictions over the past 40 years. In no other area of criminal law has such change been necessary to bring offences in line with changing community values and expectations. While these amendments have been necessary, they have also been piecemeal and ultimately, the changes have produced legislative anomalies and a scheme of great complexity. This is particularly so when it comes to the task of formulating appropriate and available charges in cases where the allegations span a number of years and the complaint is made when the child is an adult.

In a submission to the NSW Sentencing Council in 2008, the then Director of Public Prosecutions said:-

> "*The current legislative regime for sexual offences and their penalties is an accumulation of legislative amendments over the last 100 years and in particular extensive amendments in the last 26 years that has resulted in a complicated scheme of offences that are premised on concepts that are out of step with modern life.*
>
> *"The complexity arises from the following factors, firstly, the interpretation and application of past and current laws is a difficult process which the police, the prosecution and the courts continue to grapple with. Secondly, in light of the changing nature of our modern society; communication methods, availability of certain drugs and ease of travel now permit offences that possibly may not have existed when the 1981 amendments were undertaken.*
>
> *"Many sexual offences are now archaic and outdated and do not correspond with modern values and terminology. Terms such as indecent assault and act of indecency and the range of offences and penalties that come under those categories are confusing and lack transparency. Thirdly, the nature and extent of sexual offending has become better understood through improved policing, prosecution and research."*

Following this submission, the then NSW Attorney General, John Hatzistergos MLC, created an interagency working party to examine how the NSW offences could be modernised and streamlined and anomalies corrected. Due to a change of Government, the work of this group was not completed. In our view, there remains work to be done to address the anomalies and deficiencies.

The ODPP maintains the view that it is desirable to restructure the *Crimes Act* 1900 (NSW) to provide for a regime of sexual offences relating to children that do not contain the element of consent. A separate regime should apply for offences relating to adults which require the Crown to prove lack of consent. The child-related offences should be structured so that they are not defined by the age of the child, because often it will not be possible to prove age. For example, problems can occur where the alleged incident occurred within a nominated six-month period during which the child had their 10th birthday. The hierarchy of penalties within these regimes also needs to be reviewed.

Persistent sexual abuse

Traditionally, an indictment containing well-particularised separate counts has been considered the most effective way to reflect a course of conduct or persistent sexual abuse and attract a condign sentence. However, a well-particularised separate count indictment is not available in every case, because ultimately such an indictment is reliant on the memory of the victim. Further, the greater the number of indictment counts, the more onerous the process of giving evidence for the victim. The ODPP has long recognised the inherent inequity in prosecuting course of conduct offences in this way.

As such, we advocated for the introduction of an offence of persistent sexual abuse (section 66EA *Crimes Act*), but unfortunately, the section has not achieved what it was originally intended to achieve.

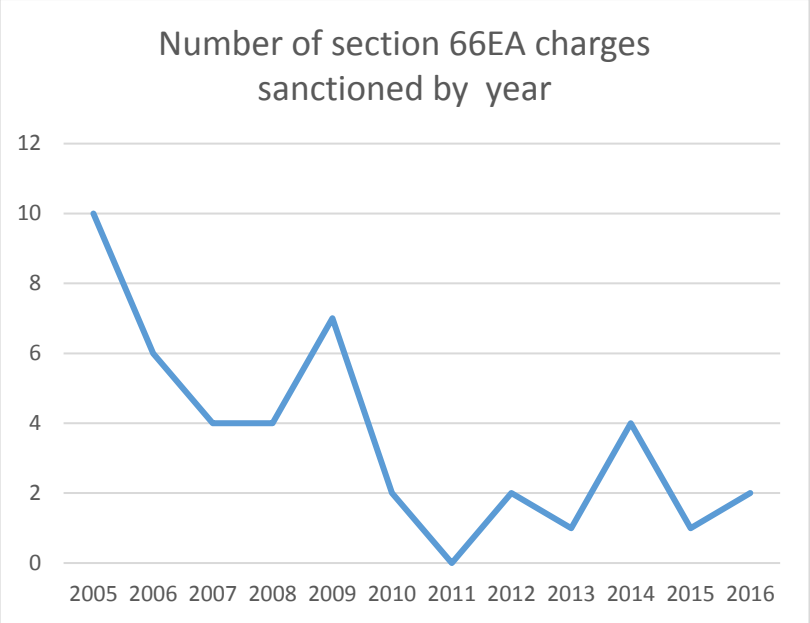
Today, in our view, the most imperative issue to be addressed in terms of child abuse offences in NSW is the inadequacy of section 66EA. We believe that the provision should be recast in a form that makes it an offence in its own right, rather than a procedural provision (*R v Fitzgerald* (2004) 59 NSWLR 493, *R v Manners* [2004] NSWCCA 181).

The gravamen of the offence should be that the child was not safe from a sexual predator who took advantage of the child's vulnerability and violated a position of trust over an extended period.

In 2008 we advised the then Attorney General that section 66EA was profoundly underutilised.

Between 27 August 1999 and 27 August 2008, of 2386 child sexual abuse trials, in only 45 cases (1.89%) was the charge used.

Because the section applies to a course of conduct and does not have a retrospective application, one would have expected that the utilisation of the offence would increase over time.



The chart (inset) has been compiled from records maintained over the past 10 years by this Office as to the number of times the charge has been sanctioned. In our 2008 submission to the Attorney General we suggested that the Queensland formula for an offence should be adopted. This is still our position.

The Royal Commission has already observed that much of the "wisdom" that has pervaded how the common law has been formulated is now known not to be based in fact. For example, the assumption that there should be "hue and cry" before a complaint of rape should be believed is now known to be incorrect. Experience shows that resoundingly sexual abuse victims do not make an immediate complaint.

In our submission, the formulation of criminal offences and evidentiary rules that rely on fragile memory should be considered in light of contemporary psychological research. Such research provides the foundations for the need for an offence of persistent sexual abuse and the way it should be framed.

"The Guidelines on Memory and the Law" published by the British Psychological Society in 2008 provide the following in respect of recall of repetitive events.

"When people repeatedly experience the same or a similar event it is generally accepted that they form a general mental representation of the event in long-term memory. These general representations may take different forms but together they are termed: schema.

…… A schema then is not a memory of a single experience or event. Rather, it is a general mental representation derived from many similar experiences. It is essentially a prediction about how a particular event should unfold overtime ...

For present purposes the following should be noted:

Schematic representations have some specific memories associated with them but there are usually relatively few of these. Memory for early experiences related to the schema, e.g., the first restaurant one went to, and most recent experiences too are often highly available for recall.

Events in which something unusual occurred, something outside the predictions of the schema, are often highly memorable. For example, paying for one's meal before it is served (as occurs in some European motorway service stations).

In general, however, schema function to prevent the detailed encoding of experience. In schematic events information is highly redundant and if an event proceeds fairly in line with the schema then there is no informational value in retaining a specific memory of that event. It seems that our memories have evolved to avoid storing what would be redundant information.

An important question is: How many repeated experiences must one have before a schema is formed? Unfortunately research currently offers no definitive answer to this question … although some studies have found evidence of schema formation after only a few repeated very similar experiences. In contrast, other research suggests that schema formation is one of the main memory tasks of childhood and takes place over a period of years.

Finally, if a person was recalling a repeated schematic event, what features would this have? There should be at least a few specific early and recent memories (with the same features as described earlier) and also any experiences in which the schema predictions failed should be well recalled. In the main, however, there would be a great deal of recall of what usually occurred, what objects were usually present, who was usually there, and what they usually did. This knowledge would not be linked to information about specific times and occurrences."

Related to the issue of an individual's capacity to recall repeated events, is a consideration of what impact does repeated questioning about the matter have. It is likely that the impact of an investigator exhorting the witness to isolate specific events and particularise them may result in unintended error by the witness. This almost certainly would have an impact, albeit unmeasured, on a prosecution.

It is our submission that in order to adequately prove the offence of persistent sexual abuse, there is a need for some particularity for two or three offences. In our experience it is usually possible for a victim to provide details of the first and last abuse event. This would strike the appropriate balance between assisting the victim to give evidence, avoiding conflation and not placing an unacceptable burden on the accused to defend the allegation.

If section 66EA is recast, which we strongly support, it should operate retrospectively at least to 1998 when the offence was introduced.

Victorian Course of Conduct Offence

It appears to us that the Victorian course of conduct offence does not have any particular advantage over an offence of persistent sexual abuse. Ultimately, in our view, it is preferable to have an offence directed at the abuse of children with a high penalty. Our experience is that in any case of long-term abuse sexual activity will escalate over time. Typically there is a progression from indecent assaults to sexual intercourse, thus encompassing several types of charge. The Victorian course of conduct offence, in providing for only one type of offence, would therefore be unlikely to be suitable to cover the course of offending. However, it seems likely that a course of conduct offence would be a useful addition to the *Crimes Act* for other types of criminal offences.

Grooming

The main issue about a "grooming" offence appears to be whether it should be cast broadly or narrowly. NSW has a narrow offence reliant on the proof of illicit activity, such as sharing indecent images or the supply of drugs or alcohol. It relies on activities which are relatively easy to prove and because these activities may be more readily detected before the behaviour escalates, it has some advantages over a broad offence.

Position of authority offences

In NSW the latest amendments to section 73 *Crimes Act* addressed earlier gaps in abuse of trust offences and now cases where a 16 or 17-year-old has had an abusive relationship involving "special care", such as where the accused is a de facto parent or teacher, are captured. However, there is a disconnection between the terminology and definitions used in section 73 and the "in authority offences" elsewhere in the *Crimes Act*.

In our submission, it is necessary to have offences available to continue to protect vulnerable persons in a special relationship who are under 18 years. The NSW legislation now provides that.

Limitation period on prosecutions

The ODPP does not support the creation or retention of limitation periods on prosecution, particularly so where the victim is a child.

We agree that the policy basis for the limitation in the repealed section 78 *Crimes Act* is out of step with contemporary understanding of the extent and dynamics of child sexual abuse. The limitation period's impact, in our experience, has been ameliorated by the fact it was limited to carnal knowledge and indecent assault offences and in most cases complaints of this nature involved other offending that was not caught by the limitation.

We appreciate that there would be a sense of injustice for victims where prosecutions have not been possible due to the operation of section 78 and so agree that it is appropriate to now make the repeal retrospective to enable consideration of the institution of proceedings in these matters.

Chapter 6 – Third party offences

This Chapter raises for consideration the possibility of enacting laws which create a positive duty on third parties to report or take action in cases of child sexual abuse.

Retention of a criminal offence in relation to failure to report

The *Crimes Act* 1900 (NSW) presently includes the offence of concealing a serious indictable offence, found in section 316. The section makes it an offence for any person who knows or believes that a serious indictable offence has been committed, and who has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, to fail without reasonable excuse to bring that information to the attention of the police or other appropriate authority. The penalty is imprisonment for two years

In 1999 the NSW Law Reform Commission recommended that this section be repealed, but this was never acted on legislatively. If that broad s316 offence were ever repealed then we would support a specific offence targeted at the reporting of child sexual abuse by third parties along the lines of the Victorian offence.

Failure to protect law

The Consultation Paper includes a discussion of the merits of introducing a law along the lines of section 49C of *Crimes Act* 1958 (Vic), which was introduced in July 2015 and which places a positive obligation (with criminal sanctions for non-compliance) on institutions to take steps to minimise the risk of child sexual abuse occurring. That offence is directed at individuals within the organisation and is based on the concept of a person in a position of power or responsibility negligently failing to reduce or remove a known substantial risk of child sexual abuse by an adult on a child.

Such a measure has the real potential to prevent abuse from occurring or continuing in an institutional context. There have been too many cases of wilful blindness to ongoing employee offending by persons in positions of institutional authority. A failure to protect law would mean that those in positions of authority would no longer be able to defer or avoid acting to remove a known potential offender from having access to children.

Possible institutional offences

The Consultation Paper raises for consideration the potential introduction of an offence committed by an institution in which child sexual abuse had occurred. Various proposals have been put forward as to how to frame such an offence. In general terms, one proposal is for an offence contingent upon a conviction of a person within an organisation/institution for a child sexual abuse offence. If the institution had failed to provide adequate corporate management, control or supervision of that person, or had failed to provide adequate systems to convey information to persons associated with that institution, they would be liable. Another possible offence is framed in terms of an institution displaying negligence, where the occurrence of child sexual abuse was substantially attributable to that negligence.

There are numerous difficulties associated with the proposals to introduce corporate criminal liability, some of which are identified at page 250 of the Consultation Paper. We believe that more in-depth research and policy consideration is needed before a final position supporting the introduction of such offences could be taken. The number and variety of different legislative frameworks proposed, and the legal complexities which attach to each proposal, require further careful consideration to be given to this issue before a final view can be reached.

Chapter 7 - Issues in prosecution responses

In this Chapter submissions are invited on:

- The possible principles for prosecution responses and charging and plea decisions, including in relation to whether it is sufficient to address the issue by setting out general principles or whether there should be more specific recommendations (and, if so, what should they be),
- Whether there is sufficient liaison between prosecutors and police in relation to charging decisions, and
- Possible DPP complaints and oversight mechanisms, including in relation to which, if any, mechanisms are favoured and any resourcing issues.

Principles for prosecution responses, charging and plea decisions

The Royal Commission has identified five aspects of prosecution responses which are of particular importance to victims and survivors. These are:

- Training in child sexual abuse cases
- Continuity in staffing
- Regular communication
- WAS assistance
- Issues concerning credibility of the complainant

Training in child sexual abuse cases

Prosecution of child sexual abuse matters is a core part of the business of the NSW ODPP. Formal training is essential in the course of a lawyer's professional development.

In his statement to the Royal Commission of 27 June 2014, John Pickering SC, Deputy Director (as he then was) was asked to comment on training provided to legal staff from 2004 until 2014 in relation to child sexual abuse (see the inset).

We recognise the need to ensure that all lawyers briefed in child sexual abuse cases are highly skilled in the area, and to this end we are developing a new curriculum of relevant training in areas such as advocacy, communication and conferencing skills and the dynamics of child abuse and legal issues. The completion of the modules of training will ensure practitioners as suitable to perform this type of work.

Continuity in staffing

We agree with the observations of the Royal Commission in relation to the importance of effective, regular and timely communication with victims.

John Pickering SC - training of prosecutors

"In order to do the work required as a prosecutor in the ODPP and be promoted, an ODPP lawyer must attain competence and skills in this area. As someone who commenced work in the Office in 1993 and has performed legal roles at all levels of the ODPP I can say that there is a high level of competence and understanding of legal and psychosocial aspects of child sexual abuse with the ODPP, achieved by a combination of training courses, presentations for continuing legal education by experts and other prosecutors, and on-the-job training which includes informal mentoring and formal oversight by managers ……. For a staff member who has come through the organisation and become a Trial Advocate or Crown Prosecutor it would simply be impossible for that person not to have done an extensive amount of child sexual assault work, and be both skilled at the legal issues involved in running trials of this nature, but also explaining to a jury many of the factual circumstances of these matters that are complex for a jury who may not have experienced this issue before" [paras 47 – 48].

This Office has long recognised that best practice in sexual assault prosecutions includes continuity of representation and early briefing of a Crown Prosecutor/Trial Advocate who will run the trial and be available for early conferencing and provision of information.

We recognise that information may need to be delivered in several meetings, may need to be repeated and should not be rushed. We also acknowledge that in stressful situations such as on the eve of a trial, victims may not be best placed to fully appreciate or understand the consequences of a decision they are asked to make within a short time-frame.

Despite acknowledging the above in our "Best Practice for the conduct of sexual assault prosecutions policy", we have experienced to date considerable difficulty in achieving continuity of instructing lawyer and early allocation of a Crown Prosecutor.

Child sexual abuse matters are less likely to result in a plea of guilty.

ODPP statistics show that

- 27% of child sexual abuse matters are committed for sentence to the District Court (the average committal for sentence rate for all offences is 37%).
- 61% of child sexual abuse matters are committed for trial (the average committal for trial rate for all offences is 33%).
- Of those matters committed for trial, 58% proceed to trial.

This Office has, over many years, advocated strongly for systemic reform to the criminal justice process to enable better allocation of prosecutorial resources. This, in turn, would enable senior prosecutors to be available at the beginning of the process to settle the appropriate charges, ensuring realistic expectations and case clarity for both victim and accused. We have argued forcefully that without early allocation to the trial prosecutor the opportunity to secure an early plea is diminished[ii]. The other side to the equation is that without early allocation of the trial prosecutor, the victim might justifiably feel that the case is not being handled professionally or with the care and attention they are entitled to expect. That is not to say that an effective and professional prosecution cannot be run if a matter is briefed later, but understandably, a victim's confidence in the process may be lower if this happens.

The New Prosecution Model

This Office continues to consider ways to improve its processes. We are presently trialling a number of initiatives as part of developing a New Prosecution Model which aims to increase the prospects of achieving continuity of representation.

Under the model, a category of matters have been identified as requiring priority attention during the prosecution process. These matters are referred to as Priority Matters and include cases involving sexual offences committed against a victim who is currently under 16 years of age. These matters are allocated to an experienced lawyer and a Witness Assistance Service (WAS) officer at a very early stage. A Crown Prosecutor or Trial Advocate and instructing lawyer are also briefed at the committal stage, with the expectation they will remain in the matter until completion. Early and ongoing victim contact is also required. An internal evaluation of this initiative is currently being undertaken. It is anticipated the model will be expanded to include matters in which other particularly vulnerable victims are identified.

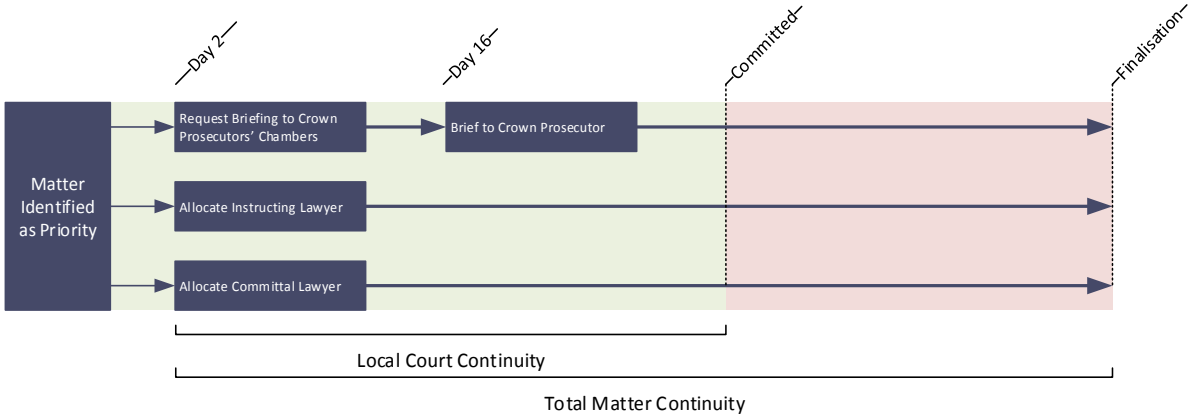
Another initiative under the model is known as the Burwood Pilot, which commenced in March 2016 in the Sydney office. The intention of the Pilot is to develop a model for handling all prosecutions more effectively and efficiently.

The Burwood Pilot involves a small team of lawyers and administrative staff who have carriage of committals and summary prosecutions listed at the Burwood Local Court. The lawyers are aligned with police Local Area Commands to establish better working relationships with investigators in order to improve the quality of police briefs of evidence.

Crown Prosecutors are briefed at committal stage in matters with vulnerable victims, and in matters identified as unlikely to result in a guilty plea. ODPP statistics reflect that child sexual abuse matters are more likely to proceed to trial.

The team is tasked with streamlining procedures, focusing on plea negotiations, victim contact and continuity of lawyers. The Pilot will be assessed in 2017 by an external agency with a view to implementing further change across the Office. The following diagram depicts the approach to continuity of representation being trialled by the Burwood Pilot.

Local Court and Total Matter Continuity



Witness Assistance Services

The NSW ODPP Witness Assistance Service (WAS) is now in its 23rd year. The WAS has become an invaluable part of the prosecution process in NSW. WAS officers have a psychological or social work background and a counselling background and significant experience in these fields before coming to the ODPP. WAS officers act as case managers, facilitating communication and ensuring that victims and vulnerable witnesses have support throughout the prosecution process. It is important that WAS officers ensure there is engagement with other resources, such as sexual assault counsellors, as WAS resourcing does not allow an officer to remain involved with the victim or witness once a case is over. An enhancement of WAS in 2016 to include an additional four WAS officer positions will assist the WAS in meeting the current demands.

We acknowledge the feedback from the Royal Commission in relation to Aboriginal WAS officers and note the importance of providing a culturally appropriate service to Aboriginal and Torres Strait islander victims and witnesses. It is noteworthy that NSW has three identified Aboriginal and Torres Strait Islander WAS positions and assists in providing a service for victims, witnesses and survivors that breaks down institutional barriers to accessing culturally appropriate services. The Aboriginal WAS

officers also consult across the State with generalist WAS officers to ensure culturally appropriate referrals to services and information for victims and witnesses.

Regular communication

This Office is bound to comply with various statutory requirements concerning consultation with victims of crime, namely, the Victims Charter and section 35A *Crimes (Sentencing Procedure) Act* 1999. The ODPP is obliged to report to Victims Services NSW quarterly as to our compliance with the Charter.

We have a number of internal policies dealing with victims, including Prosecution Guideline 19 and the Victim's Rights and Obligations Consolidated Procedures Policy.

We have listened with interest to victims' accounts of the criminal justice process, both positive and negative. Clearly there is a noticeable disparity between the individual experiences of survivors of the process that is independent of the prosecution outcome. However, there appears to have been some improvement in the support and information this Office has provided over time. We are keen to make the best of this feedback and use it to train our staff to be better communicators.

Liaison between the prosecutor and police about charging decisions

In NSW, the police retain the discretion to charge. Through our submission to the NSW Law Reform Commission in relation to early guilty pleas[iii], the ODPP made it clear that it would be our preference to have more control over the decision to charge and the identification of the correct charges before those charges were laid. Getting the charge right early in the criminal process, in our submission, adds a number of benefits to the process. It makes it clear to the accused at the outset that these are the charges to which a plea would be accepted, it gives police and victims realistic expectations as to how the case will proceed, and it better enables the defence to prepare the case for trial and the court to case manage the matter.

Charging in respect of child sexual abuse offending is, over and above other offence categories, a technically challenging exercise (please see our comments under Chapter 5 also). Charging in this area requires the application of repealed offences and changing definitions, *S v The Queen* (1989) 168 CLR 266, and navigation of the overlaps and gaps in offences under the *Crimes Act* 1900 (NSW). None of this complexity is dissipated in the context of contemporary offences, indeed, the interaction of relevant State and Commonwealth laws is but one example of how the complexity continues to grow. Multiplicity of charges sees NSW police and ODPP lawyers differing in their charging preferences, for example, one party preferring offences with the element of consent and the other party child-specific offences. We encourage police to seek pre-charge advice, particularly in relation to historical allegations of abuse, precisely because of the complexity in charging.

Possible principles for prosecution charging decisions

We are open to reviewing prosecution guidelines and policy to expressly recognise:

- The importance of laying correct charges
- Sanctioning charges
- Charges reflecting true criminality
- Adequate time being allowed to consult with the victim

We do not, as a matter of principle, support prosecution guidelines specifically addressing certain types of offences or offending. Guidelines should be of universal application for all types of crime.

Possible DPP complaints and oversight mechanisms

We agree that there will always be room for improvement in what we do, how we interact and how we report on our activities. In response to our strategic planning processes and what we have learnt from external influences, including the Royal Commission, we are actively considering how our processes may be improved. A key aspect of how we consider we can improve both our accountability and our decision-making is to provide victims and survivors with avenues to seek a review of decisions with which they do not agree, and to inform our processes from those reviews.

However, it is important not to lose sight of the context of how some prosecutorial decisions are made. In the dynamic environment of the courtroom the need to make a decision is often prompted by a late plea offer or a change in evidence. Currently many factors combine to create a situation where decisions are made on or close to the day on which a matter is listed for trial. We accept that rushed decision-making is not best practice and places victims in the unsatisfactory situation of being asked to agree to plea negotiations or decisions to terminate charges at a late stage.

Independence of the DPP and current accountability measures

It is important that the independence of the Director of Public Prosecutions is recognised as an integral part of the criminal justice process and that this independence is not undermined. Although responsible to the Attorney General for the due exercise of the functions of the office, the Director acts independently of Government and of political influence. The Director also acts independently of inappropriate individual or sectional interests in the community and of inappropriate influence by the media. As Kirby P (as he then was) said in *Price v Ferris* (1994) 34 NSWLR 704 at p 707, the object of having a Director of Public Prosecutions is:

> *"to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions."*

It ensures that there is:

> *"manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour."*

Nevertheless, we agree that independence does not mean that there is not accountability, over and above that derived from the fact that our work is essentially conducted in a public forum, the court.

Differences between NSW ODPP and United Kingdom CPS

John Pickering SC - the "two-solicitor rule"

"Where charges have been laid by the Police, the ODPP takes over and assumes carriage of the prosecution. The assigned lawyer has carriage of the matter but is limited in the decisions that they can make about changing the charges or discontinuing charges according to the delegation that they have from the Director (delegations are made according to position description). A Crown Prosecutor's power to find a bill is provided for by the Crown Prosecutors Act 1986. After a bill has been found by a Crown Prosecutor, the Crown Prosecutor must refer the matter to the Director to make any further changes to the indictment. In practice the lawyer or Crown Prosecutor will make a submission to the Director about any changes to be made to the charges beyond their delegation or for a charge to be discontinued. Every submission in the Office is reviewed by another lawyer, this is known as a "second report". The second report is usually provided by someone more senior to the writer of the first report or by someone specially designated to provide advice to the Director, such as a professional assistant. Often it is the case that there will be 3 opinions provided to the Director to assist in making the decision. The final decision is made either by the Director or Deputy Director. A designated Crown Prosecutor in a regional centre may discontinue proceedings prior to a committal hearing but only in limited circumstances." Paragraph 33

The Royal Commission's investigation into the developments in the United Kingdom's Crown Prosecution Service (CPS) concerning the review of prosecutorial decisions and accountability measures is of interest, but there are significant differences between the NSW and UK systems that suggest the UK system could not be adopted without significant modification in NSW, namely:-

- The scale of the operations of the CPS in terms of numbers of offices, of cases prosecuted and the fact that they prosecute indictable and summary offences, means the CPS had the resources to set up a separate review section and that there was greater imperative to set up an independent auditor/inspectorate.
- The way initial decisions are made by the CPS contrasts to how decisions are made in NSW. We already have review elements in the initial decision process, namely the two-solicitor rule and the system of delegations, so only senior personnel may completely terminate a matter. This decision-making process is described by John Pickering SC[iv] (inset).
- The Attorney General in the UK is not an elected politician, which changes the nature of the relationship between the DPP and the Attorney General. In NSW the distinction between the DPP and the Attorney General is political and hence it is important that the DPP's decision-making is independent from the Attorney General.

- Constitutional issues in Australia prevent judicial review. The High Court has made it clear that there is a separation of power issue in interfering with prosecution decisions:

  "Our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial." (per Dawson and McHugh JJ in *Maxwell v The Queen* (1995) 184 CLR 501).
- As Professor Aronson noted in the Roundtable on 29 April 2016, the legislative environment is different in the UK, as legislation is more skeletal and less prescriptive than in Australia. As a result guidelines perform a more important role, as they are required to supplement the legislative provisions.

Possible reforms

Adopt comprehensive written policies for decision-making and consultation with victims and police

We agree that it is appropriate to have comprehensive written policies for decision-making and consultation with victims and police. In NSW these policies have been developed over the past 20 years, particularly since the Samuels Report in 2002. Our current policies and guidelines are published and address communication with victims and the requirement to consult.

Publish all policies online and ensure they are publically available

We agree that all policies in regard to our decision-making and our interaction with the public should be published. We also note that pursuant to the *Government Information (Public Access) Act* 2009 (NSW) the ODPP is obliged to release and publish its policies.

Prosecution Guideline 12 provides for reasons for decisions to be provided.

Reasons for decisions made in the course of prosecutions or of giving advice, in appropriate circumstances, may be disclosed by the Director to persons outside the ODPP. Reasons will not be given in any case, however, where to do so may cause serious undue harm to a victim, a witness or an accused person, or could significantly prejudice the administration of justice.

Generally the disclosure of reasons for prosecution decisions is consistent with the open and accountable operations of the ODPP; however, the terms of advice given to or by the Director may be subject to legal professional privilege and privacy considerations may arise. Reasons will only be given to an inquirer with a legitimate interest in the matter and where it is otherwise appropriate to do so. A legitimate interest includes the interest of the media in reporting the open dispensing of justice where previous proceedings have been public.

Reasons for not proceeding with a prosecution where committal proceedings or an inquest has taken place may be given by the Director.

Where there have been no prior public proceedings and a decision is made not to commence or continue a prosecution, reasons may also be given by the Director. However, where it would mean publishing material assessed as not having sufficient evidentiary value to justify prosecution, only a brief explanation may be given.

Detailed reasons will not normally be given publicly for the decision to appeal or not to appeal against a sentence.

Provide a right for victims to seek written reasons for key decisions

The provision of written reasons where requested is desirable and the NSW Prosecution Guideline 12 deals with the provision of reasons for decisions and is reproduced here. There are a number of factors that we need to consider when providing written reasons, including that reasons may need to take into account particular sensitivities of the victim for example, the fact that family or friends directly contradict their account.

Complaints Policy

A complaints policy is necessary and important for any organisation that deals with the public. The ODPP Complaints Policy has recently been reviewed and published.

The complaints policy does not address disagreement about a decision but rather conduct that is unacceptable, such as delay, rudeness, conflict of interest or failing to do something that was promised.

Developing a right to review of decision policy

A prosecutorial decision to terminate proceedings or not commence proceedings may not be a decision agreed to by a victim or other interested party to the proceedings.

The fact that a decision is not welcomed does not necessarily found a ground of complaint if the decision is properly reached and has been communicated sensitively and effectively and in a timely way. However, as a decision is likely to have been made based on numerous competing factors and an assessment of those factors, it is acknowledged that minds might reasonably differ as to the weight that each factor be given in making the decision. Accordingly, if the complainant or Police request it, a prosecutorial decision to terminate proceedings or not commence proceedings will be reviewed.

Audit of compliance and publication of data

There are a number of external agencies and bodies which subject the ODPP to scrutiny and oversight.

The ODPP Executive Board

This Office has an Executive Board that has oversight of our managerial functions. The Board is chaired by the Director and includes the Deputy Directors, Solicitor for Public Prosecutions, the Senior Crown Prosecutor, the Director, Corporate Services and two persons appointed by the Director with the approval of the Attorney General for (inter alia) their financial and/or management expertise.

The Board is an advisory body established administratively and its functions are to:

- Advise the Director on administrative and managerial aspects of the ODPP with a view to ensuring that it operates in a co-ordinated, effective, economic and efficient manner,
- Advise the Director on issues relating to strategic planning, management improvement and monitoring performance against strategic plans,
- Monitor the budgetary performance of the ODPP and advise the Director on improving cost effectiveness, and
- Identify and advise the Director on initiatives for change and improvement in the criminal justice system.

The Director's prosecutorial independence is maintained, as none of the functions of the Board relate to the exercise of the Director's prosecutorial discretion.

Sexual Assault Review Committee (SARC)

The SARC is an interagency committee convened by this Office since 1989. The Terms of Reference are attached to John Pickering SC's statement of June 2014. The SARC's primary aim is to improve the prosecution process for sexual assault victims through internal process amendments, training, legislative change and more co-ordination between relevant agencies. The committee regularly considers issues and complaints raised by victims via this Office or other agencies.

ODPP Audit and Risk Committee

We have made a number of changes to our Audit and Risk Committee (ARC) Charter and its Internal Audit Charter to comply with the core requirements of the Treasury Policy Paper *Internal Audit and Risk Management Policy for the NSW Public Sector* (TPP 15-03).

The ARC, now constituted by three independent members under the revised Charter, reports to the Director annually on a number of issues, including an overall assessment of our risk, control and compliance framework, including details of significant risks or legislative changes impacting the Office.

The revised Internal Audit Charter has adopted a combined internal and external audit process. External auditors have been engaged to focus on operational audit processes and systems, including those for finance and technology. Internal practice management and legal audits will be conducted by our staff. Consultants have been engaged to review the existing risk framework and the 2016/2017

Internal Audit Plan and, where necessary, to either provide or advise us on appropriate training to ensure that internal audits are conducted with regard to appropriate auditing standards.

Oversight of the ODPP audit process is undertaken by the ARC, the two independent Executive Board members and the NSW Audit Office. Audit compliance is also reported in the Annual Report. The current practice for legal audits involves selecting a random sample of files at a particular office. The files will involve matters in various jurisdictions. Assessment factors to audit our decision-making include whether the charges are settled and whether decisions, such as termination of charges, plea negotiations and acceptance of pleas to lesser charges, were made in accordance with delegated authority and our Prosecution Guidelines. Allocation of work to a lawyer with appropriate experience, compliance with policies and procedures such as the second-lawyer report to oversee decisions, timely completion of work and adherence to timeframes for victim contact, engagement and provision of information are also audited through paper-based and electronic records.

Annual reporting requirements in NSW

Annual Reports (Statutory Bodies) Regulation 2015 requires that we provide a "Consumer Response", which describes the extent and main features of consumer complaints, indicating any services improved or changed as a result of the complaints or suggestions made. We are currently investigating ways to improve our capacity to record and report on complaints by use of software.

Treasury Policy Paper (TPP) 15-03 requires that agencies include a statement attesting to their compliance with that TPP in their annual reports. TPP 15-03 became operative on 1 July 2015 and applies for 2015-16 and subsequent financial years.

Other regulatory and oversight mechanisms in NSW

There are a number of legislative requirements that provide a framework for reporting corruption and other regulatory requirements, such as the *Public Interest Disclosure Act* 1994 and the Legal Profession Uniform Law (NSW), which provide various oversight mechanisms. The NSW Ombudsman also has an investigatory oversight function, for example, the audit conducted in respect to agency responses to the Aboriginal Child Sexual Assault Task Force recommendations.

Chapter 8 - Options to deal with delays in prosecutions

The ODPP has for many years advocated for improvements to the criminal process to combat delay and for listing practices that better utilise scarce resources.

Specialist Courts and Prosecutors

In the late 80s the ODPP was divided into specialist prosecuting units, one of which was a child sexual assault unit. It was based in Sydney and operative from 1989 until it was disbanded in 1996 due to, primarily, health concerns for staff. John Pickering SC's statement at paragraphs 40–42 refers to the problems that we experienced with the specialist sexual assault unit. Further considerations in discontinuing the specialist unit were:

- That many child sexual assaults occurred in metropolitan Sydney and regional areas. These matters were not caught by the specialist unit located in Sydney, and funding was not available to extend specialisation to these areas.
- A difficulty in attracting and retaining suitably experienced and senior practitioners as a result of vicarious trauma and the specialisation itself.
- Not all matters allocated to the specialist unit could be accommodated by specialist staff due to the court listing system.

The Director, Lloyd Babb SC gave evidence before the Royal Commission on 15 July 2014 on the question of a specialist sexual assault unit in the ODPP.

Lloyd Babb SC, Evidence to the Royal Commission on specialisation

"At present, we are just not funded for a specialist unit. Sexual assault trials are occurring all over the State and, in fact, they are more frequently outside of Sydney than in Sydney. They occur in Sydney west and regional New South Wales on an almost weekly basis. So, really, the idea of a specialist unit is somewhat difficult to implement with our current system and our current listing practices. Matters don't always get on, and pleas are often entered late to some charges. So that's one issue, that is, having the resources to be able to hive experts off to travel and present these matters. In fact, most of my prosecutors in the regions and in rural New South Wales are experts in this area because they are conducting so many of these matters.

The other issue that I would have to deal with, as the leader of the organisation, is adequately looking after the mental wellbeing of staff that deal with this sort of work as a continual practice. It is very draining, very draining work. It is emotionally upsetting. There is some benefit in doing a variety of work and not doing only child sexual assault prosecutions to the lawyers who are doing the matters. But that could be overcome with sufficient resources. There could be a term, a reasonable term, and really good mental health checks and assistance in relation to a specialist unit. But at the moment, it's not something that is on my or the executive board's plans for re-implementing…"

The Director also supported consideration being given to the introduction of specialist sexual assault courts, but noted that:

> *"…one of the real difficulties with a specialist court and specialist prosecutors is getting people to volunteer for the work and to stay in that line of work, because there is burn-out.*
>
> *… For it to be an attractive area for a judge to work in, there would have to be some recognition of the work and not just the grind and emotional trauma of dealing with these terrible offences day in and day out."*

Resourcing

The Royal Commission seeks submissions on the resource implications of creating a specialist jurisdiction. The first consideration is that while a specialist jurisdiction would divert work from the District and Local Courts, it should not be assumed that resourcing the specialist court simply requires diversion of equivalent resources. This is because a specialist court would demand a higher level of prosecutorial resourcing to account for continuity of representation and lighter workloads to ameliorate the likely impact of vicarious trauma. Also, it could not be assumed that the demands on prosecution resources in the District Court would decrease to a level that corresponds with the work that is diverted, as the District Court may simply continue listing other matters to fill the gap.

Without details about how a specialist jurisdiction is to be implemented it is difficult to put an estimate on how much additional funding the ODPP would need. However, by way of a guide, for the Child Sexual Offence Evidence Pilot, to meet 2 additional Judges, the ODPP received funding of $5.6 million over 4 years for additional legal and administrative staff. This funding did not include additional WASO's, nor was it necessary to create additional office space. Another possible guide to estimating the cost is the Early Guilty Plea initiative, as the funding proposal for this project takes into account early briefing of the trial prosecutor, a team approach and continuity of representation.

Abolition of committals

We agree with the Royal Commission that committals are of little utility and have virtually no role to play in allegations of child sexual abuse. NSW has long recognised the failings of a system which requires a child victim to give evidence on more than one occasion. Nevertheless, the Local Court process provides time to assemble and complete the brief of evidence. A consequence of the recording of interviews of children, accused and some other witnesses is a delay in getting the transcript required for the brief of evidence. In NSW, delays may also be experienced in obtaining forensic and expert evidence.

Commencing proceedings for child sexual abuse offences in the District Court.

The Royal Commission has suggested that commencing child sexual abuse proceedings in the District Court could be considered. In NSW this would require a number of procedural and jurisdictional reforms and the following arguments for and against it would need to be considered:

- A proportion of child sexual abuse cases in NSW are dealt with summarily. Given the current backlog of trials in the District Court, there would currently appear to be little advantage in moving all child sexual abuse cases to the District Court.
- However, if the current jurisdictional division is maintained and there was the option to commence proceedings in the District Court, given that all child sexual abuse cases are prosecuted by the ODPP, it would be possible for us to determine where the proceedings are commenced.

- The Child Sexual Offence Evidence Pilot has established a precedent for specialist and separate handling of child sexual abuse cases in the District Court. Therefore, these matters already receive preferential or different handling by that Court, which is correspondingly building expertise in the area. This may support the argument for District Court commencement.
- However, the Pilot operates on much work being done on matters during the Local Court stage and therefore, the time factors currently at play in the District Court would blow out.
- Further, these matters would lose the benefits other types of criminal matters would receive by commencing in the Local Court, such as the discount for an early plea and opportunities to argue against progression to trial or otherwise test the evidence. Adjustments to incorporate these features in the District Court would likely add to that Court's backlog.
- One particular impediment in NSW is access to the District Court in regional centres. The District Court does not regularly sit in all regional centres and nor is it set up to deal with bail after arrest.

Ultimately, our position is that while we can see advantages to child sexual abuse proceedings commencing in the District Court, there would be a number of logistical and procedural impediments that may outweigh the advantages.

Case management and early identification of the issues

This Office has advocated for some time that there be greater case management by the District Court to promote, if not mandate, the early identification of issues by the parties.

The Sexual Assault Review Committee[v] (the minutes of this Committee have been produced to the Royal Commission) has, over the years, compiled many examples of delay created by the fact that one or both parties were not ready to proceed due to late preparation of the case. We recognise that postponement of trials places unacceptable stress on victims, their families and also disrupts the schedules of other witnesses involved in the case. Further, it is an impediment within this Office to continuity of prosecution lawyers as it creates the possibility that the instructing and trial lawyers will not be available on the next occasion and the matter will need to be reallocated or re-briefed.

A number of initiatives have been tried in NSW to improve this situation. For example, early disclosure by the prosecution and the defence has been attempted by NSW since 1999. The *Criminal Procedure (Amendment) Pre-trial Disclosure Act* 2001 introduced a statutory duty of prosecution and defence pre-trial disclosure but it was limited to complex criminal trials and only in cases where the court makes pre-trial disclosure orders. A review of the complex trial disclosure provisions conducted in 2003 found that they were virtually ignored.

In 2008 the Attorney General established the Trial Efficiency Working Group (TEWG). The TEWG was tasked with identifying the causes of inefficiencies in the conduct of criminal trials and evaluating possible solutions. The TEWG made a number of recommendations about case management that were reflected in a revised Division 3 to the *Criminal Procedure Act* 1986 which commenced on 1 February 2010. These amendments provided for a pre-trial disclosure regime by the prosecution and the defence that enabled the court to undertake case management where appropriate, either on its own motion or on the application of a party to the proceedings.

A review of the provisions in 2012 found that while case management was adhered to in the Supreme Court, compliance was much lower in the District Court. The TEWG was reconvened to consider again the issue of defence pre-trial disclosure.

The *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act* 2013 was introduced as a result of further recommendations by the TEWG, and the provisions have been in force since 1 September 2013. The purpose of the mandatory disclosure amendments is to reduce delays in proceedings on indictment by requiring pre-trial disclosure by the prosecution and the defence and by enabling the court to undertake case management when appropriate: section 134. To date, while there has been compliance with the provisions, the quality and extent of responses by the defence has been variable.

On 25 July 2016 the District Court introduced Practice Note 12, the purpose of which is to reduce delays in proceedings on indictment with an estimated duration of four weeks or more by enabling the Court to order the parties to attend one or more readiness hearings. Practice Note 13 commences in the District Court on 1 December 2016, the purpose of which is to reduce delays in criminal trials in circuit sittings by having mandatory case management telephone call overs in all circuit matters at least 3 weeks out from the listed trial date. Accordingly, it appears that in NSW we are approaching a system where there will be case management of lengthier trials and all circuit Court trials.

In the Early Guilty Pleas[vi] initiative, a central plank of the proposal is early discussion and resolution of issues. Mandatory case management is to occur in the Local Court.

Trial listing practices – "The Rolling List Court"

In April 2015 the Sydney District Court commenced the "Rolling List Court" pilot, an initiative that endeavours to deal with the trial backlog. One court with the same judge is serviced by two permanent teams of Crown Prosecutor/instructing solicitor and Public Defender/instructing solicitor. Counsel are briefed immediately after committal and enter into negotiations. A Bill is not found nor a trial date set until initial discussions take place. Issues are identified and narrowed before the matter is listed for trial. It is rare that trials do not proceed on the set date.

The pilot only accepts trials in which Legal Aid NSW represents a single accused, the estimate is less than 10 days, there are no issues of fitness, and the matter was committed for trial from a metropolitan local court.

The Bureau of Crime Statistics and Research (BOCSAR) are analysing the results of the pilot using a control group of trials in the general trial list. Results are expected in April 2017. However, a preliminary report released by BOCSAR on 18 October 2016 shows 65% of trials in the Rolling List were completed in the period of the pilot in comparison to 37% of matters in the control group. A higher proportion of matters in the Rolling List resulted in a guilty plea (63%) compared with the control group (41%). Generally those pleas were entered at an early stage in the Rolling List. A total of 16 trials for child sexual abuse/sexual assault were included in the Rolling List pilot.

More generally with respect to District Court listings, we submit that the Court should implement:

- Listing procedures that can accommodate advocate's availability. If a prosecutor is briefed in a matter the Court should allow some flexibility in listing the matter on the next occasions so that continuity can be maintained where possible.
- Proper case management, including call-overs for all country sittings. There is a higher percentage of child sexual abuse matters in the regional courts.
- Meaningful defence disclosure. Late pleas, delays in commencing trials/calling victims due to pre-trial arguments and matters not ready to proceed could be addressed with more effective defence disclosure. It is recommended that Legal Aid consider their fees structure to brief

Child sexual assault trials dominate NSW country circuits

ODPP figures for trial registrations in 2016 show the percentage of child sexual abuse trials held by our regional offices:

Wagga Wagga	37.79%
Wollongong	29.25%
Newcastle	26.42%
Sydney	11.46%

Counsel early and that the Court expects and enforces considered responses to Crown disclosure.

- Trial date certainty. This is more difficult in the larger centres than in regional sittings. Although child sexual abuse and sexual assault trials are given priority, they will lose that priority if another accused is in custody and the trial will therefore be delayed. Although over-listing is the Court's practice in order to ensure the court is being fully utilised, if case management was better used the need for over-listing may be reduced. In addition, if a judge is not immediately available, a trial is often adjourned to the next day for mention. This can happen over a number of days. This process is distressing for victims and their families. Victims have prepared to give evidence and the trial date is one that assumes great importance for them.

Chapter 9 - Evidence of victims and survivors

This Chapter examines the availability of "special measures" and their use; other issues that arise for victims at trial, including competency testing and courtroom questioning, and discusses possible reforms to help ensure that the best evidence is available for juries in child sexual abuse matters.

Eligibility for, and use of, special measures and how special measures can be improved.

Eligibility for access to "special measures" in sexual assault matters attaches, in the first instance, to the offence, and all victims – whether adult or child – have access to, or the benefit of, a basic set of measures, such as:

- a right to give evidence remotely via CCTV or via alternate means in court
- a right to a support person or persons
- a right to a closed court
- a prohibition on a self-represented accused directly conducting the cross-examination
- a prohibition on questioning relating to prior sexual history
- an identification prohibition
- the use of recorded evidence in re-trials
- protections stemming from the sensitive evidence provisions
- protections relating to the Sexual Assault Communication Privilege

There are additional measures for children, such as the recording of their interview with police and this interview being played as examination-in-chief. Additionally, there are extra measures for child victims whose matters are within the Child Sexual Offence Evidence Pilot, such as:

- The pre-recording of their evidence, including cross-examination
- The use of a witness intermediary to assist them when giving evidence

- The playing of the pre-recording at the subsequent trial in lieu of the child being called

There are also additional measures for vulnerable persons, such as:

- The recording of their interview with police
- This interview being played as examination-in-chief
- The right to communication assistance in court from a person or aide if such assistance is provided on a daily basis

In our submission these measures need to be improved by ensuring there is consistency between definitions of "child" by uniformly, across all applicable Acts, defining child as "under 18". This would ensure that benefits such as a recorded police interview extend to child victims aged 16 and 17.

The gaps and other inconsistencies in legislation also need to be identified and amended to ensure that no victim is disadvantaged. For example, under section 306ZK of the *Criminal Procedure Act* 1986, the support person for a vulnerable person may assist the vulnerable person with "any difficulty in giving evidence associated with an impairment or a disability" but this section does not apply to sexual assault victims. Leaving aside the fact that that section does not recognise the inherent difficulties all children face when giving evidence, the alternate sections, section 294C and section 275B, offer less support for sexual assault victims in terms of what role a support person can play in proceedings and what communication assistance can be provided.

Other legislative gaps occur in the Children's Court when the prosecution seeks that a matter be dealt with according to law and committed for trial. In these matters, sexual assault victims, who are almost always children in this jurisdiction, do not benefit from the same prohibition from giving evidence as victims of an adult accused whose matters proceed through the Local Court do. As such, they may give evidence twice: in the Children's Court and District Court. We are seeking legislative reform to ensure that according-to-law applications are dealt with "on the papers", without the need to call the victim or recording the evidence the victim gives in the Children's Court and allowing its use in the District Court trial, as if it were "re-trial" evidence, would mean the victim gives evidence only once.

There are also gaps in the law in relation to Victim Impact Statements (VIS) which we would like to see closed by legislative amendment. Firstly, whilst there is an ability for a victim to give a VIS, in accordance with the *Crimes (Sentencing Procedure) Act* 1999, it is not an entitlement (or right) and is subject to defence objections – which are sometimes made. The making of such objections, usually in court when the VIS is due to be read, is extremely traumatic for victims. Secondly, with one exception, the support provisions a victim is entitled to when giving evidence do not apply to the reading of a VIS. The exception is the CCTV entitlement (section 30A(3) of the *Crimes (Sentencing Procedure) Act.*) The right to a support person or to a closed court do not apply.

More work also needs to be done to increase the provision of and access to, technology based special measures, especially in regional and country courts, and to ensuring the equipment is up-to-date and adaptable, and further training is needed for court staff in the operation of the technology. Further training is also required for police officers who conduct interviews with sexual assault victims to ensure that questions relating to peripheral or incidental details – which can be used to attack a victim's credit – are not asked.

As previously discussed, further case management is called for to avoid delays at trial, thereby providing certainty of day and time for victims giving evidence, whether in person or via CCTV, as such delays can undermine the advantages offered by the special measures.

Intermediaries and ground rules hearings

Feedback in relation to the relatively small number of matters that have progressed as part of the Child Sexual Offence Evidence Pilot suggests that the use of a witness intermediary has significantly improved the court process for the child victims and the quality of the evidence they have given.

As such, witness intermediaries have now been utilised in a small number of non-Pilot matters, although the acceptance of their recommendations is voluntary and the use of the witness intermediary to assist the victim in court when giving evidence, pursuant to section 294C (3) of the *Criminal Procedure Act* 1986 (as a support person assisting the victim in a "professional capacity") has yet to be tested.

Ground rules hearings, though not enabled by the NSW legislation, are in our submission an essential part of the process and should be conducted far enough ahead of the pre-recorded hearing to ensure that the agreed recommendations are reflected in the cross-examination and other questioning.

We support the use of witness intermediaries in all matters involving child victims and for any court participant who requires assistance.

We would also like to see further training in relation to witness intermediaries amongst the judiciary and the Bar to effect cultural change.

Whether competency testing should be reformed

As noted in the Consultation Paper, at present, competency testing tends to be undertaken with younger victims and with cognitively impaired victims and takes the form of establishing if they can explain what the difference is between truth and lies (this same testing is routinely undertaken by police officers in recorded interviews). As also noted, academic literature suggests that a better approach is to ask the child victim to promise to tell the truth.

The length and number of questions in these exchanges also addresses a victim's basic competency to give evidence, that is, to understand and answer questions but without any specific issue being raised to displace the presumption of (basic) competency. It seems that it is just accepted that a child is not entitled to the presumption by virtue of their age. Very rarely are language or style adjustments for the particular victim incorporated into this questioning.

Explaining the difference between truth and lies goes to the second-step issue of a victim's competency to give sworn evidence, that is, their capacity to understand that there is an obligation to give truthful evidence.

The use of witness intermediaries – and the discussion about and adoption of their recommendations in relation to successful communication with a victim – should dispel any concerns in relation to basic competency before the victim is required to give evidence, thereby removing the need for basic competency testing.

The witness intermediary could also give guidance to the court on how to establish that a victim is competent to give sworn evidence. Ultimately, a promise to tell the truth is the preferred approach. In reality this is all that is asked of adults.

For older children unable to make an oath or affirmation, a promise to tell the truth is also the preferred approach. It should be proceeded, as with younger victims, by some questioning by the judge in order to establish rapport and perhaps satisfy themselves, if necessary, that the child

understands what is being asked of them. But, again, the judge should be informed by the report from the witness intermediary and these type of questions need not be based on articulating the truth/lie difference. Straightforward, non-confrontational, non-theoretical questions could be asked (age, school, number of siblings, pets) where the answer is known and therefore concepts of truth and so on are also explored if required.

As witness intermediaries are also being engaged at the police interview stage, this aspect of the interview should also be based on the recommendations made by the intermediary and use the promise to tell the truth approach.

Other reforms to improve courtroom questioning

The use of witness intermediaries and the adoption of their recommendations in relation to language, questioning types, breaks and tools for making child victims feel at ease should go a long way to reducing the difficulty these victims face when cross-examined, whether deliberately or otherwise, as if they were adults – and adults with an ability to answer confronting, confusing and complex questions for extended periods of time.

Even with the use of witness intermediaries, more emphasis needs to be placed on adhering to section 41 of the *Evidence Act* (which provides for the Judge to disallow improper questions). This section is particularly important for adult sexual assault victims who will not receive assistance from a witness intermediary.

Cross-examination in relation to minor details and what flows from that can be limited by further training for police officers to ensure that these peripheral matters are not raised at the first instance but, if they do form part of a victim's evidence, questions of relevancy should be raised. Practice reform to limit the leeway given to cross-examiners in child sexual abuse matters may also serve to limit this type of questioning.

Limiting prolonged cross-examination by focusing on relevance and the elimination of repetition and, where there is more than one accused, limiting repetitive cross-examination, could also be considered.

Placing more emphasis on the calling of expert evidence – or automatically calling and admitting such evidence - in relation to child victims and their response to sexual abuse, would go some way to "shutting down" cross-examination that relies on outdated and incorrect stereotypes to attack a victim's credibility.

With respect to cross-examination in relation to inconsistencies, further training of police officers to ensure more directed, shorter interviews would limit the scope for this type of questioning, as would consideration of relevance with respect to questioning on peripheral inconsistencies.

Requiring cross-examiners to question child victims by reference to the child's preferred "label" for an event or incident (where that label did not presuppose an outcome or suggest an admission, such as describing an incident as "the rape"), would assist child victims by reducing confusion, ensuring consistency and aiding their recall.

Pre-recording the evidence of all child or cognitively impaired victims in the absence of the jury assists in a number of ways, including in relation to questioning, as the absence of the jury removes a perceived barrier to judicial and prosecutor intervention in relation to improper questioning.

Reform in relation to the rule in *Browne v Dunn* in relation to victims who are children or cognitively impaired would be supported, preferably by legislative reform.

The use and availability of interpreters

Assisting Aboriginal or Torres Strait Islander victims give evidence by the use of language interpreters where for example, English is not the victim's first language is supported. Issues with appropriate translators would be an issue as it is in other jurisdictions.

Consideration could perhaps be given to the use of cultural experts who could give evidence in relation to Aboriginal and Torres Strait Islander cultures and how sexual assault and the reporting of it is viewed/considered/responded to.

Chapter 10 - Tendency and coincidence evidence and joint trials

The preponderance of appellate law in relation to the admissibility and use of tendency and coincidence evidence relates to child abuse cases. The criminogenic profile of offenders who sexually abuse children is that they will abuse more than once. Consequently, not only is the use of tendency and coincidence evidence desirable from the prosecution point of view to augment the case, but it is often available. Accordingly, it is vital in our view that the criminal law to adopt a fair, easily understood and readily applied test for the admissibility of this evidence. Not to do so will see a disproportionate number of acquittals or appellate proceedings, as NSW experienced between 2001 and 2007.[vii] As noted by Ms Williams, Crown Prosecutor, in her evidence before the Commission, severance of trials can have a catastrophic effect where one complainant of many is left giving evidence alone, their evidence often standing alone against the word of an authority figure such as a priest [page 402].

In our view, while we have somewhat succeeded in NSW in achieving the right balance, there is room for improvement. We agree with the view of the Commissioners that "the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters [page 447]".

Reform of the law in relation to tendency and coincidence and joint trials

We agree that from the Royal Commission case studies and our own observations, there have been perverse outcomes in trials involving multiple complainants where those trials have been severed. In NSW there has been a rigorous process of interpreting the *Evidence Act* over the last 21 years through the appellate courts.

We were most interested to hear the West Australian Director of Public Prosecutions, Mr Joe McGrath SC give evidence in Case Study 38. He referred to section 31A (3) of the *Evidence Act* 1906, that was enacted in answer to the *Hoch* decision, and said the provision:

> "*has been strictly applied and understood…and that it is entirely a matter for the prosecutorial discretion whether we would run the case differently forensically or prefer it in a different manner on indictment, and otherwise it is left for the jury and a direction for the trial judge*. Transcript p 17767-8

And particularly:

> "*the rate on which applications are received favourably is extremely high. In sex cases, it is extremely difficult to think of cases where we have endeavoured to lead propensity evidence*

> *and failed to do so. I might say, I have read all the excellent material provided by the Commission, the various cases from around the country. I think I can probably say in respect of all of those that in Western Australia virtually all the evidence would have gone in under 31A."* 17775

In our view, the lower threshold for admissibility in the Western Australian provision appears to give the prosecution the advantage of greater certainty in determining how the trial will proceed. One of the practical issues that we face in NSW is that there is rarely certainty about how trials will proceed, that is jointly or singly, until objections to tendency and coincidence evidence and consequent separate trial applications are determined by the court. More often than not this is not determined in advance of the trial date. This in turn causes uncertainty as to the commencement of the evidence and consequent anxiety for witnesses and last minute organisation for the prosecution team. Witnesses cannot be thoroughly prepared to give evidence or interviews edited, until it is known what evidence is going to be permissibly led. Whilst this problem could be addressed in NSW by early case management hearings there would still be benefit, much earlier in the proceedings, from both the prosecution and defence perspective to have a reliable informed view as to whether or not there will be a joint or separate trial. The uncertainty about such a central issue delays the entry of pleas of guilty and otherwise hampers the timely preparation of a case for trial. A decision to appeal the ruling by the trial judge on the eve of the trial further delays proceedings from time to time. Such a situation would be avoided if determinations were made well in advance of the trial date.

We are also interested to further consider the more radical 'fundamental variable' posited by Counsel Assisting that, in terms of assessing probative force, it is simply sufficient if the evidence is relevant. We agree that denying the triers of fact such relevant material increases the risk of the guilty going free to the detriment of the community and the administration of justice.

Validity of the concerns of the courts in relation to unfair prejudice

As noted in Chapter 5, much common law "wisdom" is now being corrected by contemporary learning and research. The research conducted by the Royal Commission clearly points in the direction that assumptions about jurors being unduly swayed by particular types of evidence have been over corrected in the criminal justice process.

In our submission, an equally viable view concerning unfair prejudice is that innumerable juries have judged cases based on a sanitised and entirely artificial version of the facts, where victims and witnesses have perhaps looked unreliable or dishonest while struggling to give a truthful account, because they have been told to omit aspects of the accused's offending or other behaviour.

We endorse Lord Griffiths' observations in *R v H* [1995] 2 AC 596 [at613] that:

> "*in the past when jurors were often uneducated and illiterate and the penal laws were of harsh severity, when children could be transported and men were hanged for stealing a shilling and could not be heard in their own defence, the judges began to fashion rules of evidence to protect the accused from a conviction that might be based on emotion or prejudice rather than a fair evaluation of the facts of the case against him. The judges did not trust the jury to evaluate all the relevant material and evolved many restrictive rules which they deemed necessary to ensure that the accused had a fair trial in the climate of those times. Today with better educated and more literate juries that value of those old restrictive rules is being re-evaluated and many are being discarded or modified. …"*

Approach in England and Wales

England and Wales have been progressive in bringing the law into line with contemporary reasoning and understanding. This has occurred in a number of areas of criminal law. Their approach to the use of "bad character" evidence is a significant change from other common law jurisdictions. Each common law jurisdiction has, over the years developed, in its own way and has an idiosyncratic legislative framework in which the common law applies. This may caution against the wholesale adoption of a reform from another jurisdiction. It may not have the same outcome given local rules and conditions.

We are accordingly cautious yet supportive about the proposition of introducing the England and Wales reforms to "bad character" in NSW. We recognise that such a significant change in approach would mean quite fundamental re-education of lawyers and an absence of precedent and uncertainty. In the mid-1990s in NSW we went through a comparable process with the introduction of the *Evidence Act* 1995. This is not reason to not to consider tackling the reform. We cautiously support changes that favour the joinder of trials and bring about greater certainty as to how a trial with multiple complainants will proceed.

It would undoubtedly be desirable for there to be a nationally consistent approach to this issue. We note in this context that the implementation of the Uniform Evidence rules has demonstrated that uniformity is difficult to achieve between jurisdictions applying the same Act.

Intermediate Approach

An "intermediate" approach has been suggested by Counsel Assisting the Commission, it is suggested, in order to be admissible, that:

- evidence is required to have significant probative value and/or;
- the burden of persuasion is on the prosecution to justify admission; and
- in either case the probative value is only required to outweigh (not substantially outweigh) any unfair prejudicial effect.

In our view there is considerable merit in considering this approach. Any new approach in this area of the law must be assessed both in terms of fairness and workability, but also in terms of its ability to deliver better results for victims of child sexual assault than has occurred in the past. There is reason to believe that some of the least acceptable outcomes in terms of exclusion of tendency and coincidence evidence which have emerged in the course of the Royal Commission hearings would not have eventuated if the proposed new approach had been in place. We are interested in making further submissions about this in due course.

We support the notion that reform is needed in reforming the law relating to tendency and coincidence evidence in joint trials. In response to the specific questions posed about the law relating to tendency and co-incidence evidence being reformed, our response is:

- *Is there validity in the concerns of the courts in relation to unfair prejudice in light of the Jury Reasoning Research findings?*

  In our view the research findings provide powerful support for the proposition that much accepted wisdom that juries will misuse evidence tendency and coincidence evidence is misplaced and overstated. The caution that the courts have routinely applied to these

categories of evidence has had the effect that triers of fact have been deprived of truthful and full accounts, such that those guilty of child sexual abuse have been acquitted.

- *Should there be any requirement beyond relevance for admissibility and, if so, what should it be?*

  We are interested in further considering relevance as the sole requirement for the admissibility of tendency and coincidence evidence. It is accepted that this is a radical departure from the current state of the law in NSW. We believe, however, that the robustness of the Jury Reasoning Research is such that an approach that focuses on relevance has much to commend it. We would welcome the opportunity to further consider this reform.

- *If there is to be any requirement for similarity in the evidence, how should it be expressed and what should it allow and exclude*?

  We agree with the New Zealand position which recognises that child sexual abuse offending involves an unusual class of offender and that a single previous incident can have sufficient probative value. Differences in detail are not greatly significant [page 431]. Moreover, given our prosecutorial experience over many such cases, we particularly agree with the experience and understanding of the Commissioners that "some perpetrators of child sexual abuse offend against multiple victims, including on some cases both girls and boys and children of quite different ages, and that they offend in a variety of ways" [page 448]. The logical extension of this approach must be that any requirement for similarity is inconsistent with the nature of institutional sexual offending (and we note offending over multiple victims at large).

  It is axiomatic that the relevance of the evidence depends largely on this issues in the particular case in question. There should be no requirement of similarity for tendency evidence to be admissible. As noted at page 394 of the Consultation Paper, in NSW, similarity can assist in establishing significant probative value but is not required. We share the view that similarity can be relevant to the question of admissibility but is not determinative. We regard similarities in circumstances of institutional offending as being capable of bearing on the question of relevance.

  The requirement for similarity can bring about perverse outcomes. Generally, sexual acts do not vary widely and minds might differ as to the level of similarity involved. Moreover, ostensible similarity may not be similarity in substance, but evidence of motive and opportunity. For instance the fact the accused is a scout master and numerous complainants are scouts is really more relevant to, and admissible as opportunity rather than similarity.

- *If there is to be a weighing of probative value against prejudicial effect, should the test favour admissibility or exclusion of the evidence?*

  As the Director said in evidence, juries can cope with abhorrent acts and nevertheless deliver sounds verdicts based on the evidence presented [page 437].

  We are interested in further considering the Western Australian model for admissibility wherein "the probative value of the evidence [is] compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial".

We agree that if evidence is logically probative of guilt, and the jury uses it to reason in permissible ways, the evidence will not be unfairly prejudicial [page 415].

The jury research conducted by the Commission is compelling evidence that juries can and do use evidence such as tendency evidence in permissible ways.

- *Should the burden for persuading the court be on the prosecution (to admit the evidence) or the accused to (exclude the evidence)?*

  Consistently with other evidence admitted in a trial, the prosecution should retain the burden of persuading the court to admit the evidence.

- *Should issues of concoction, contamination or collusion be left to the jury?*

  Yes, these are jury issues. They will only be relevant and put before the jury if there is a cogent evidentiary basis to do so. We agree with the views of the Commissioners that "the risk of collusion, concoction or contamination should be a matter that is left to the jury" [page 449]

- *Should the evidence need to be proved beyond reasonable doubt?*

  No, as the Director said in evidence, as it is a form of circumstantial evidence there should not be a requirement that the prosecution prove such evidence beyond reasonable doubt [page 440]. We agree with the views of the Commissioners that this is the case [page 449]

- *Should evidence of prior convictions be made admissible?*

  Yes; in a limited way, namely if the evidence is relevant to the issues in dispute in the trial. We note with interest that 60% of mock jurors expected that they would be informed at a trial of any prior child sexual abuse incident or conviction involving the accused [page 423].

- *Should evidence of alleged conduct for which the accused has been acquitted be admissible?*

  We do not have a settled view on this question. The arguments in favour are that in an institutional context in particular, as complainants come forward at different times, it is often the case that when the first complainant comes forward there is no tendency or coincidence evidence available from other complainants because they have not yet come forward. The argument against is that it would be inappropriate to deprive the accused of the full benefit of an acquittal.

- *Does any specific provision need to be made in favour of joint trials, in addition to the law in relation to admissibility of tendency and coincidence?*

  We support a statutory presumption in favour of joint trials for all charges where there are allegations of a sexual nature made by one or more complainants and the evidence is cross admissible. Our support for this is based on the need to have greater certainty at the outset of the criminal process as to how the evidence at trial will be presented. We also believe that

such a presumption is in line with community expectations that other similar allegations will not be hidden from the jury. In addition, the Royal Commission hearings have highlighted the support that victims receive form the knowledge that other victims have come forward and that the complete picture of the alleged offending will be placed before the jury. We agree with the victim that gave evidence before the Commission that limiting the number of complainants who give evidence is not reflective of the truth [at page 405].

We agree that the jury research provides cogent evidence that juries will not reason impermissibly in relation to tendency and coincidence evidence.

One important factor in favour of joint trials is that victims are better able to give full and frank evidence. As noted above, at present they are often obliged to refrain from telling the whole truth. This is problematic in an environment where they have sworn or affirmed to tell the whole truth. As noted in the Consultation Paper, our experience is that victims are prevented from telling the whole truth in separate trials and can appear less reliable and credible as a result of needing to comply with complex rulings on the evidence that mean they cannot refer certain events or aspects of their evidence [page 448].

We agree that rigid distinctions between tendency evidence and coincidence evidence are artificial. There is no bright line between tendency evidence and coincidence evidence. For example, to invite the jury to reason that it is implausible for numerous complainants to make similar allegations absent any concoction is to invite coincidence reasoning. There will be tendency aspects to the evidence as between the evidence of the complainants.

As highlighted in the Consultation Paper, where there are multiple complainants, series of single trials often unfairly result in a series of acquittals. If the jury had in fact been presented with the true body of evidence against an accused rather than running a case where the prosecution was required to rely upon word against word, the result would have been a reflection of the state persuasive force of the evidence.

- *Should any reforms apply specifically to child sexual abuse or institutional sexual abuse offences, or should any reforms be of general application?*

  We have said elsewhere in this submission that we do not support reform to address a limited cohort of offences.

Chapter 11 - Judicial directions and informing juries

Chapter 11 outlines the history and the present state of the common law and legislation in Australian jurisdictions concerning judicial directions, with a particular focus on Victoria. The Chapter contrasts the position in that state following the enactment of the *Jury Directions Act* 2015, which codified the law with respect to jury directions and that in other states where the common law applies as supplemented by various legislative enactments.

NSW does not have the equivalent of the Victorian Act, yet, as noted in the Consultation Paper, various legislative provisions have been enacted. They have achieved a position similar to some of the provisions that exist in Victoria on the key directions that arise in child sexual assault matters.

Jury directions and warnings requiring abolition

The Consultation Paper asks the broad question as to whether any judicial directions and warnings continue to create difficulties in child sexual assault matters, especially in prosecutions from an institutional setting. The Consultation Paper also asks whether any particular direction should be abolished.

The "*Markuleski* direction" is a jury direction which should be considered in this context. In cases involving both (a) numerous counts on the indictment and (b) a word-against-word case, the trial judge is required to direct the jury that a reasonable doubt with respect to the complainant's evidence on any specific count on the indictment is to be taken into account in assessing the complainant's credibility generally. Victorian courts have doubted the desirability of this direction and have held that it should generally be avoided. NSW courts continue to require it. This has the effect that where a complainant appears to be less credible in their evidence on one count (and for example they may seem so because they are attempting to navigate admissibility rulings on tendency for evidence and be required to avoid some aspects of a truthful account) any assessment made by the jury can, perhaps unfairly, be applied across the range of charges.

The reasons cited by those doubting the wisdom of the "*Markuleski* direction" include that it arguably pushes the jury towards propensity reasoning, is condescending to jurors and may undermine the separate consideration direction (the "*KRM* direction") which forms part of accepted judicial practice in NSW and Victoria.

Our view is that the Victorian position is preferable. Legislation in NSW directed at strictly limiting the circumstances in which the "*Markuleski* direction" should be given is warranted.

Codification

The Consultation Paper asks whether the directions in child sexual assault matters should be codified.

The advantage of codifying jury directions in one Act of Parliament is that it would simplify and clarify the law. There are too many directions in NSW and the interplay between them is complex. As noted in the Weinberg Report, the jury in NSW is often burdened with prolix and multiple directions. Brevity and clarity would be the product of legislation. There can be significant discrepancies as between various judicial officers in terms of the tenor and application of the directions. Whilst there will inevitably be this quality in the criminal justice process, a clear legislative framework would provide for greater consistency across the cases we prosecute. There would also be a reduction in the risk of a trial miscarrying due to an erroneous direction. Our view is that while the law in NSW in relation to the key directions in child sexual assault matters is adequate, we support the codification of all jury directions in a manner similar to the Victorian Act.

The Victorian Act also contains directions in areas which do not generally arise in child sexual assault trials. Any NSW Act should also cover the field of jury directions and not be limited to the child sexual assault context. The effect of codification would thus go beyond the area of child sexual abuse prosecutions, but the clarifying impact in that area would be worthwhile.

Training for judicial officers and lawyers

The Consultation Paper also asks what education or training would be most effective in ensuring that judges (including appellate judges) and lawyers are better informed about child sexual abuse. We agree that research has demonstrated that there are myths and misconceptions about victim behaviour. This can be inconsistent with routine cross examination that seeks to undermine a

complainant's credit and is in fact misleading, and standard judicial directions for juries to apply their common sense and experience of the world. We agree that juries would benefit from sound knowledge about child development, behaviour and memory.

The Consultation Paper raises for consideration whether social-science-based education about the dynamics of child sexual offending and reporting should form part of ongoing judicial and practitioner training.

In our view, this type of training would be very valuable in that it has the potential to undermine misconceptions and to raise awareness about the unique issues surrounding child sexual abuse. Practitioners would be less inclined to highlight relevant evidence or cross examine on false bases. Judges would be more inclined to disallow irrelevant and misleading cross examination. Juries would not be misled by evidence that is not ascribed its true meaning. Such education is strongly supported.

Finally, the Consultation Paper asks what methods would be most effective for improving jurors' understanding of child sexual abuse. The specific issues raised for consideration are:

- the use of expert evidence;
- particular judicial directions;
- the timing of judicial directions; and
- providing educational materials (e.g. training DVDs) to jurors.

In our view, there continues to be a place for expert opinion in the context of child sexual assault trials as permitted by sections 79 and 108C of the *Evidence Act* 1995 (NSW). However the cost to the criminal justice system of relying on experts to give evidence on issues about which there exists a consensus in mainstream academic thinking is unwarranted. In such areas, the formulation of an acceptable jury direction is preferred. The ODPP supports the use of judicial directions in this area as a preferable course to reliance on an expert giving evidence in each trial. It supports the ALRC and NSW LRC position stated at page 480 of the Consultation Paper that there is a "strong case for use of jury directions which would 'summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour' ". Work is therefore needed on identifying and formulating appropriate judicial directions about child development and behaviour as it applies to cases involving child sexual abuse. The New Zealand model provides a sound basis for considering this issue.

The ODPP also agrees with the suggestion in the Consultation Paper that the timing of directions should be such as to maximise the usefulness of that direction to the jury. In some cases this will mean that the direction should be given prior to the child complainant giving evidence. The repetition of a direction in the summing-up or at another important juncture in the trial is also supported. This would warrant inclusion in any legislation introduced to codify jury directions in NSW.

On the issue of the provision of training material (for example DVDs) to jurors, while the ODPP is generally supportive of any innovation in this area which brings about a reduction in jury misconceptions about the dynamics of child sexual abuse, significant caution would need to be exercised in developing training materials to ensure that they were accurate, fair and balanced. Moreover, the circumstances of a jury viewing the material would need to be carefully considered and monitored. Research and consultation would be needed to ensure any potential pitfalls were identified and avoided.

Chapter 12 - Sentencing

Good Character

The Commission seeks views on whether provision should be made to exclude good character as a mitigating factor in sentencing for child sexual abuse offences, similar to the approach of the provisions in New South Wales and South Australia – and whether provision should be made for good character to be an aggravating factor, as in England and Wales, where good character facilitated the offending.

The relevant statutory provision in NSW is section 21A (5A) of the *Crimes (Sentencing Procedure) Act 1999* which provides:

> *(5A) Special rules for child sexual offences*
>
> In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

The question of whether good character, where it facilitates offending, should be an aggravating factor is vexed.

Good character as an aggravating factor does not sit comfortably with current understanding of good character in sentencing. Good character is generally understood to operate as a mitigating factor insofar as it indicates better prospects of rehabilitation, less need for specific deterrence and that the offender poses less of a risk to the community.

The practical effect of such a feature of aggravation must be examined. Consider the following example: two offenders are both charged with identical offences in identical circumstances. Offender A has no prior criminal history and is otherwise of good character. Offender B has prior criminal history and is not otherwise of good character. The circumstance of aggravation would apply where Offender A used his good character to facilitate his offending. Offender B's offence is not aggravated because he has a criminal record. This leads to the counterintuitive result where the offender with no criminal history, Offender A, is dealt with more severely than the Offender with a criminal history. Whilst this example is oversimplified it illustrates a logical inconsistency that leads to a potential for contradictory outcomes.

Furthermore, where an offender has used this good character to facilitate offending, it is difficult to imagine a situation where this would not be seen as increasing the objective seriousness of the offending or considered an aggravating feature due to the offender's abuse of a position of trust or authority in relation to the victim: section 21A (2) (k) of the *Crimes (Sentencing Procedure) Act* 1999.

The offences and offenders that come before the Courts for sentence are varied and complex. The Court is often required to consider intertwined facts and circumstances and attempt to untangle those factors to apply the relevant sentencing principles. *R v Liddy No* 2 [2002] SASC 306 is an example of this difficult exercise. The offender was convicted of five counts of unlawful sexual intercourse with a person under the age of 12 years, four counts of indecent assault and one count of offering a benefit to a witness. The offences had occurred over a period of 20 years. The offender had otherwise been a person of good character.

While finding on the one hand that the offender's work as a magistrate and in the life saving club may have indicated his otherwise good character, those same features were found by the Court to be

aggravating features insofar as his positions both facilitated his offending and involved a breach of trust:

> *[169] The appellant's conduct was aggravated by the fact that he used his position as a surf lifesaving coach to gain the trust of the complainants. Many of the offences were associated with surf lifesaving and recreational activities instigated by the appellant. The conduct did not appear to the complainants to be unusual or wrong as it was disguised with enticing, exciting and adventurous activities, away from other adults. The activities were appealing to boys of the complainant's age. The appellant developed a scheme and system. This included transporting the complainants in his van to and from surf lifesaving and other activities. His modus operandi was designed to have sexual discussion and activity viewed as normal by the complainants so that he could advance his criminal pursuits.*
>
> *[170] The appellant's conduct was further aggravated by the use of his position as a magistrate to instil respect and authority amongst the complainants. He used his office as a magistrate for recruiting purposes and to engender trust and confidence in the complainant's parents. He chose locations designed to underscore his authority and made use of court facilities. The appellant wrote to parents on court letterhead. These features of his conduct provide an explanation as to why the complainants' parents trusted the appellant.*

The Court found that though it was a matter in his favour, the offender had otherwise lived his life without offending and had made positive contributions to the community; in the circumstances it did not justify a reduction in the sentence (para 23).

R v Liddy No 2 illustrates how a Court is presently able to deal with situations where otherwise good character is used to facilitate offending in a manner that appropriately aggravates offending without need for a statutory aggravating feature.

In circumstances where otherwise good behaviour has been used to facilitate heinous offending it is proper that the offender be denied leniency that would otherwise be afforded. Further, it is proper that when good character is used to engender relationships of trust that are subsequently breached, that offending be aggravated by that breach of trust.

On balance, where good character facilitated the offending, the fundamental harm would ordinarily be captured by other aggravating features such as the abuse of trust. The ODPP considers that the use that can be made of good character at sentence is best reflected by the present provision.

Cumulative Sentencing

Specifically, views are sought as to whether there should be a presumption in favour of cumulative sentencing for child sexual abuse offences, similar to the approach in Victoria.

The ODPP considers the current sentencing principles in NSW applicable to questions of concurrency, accumulation and totality are adequate to address this issue.

The ODPP notes that mandatory or presumptive provisions fetter a sentencing judge's discretion and may decrease the court's ability to appropriately tailor the sentence to an individual case. The abrogation of judicial discretion, particularly in sentencing, can result in unjust outcomes that do not meet the intended aims of the criminal justice system.

Sentencing standards

Submissions are sought on 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.

In NSW an offender is currently entitled to be sentenced in accordance with the sentencing practices as at the time of the commission of an offence when sentencing practices have moved adversely to the offender and a range can be determined: *R v Shore* (1992) 66 A Crim R 37; *R v Moon* (2000) 117 A Crim R 497; *R v MJR* (2002) NSWCCA 129; 54 NSWLR 368.

Although in *R v PLV* [2001] NSWCCA 282; 51 NSWLR 736 Spigelman CJ at [94] (Simpson J, as she was then, agreeing) rejected a submission that a sentence imposed should have been "no harsher" than that which would have been imposed had the offender been convicted 20 year earlier. When an apparent disparity was identified between *R v PLV* and the earlier approach taken in *R v Shore,* a five judge bench was constituted: *R v MJR* (2002) NSWCCA 129; 54 NSWLR 368.

In *R v MJR,* Spigelman CJ (with whom Grove and Sully JJ and Newman AJ agreed) expressly disavowed the previous view he had taken in *R v PLV* at [93]. Instead, Spigelman CJ approved the principle in *R v Shore* (1993) 66 A Crim R 37 and found:

> *"[31] Similarly, I am now satisfied, after assessing the above authorities, that it is, "out of keeping" with the provisions of s19 of the Crimes (Sentencing Procedure) Act 1999, for this Court to refuse to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender. Accordingly, the view I expressed in PLV was incorrect."*

It is clear that in addition to accepting the earlier authority of *R v Shore,* Spigelman CJ also placed some weight upon section 19 of the *Crimes (Sentencing Procedure) Act* 1999 which provided that increases in penalty would only apply to offences committed after the commencement of the provision.

Two relatively recent cases have considered this issue in considerable detail: *Magnuson v R* [2013] NSWCCA 50 per Button J at [84]-[90] (with whom McClellan CJ at CL and Bellew J agreed) and *MPB v R* [2013] NSWCCA213 per Garling J at [87]-[106] (with whom R A Hulme agreed).

In *Magnuson,* Button J accepted the following propositions:

> *"84 It is true that, for over a decade, it has been clear that a sentencing judge dealing with very old offences must take into account the sentencing patterns that existed at the time of the offences: see R v MJR [2002] NSWCCA 129; 54 NSWLR 368.*
>
> *85 If such a pattern is unable to be discerned, the judge should commence the sentencing process in the usual way; that is, by reference to the maximum penalty, and the place in the range of objective gravity occupied by the offence: see Moon v R [2000] NSWCCA 534; 117 A Crim R 497 at [66] - [71] per Howie J (with whom Fitzgerald JA agreed).*
>
> *86 Even if a sentencing judge does take an established sentencing pattern into account, a failure adequately to reflect the principle and the relevant sentencing pattern may cause the sentence to be manifestly excessive, or otherwise erroneous: see RWB v R [2008] NSWCCA 93; 184 A Crim R 453 at [24] - [26].*
>
> *87 If sentencing for offences committed at a time when the statutory ratio did not exist, sentencing judges should sentence in accordance with that fact: see AJB v R [2007] NSWCCA 51; 169 A Crim R 32 at [36] - [37] and Rosenstrauss v R [2012] NSWCCA 25 at [16].*

> *88 Having said that, a court sentencing today with regard to old offences with regard to which a different sentencing pattern can be discerned must nevertheless bear in mind that, since 1974, it has been established that a non-parole period represents the minimum period of imprisonment required to be served by an offender having regard to all of the purposes of justice: Power v The Queen (1974) 131 CLR 623, referred to in AJB v R and many subsequent cases dealing with the principle under discussion.*
>
> *89 Finally, in appeals to this Court, reduction has not been automatic, even if it is determined that the sentencing judge failed to advert to the principle: see, for example, Mottram v R [2009] NSWCCA 210 and RLS v R [2012] NSWCCA 236.*
>
> *90 Applying those principles to this case, I consider that a sentencing pattern with regard to sexual offences committed against children in the late 1970s and early 1980s can be established. That is founded upon five factors. The first is the statistics that were before her Honour and this Court relating to disposition of offences in 1976 and 1978. The second is summaries of cases. Some were provided by the parties to her Honour. Others are contained in other decisions of this Court dealing with this question. The third is the general increase in sentences that has occurred across the board in New South Wales over the past quarter century. The fourth is the upward movement in maximum penalties with regard to the crimes of the applicant between the period under consideration and today. The fifth is judicial memory. I shall deal with each of those factors in turn."*

However there are clear and obvious difficulties in applying this principle. As Whealy J emphasised in *R v Moon* (at 502 [23]):

> *"Although the principle stated in Shore is clear, its application in a particular appeal is often a difficult matter. First, there is a need to have a clear picture as to the range of penalties imposed at the earlier point of time. In Shore's case for example, there was an extensive analysis of over twenty cases of importation of drugs (see schedule, Shore at 49). Second, the perceived difference between range of sentences disclosed at the earlier point of time and the sentence imposed by the sentencing judge may reveal a discrepancy. Nevertheless it may be one of not so high a kind that the appellate court should interfere (Shore at 43)."*

Later, Sully J (in agreement with this view) said, in *R v MJR* (at 496) [104] that:

> *"As a practical matter, the Shore approach cannot be implemented, as it seems to me either intelligently or intelligibly, unless it happens, as was fortuitously the fact in Shore itself, that there exists an authentic and credible body of statistical material that is capable of putting practical flesh upon the theoretical bones of an approach that entails reconstructing what would have been done twenty or so years previously."*

In *Regina v MJR,* Mason P dissented, preferring the approach adopted in *R v PLV* and said "*[s]tated bluntly, it is wrong for a court to apply earlier patterns that have been repudiated as erroneous in the single eye of the law*." Discussing declaratory theory, Mason P referred to Issac J's statement in *Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australia* (1913) 17 CLR 261 at 275 where he referred to the judicial oath which binds the judge *"to do right to all manner of people according to law"* and continued (at 278):

> *"If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right."*

In *MPB v R,* Basten JA (in dissent) also identified a number of difficulties with this approach. His Honour at [17]-[19]:

> *"Attitudes towards offences and practices, as reflected in the application of general principles, can often be sought only in isolated reported authorities, statistics and the memory of the judge. All of these sources are suspect in different ways. Although in PLV Smart AJ (in dissent) accepted that reliance on memory, if available, was appropriate (at [107]-[108]), it would be anathema to the consistent application of legal principle if one offender were to obtain the benefit of a judge's experience and recollection that earlier sentences were more lenient, whereas another offender would not because another judge had no such experience or recollection.*
>
> *There is a further difficulty, illustrated by the present case. To the extent that material is available which conveys in objectively assessable terms the practices and patterns of sentencing in prior times, it is often difficult to obtain and not readily available to solicitors and counsel appearing at first instance. One result is that the material is only made available in this Court, a matter which will be addressed below. The lack of readily available material is itself a factor which militates against requiring (or permitting) an overly sophisticated analysis of past practices.*
>
> *The appropriate resolution of these difficulties is to give primary attention to the range of penalties available (usually a maximum term of imprisonment) and the conduct to which such penalties applied at the date of the offence, in order to assess objectively where, on a broad scale, such offending was likely to fall. These are matters to be determined by reference to the statutory provisions.*

Basten JA at [34]-[35] ultimately found:

> *"It follows that the correct approach to the fixing of the sentence involves the following steps:*
>
> *(a) determine the facts as now available to the court;*
>
> *(b) have regard to the maximum penalty in force at the time of the offending, as a guide to the range of punishment then available;*
>
> *(c) identify where, within the range of offending conduct covered by the offence charged, the offence under consideration falls;*
>
> *(d) fix the term of the sentence or sentences;*
>
> *(e) determine whether special circumstances require that the relationship prescribed by s 44 be varied, and*
>
> *(f) fix a non-parole period in accordance with s 44 of the Sentencing Procedure Act (as in force prior to the 2002 Amendment Act).*
>
> *In accordance with that approach, it is neither necessary nor appropriate to have regard to the actual patterns or practices of sentencing which are now believed to have operated at the time of the offending, whether based on acceptable statistical evidence, cases or memory."*

Where sentencing principles contemporary to the offence have been found to be erroneous, there is something perverse about requiring a Court to be bound by and apply such incorrect principles. The approach taken in England and Wales to apply maximum penalties contemporary to the offences, where they are not higher than today's penalties, but then sentence according to today's standards has much to commend it. Acknowledging that there may be those that would argue that there is a degree of unfairness to the accused in that they may be deprived of consideration of historical

community standards that could operate to reduce the seriousness of their offending, this approach strikes the right balance between the presumption against retrospectivity and the need to give effect to current law and community standards.

Chapter 13 - Appeals

Prosecution's right to bring interlocutory appeals

We agree with the observations of the Commission at [13.4.1] that interlocutory appeals play a very significant role in correcting errors of law before trial. Given the prosecution's lack of any right of appeal from an acquittal, it is important that the ODPP has adequate rights of interlocutory appeal to reduce the possibility of error in trials.

Since January 2014, there have been a total of thirteen appeals pursuant to s5F(3A) *Criminal Appeal Act* 1912 heard and determined (three involved two co-accused). In that period, there have also been four appeals pursuant to s5F (2); three that were filed together with related s5F (3A) appeals and one stand alone. Of the fourteen interlocutory appeals, six matters involved child sexual assault.

These figures indicate that the ODPP and Attorney General's right to appeal against interlocutory orders is, in practice, used sparingly.

The ODPP does not support the view of the NSWLRC that leave requirements should be imposed on the ODPP and Attorney General's right to appeal against interlocutory orders.

Inconsistent verdicts

We agree with observations made in the Consultation Paper at [13.4.2] that, following the decisions in *MFA* [2002] HCA 53; 213 CLR 606 and *Markuleski* [2001] NSWCCA 290; 52 NSWLR 82, 125 A Crim R 186, much of the uncertainty in this area has been resolved. Successful appeals arising from asserted inconsistency of verdicts are infrequent.

Since January 2014, there have been twenty two appeals to the Court of Criminal Appeal asserting inconsistency of verdicts. Of these only four appeals have been allowed. Of those only one was a child sexual assault conviction.[viii] We do not consider that there is need for further consideration of the principles to be applied where inconsistency of verdicts is alleged.

Recording complainants' evidence at trial for use in any retrial

In our experience, complainants often ask whether they will be required to give evidence at any retrial. The recording provisions certainly assuage some anxiety on this issue. The use of recorded evidence also avoids the problem of a complainant giving another version of their evidence in chief upon which she or he can be cross examined at a retrial.

We note that the prerecording provisions do not apply to tendency or coincidence witnesses who give evidence of sexual abuse and so there is no provision by which their evidence can be played at a retrial. This is an area in which the Commission may recommend reform, to make the approach to witnesses giving evidence of sexual abuse uniform in its application to complainants and other witnesses.

Prosecution guidelines on a retrial after a successful appeal by the defendant

We are asked to consider whether the prosecution guidelines should explicitly address the issue of decision-making on whether or not to bring a retrial after a successful appeal by the defendant, including requiring consultation with the complainant and the relevant police.

We consider that no further guidelines are required to address issues that arise on the question of a retrial following appeal.

Prosecution Guidelines 4, 7, 19 and 31 (whilst not strictly about retrials after an appeal) adequately cover the field. Guideline 19 provides that if a re-trial is directed, a victim will need to be consulted. The Charter of Victims' Rights (to which the Guideline requires regard be had) also ensures that victims will be consulted.

Guideline 7 (Discontinuing Trials) applies in respect of retrials where defence request consideration be given to directing that there be no further proceedings. Guideline 4 also clearly applies.

Monitoring appeals and appellate decisions

All appeals filed are screened by the ODPP CCA Unit, and all judgments are read and considered in a timely manner for issues relating to reform. Statistics are also kept. We would also expect the NSW Judicial Commission to continue to monitor appeals.

Chapter 15 - Juvenile offenders

Submissions are invited on the issues raised in chapter 15 generally. Accordingly the ODPP makes submissions on some of the issues raised therein, as follows:

The ODPP supports the continued application by courts of the principle of *doli incapax* [paragraph 15.3].

The ODPP submits that one area where reform is needed in the juvenile justice context is in the area of committal proceedings involving victims of child sexual offences which are indictable offences but are not "serious children's indictable offences" (as defined in section 3 of the *Children (Criminal Proceedings) Act* 1987 (NSW)). Presently, a child victim of such an offence, where the alleged perpetrator is a juvenile, is not afforded the protections contained in sections 91 and 93 of the *Criminal Procedure Act* 1986 (NSW) if the matter is serious enough to be committed for trial. Those sections operate to severely limit the circumstances in which a court can require a complainant to attend a committal for the purposes of giving evidence. For a child complainant aged under 18 at the time of the hearing, who was aged under 16 at the date of the earliest offence, there is indeed a prohibition on that complainant being ordered attend the committal: section 91(8). Moreover in any offence involving violence (defined to include all prescribed sexual offences) the accused must satisfy the court that there are special reasons in the interests of justice to justify that victim being required to attend the committal to give evidence: section 93.

However, where the alleged offender is a juvenile, section 31(3) of the *Children (Criminal Proceedings) Act* 1987 operates to deny a complainant including a child complainant these important protections. That section states that if, in the opinion of the Children's Court Magistrate, an indictable charge is too serious to be dealt with in the Children's Court, it will be committed for trial. Yet, regrettably, section 31(3) only permits the Children's Court Magistrate dealing with such an indictable offence (which is not a "serious children's indictable offence") to commit the young person for trial "after all

the evidence for the prosecution has been taken". This effectively means that before any such committal for trial in the Children's Court can occur, the complainant has to attend to give evidence. Thus, if such an offence goes to trial, the child will end up giving evidence twice. This issue is of some moment because there are numerous child sexual assault offences which fall into this category i.e. offences which are indictable offences but which are not "serious children's indictable offences" Paragraph - 15.5 Prosecution of Juveniles].

The ODPP concurs with the recommendation contained in the *Working with Children Checks Report* published by the Royal Commission that offences committed as juveniles should be available for review as part of the screening process conducted for persons wishing to commence work with children [Paragraph15.7.2]. The proposed standard definition of a "criminal history" for working with children purposes should be broadened in the manner proposed in recommendation 17 of the *Working with Children Checks Report.* This would ensure that the risk assessment process would include consideration of offences committed as a juvenile, while not resulting in an automatic refusal of clearance because of the existence of such an offence.

Conclusion

We are grateful for the opportunity to be consulted and comment on the many important issues raised in the Consultation Paper and will continue to consider the complex and detailed matters raised therein.

Office of the Director of Public Prosecutions

4 November 2016

Endnotes

[i] New South Wales Law Reform Commission Report 141 December 2014 "Encouraging Appropriate Early Guilty Pleas"
[ii] In particular see the ODPP's preliminary Submission to the NSW Law Reform Commission on Early Guilty Pleas in June 2013
[iii] ibid
[iv] John Pickering SC, former Deputy Director, statement to the Royal Commission 27 June 2014 paragraphs 30 - 33
[v] The complete collection of the minutes from the Sexual Assault Review Committee have been produced by the ODPP to the Royal Commission.
[vi] NSW LRC Report 141
[vii] See generally the Research conducted by the Judicial Commission of NSW, *H Donnelly, R Johns and P Poletti, Conviction Appeals in NSW: Monograph 35,* 2011

[viii] *Sutcliffe v R* [2014] NSWCCA 208 (not CSA, dismissed) ; *Taleb v R* [2015] NSWCCA 105 (sexual assault but not a child, dismissed); *Youkhanis v R*[2014] NSWCCA 220 (not CSA, dismissed) ; *SM v R* [2016] NSWCCA 171 (CSA, appeal dismissed); *Peiris v R* [2014] NSWCCA 58 (CSA, appeal dismissed); *Hawi v R* [2014] NSWCCA 83 (not CSA, appeal allowed on basis of inconsistent verdicts) ; *TA v R* [2015] NSWCCA 151 (adult sexual assault, dismissed)**;** *PA v R* [2015] NSWCCA 18 (CSA appeal dismissed) ; *McCann v R* [2014] NSWCCA 79 (CSA, verdicts inconsistent appeal allowed) ; *Drysdale v R* [2015] NSWCCA 135 (sexual assault but not CSA, one episode verdicts inconsistent, appeal allowed); *AC v R* [2016] NSWCCA 21 (CSA, appeal dismissed); *Tsaccounis v R* [2016] NSWCCA 163 (sexual assault, not CSA appeal dismissed); *Miller v R* [2014] NSWCCA 34 (not CSA dismissed); *Mason v R (No. 2)* [2015] NSWCCA 325 (CSA, appeal dismissed); *CH v R* [2014] NSWCCA 119 (CSA, appeal dismissed); *Wingrove-Pryce v R* [2014] NSWCCA 290 (Adult SA, appeal dismissed*); Elwood v R* [2016] NSWCCA 18 (not sexual assault appeal dismissed); *Lachlan Wilson v R* [2014] NSWCCA 266 (not sexual assault appeal dismissed); *Parkinson v R* [2016] NSWCCA 49 (CSA appeal dismissed)**;** *Parhizkar v R* [2014] NSWCCA 240 (not sexual assault, appeal dismissed); *Langelaar v R* [2016] NSWCCA 143 (CSA appeal dismissed); *Darby v R* [2016] NSWCCA 164 (adult sexual assault, appeal allowed)