Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

Consultation Paper: Criminal Justice

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Comments on Chapter 2

Even if criminal justice responses are available to those who seek them, it is the *quality* of the criminal justice response that will determine whether the Royal Commission's approach to criminal justice reforms will achieve the Commission's objectives of:

- punishing the offender
- recognising the harm done to the victim
- identifying and condemning the abuse as a crime against the victim and the broader community
- emphasising that abuse is not just a private matter between the perpetrator and the victim
- increasing awareness of the occurrence of child sexual abuse through the reporting of charges, prosecutions and convictions;
- deterring future offending through the increased risk of discovery and detection;
- availability of criminal justice responses to those who seek them;
- support of victims/survivors during the process; and
- the criminal justice system operating in the interests of justice

The quality of a criminal justice response in the child sexual abuse context is dependent on a re-consideration of balancing the interests of justice within the trial process (justice for society, the complainant and the accused) such that relevant evidence (such as tendency/coincidence or delay in complaint evidence) is routinely admitted unless there is demonstrable, rather than speculative, evidence about unfair prejudice to the accused. The quality of the criminal justice response is also dependent on ensuring that a child's or adult's best evidence is able to be given (as a result of reforms to the cross-examination process) and ensuring that jurors should are not left in the dark about types of evidence they think ought to have been made available to them (such as medical evidence) since there is evidence to show that laypeople believe that medical evidence is the type of evidence that would prove whether or not a sexual assault had occurred.[1]

Thus, a holistic analysis of all the barriers and problems associated with prosecuting child sexual assault cases within the adversarial system is the only way of assessing the adequacy of the system's response to this particular crime.

[1] Goodman-Delahunty, J., Martschuk, N. & Cossins, A. (2016) 'Programmatic Pretest-posttest Research to Reduce Jury Bias in Child Sexual Abuse Cases' *Onati Socio-Legal Series*, 6(2): 283-314.

Comments on Chapter 8: The issue of specialist courts

In this section, I make responses to the Royal Commission's reasons, listed below, for not appearing to favour a specialist sex offences court as a possible answer to the issues of delay and justice in relation to child sexual assault matters. I then discuss a study tour of the New York Sex Offenses Court from the perspective of people who actually visited and observed the working of those courts. First, the Commission's reasons for not favouring a specialist court in its Consultation Paper include the following:

- burnout of judges and prosecutors;
- difficulties in attracting the best judges and prosecutors;
- compartmentalising a certain category of cases creates the risk of creating a separate class of law;
- because judges sitting in regional courts often become experts in areas of law such as tendency and coincidence, it would be to the detriment of the criminal justice system in general for such expertise to be restricted to a certain class of matters;
- given the present demands on the courts in Australia's larger jurisdictions, greater efficiencies might be achieved if all judges remained generalists;
- we have not heard much support for the creation of child sex offence specialist courts.

I address each of these arguments in turn below.

1. Burnout of judges

This is a view that I have commonly heard from judges although it is usually accompanied by no insight into how burnout is dealt with by other professions who deal with victims of child sexual abuse at the 'coalface'. The police in many jurisdictions have specialist sex offences or child abuse squads (e.g. the Child Abuse Squad in NSW), the members of which are required to undergo professional counselling on a regular basis to prevent burnout. As well, sexual assault counsellors who are specialists in relation to victims of sexual assault are also required to under mandatory professional debriefing on a regular basis.

Since there is exceptionally good evidence to show that professional debriefing works for these professionals[2], why would it not work for prosecutors and judges? In other words, burnout is a

[2] Trippany, R L, White Kress, V E and Wilcoxon, S A (2004) 'Preventing Vicarious Trauma: What Counselors Should Know When Working With Trauma Survivors', *Journal of Counseling and Development*, 82: 31-37.

justification with no basis to it for not considering the efficacy of specialist courts for achieving the Royal Commission's objectives set out in Chapter 2.

2. Difficulties in attracting the best judges and prosecutors

The Royal Commission did not provide any evidence that a specialist sex offences court will have difficulties in attracting the best personnel. Indeed, it is more likely that those judges and prosecutors who are committed to this area of the law will be keen to specialise in the area. For example, in Victoria, a former member of the specialist prosecutorial unit was a former Deputy Director of Public Prosecutions in the Northern Territory, a senior counsel of considerable experience and expertise. So too are the two barristers who were appointed as specialist judges in NSW recently. Judge Girdham was a highly experienced prosecutor doing appellate work for the Crown in the Court of Appeal and the High Court while Judge Traill had 20 years of experience appearing as both defence and prosecutor in child sexual assault matters.

3. Compartmentalising a certain category of cases

It is very difficult to see how 'a separate class of law' would be created if a specialist court is introduced since the expectation would be that the court would operate under the same rules of evidence and procedure. However, if a separate class of law is feared, then it is already in existence in terms of the application of the rules governing tendency and coincidence evidence under the Uniform Evidence Legislation (UEL) in Victoria which has developed a separate jurisprudence on the admissibility of this type of evidence specifically in child sexual assault trials[3], a matter that will be the subject of a High Court appeal hearing in December.[4] Victoria has also created a separate jurisprudence in relation to the admission of complaint evidence in child sexual assault trials.[5]

Thus, court specialisation is not the necessary trigger for creating a separate class of law—other factors within the trial process are responsible for this.

However, it is the appeal process that ensures that a separate class of law does not develop either within a jurisdiction, or between jurisdictions where the rules of evidence and procedure are the same.

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[3] Cossins, A (2011) 'The Behaviour of Persistent Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials', *Melbourne University Law Review*, 35(3): 821-864.

[4] *Hughes v R* [2016] HCATrans 201.

[5] A Cossins and J Goodman-Delahunty (forthcoming) 'The Application of the Uniform Evidence Act in Child Sexual Assault Trials' in A Roberts and J Gans (eds) *Critical Perspectives on the UEL*, Sydney: Federation Press.

The recent High Court case in *IMM v R*[6] which dealt with the differences that had emerged between different UEL jurisdictions in relation to the interpretation of the words, the probative value of the evidence, for the purposes of ss 97(1)(b) and 137, has proved that proposition, as will the outcome of the *Hughes* appeal in December.

4. It would be to the detriment of the criminal justice system for judicial expertise to be restricted to a certain class of matters

The Royal Commission makes the argument that because judges sitting in regional courts often become experts in areas of law such as tendency and coincidence, it would be to the detriment of the criminal justice system in general for such expertise to be restricted to a certain class of matters if a specialist sex offences court was introduced.

However, in cases which deal with complex evidentiary issues, such as tendency and coincidence evidence, it would be highly desirable for judges sitting on child sexual assault cases to have a high level of expertise in admitting this type of evidence in the interests of justice, particularly since it is these cases, much more than any other type of criminal trial, that give rise to the issue of joinder and hence the cross-admissibility of the evidence of two or more complainants.

As discussed in Chapter 10 of its Consultation Paper, if the Royal Commission decides to recommend changes to procedural laws to increase the number of joint trials of child sexual assault matters involving institutional abuse, and governments adopt such a reform, the need for expertise in relation to tendency and coincidence evidence will increase whether a specialist court is adopted or not. In fact, this need will mean it is likely that regional court judges continue to develop their expertise in this area of law. However, the Royal Commission did not point to any particular detriment that is presently being experienced within the criminal justice system as a result of this already existing level of expertise.

The other problem with the Commission's argument is that it assumes that judges who would not be sitting in a specialist sex offences court are not as intellectually capable when it comes to dealing with complex evidentiary issues. Guided by arguments from counsel, I think it is doubtful that the current group of District Court judges in NSW, for example, would not have this capacity.

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6 [2016] HCA 14.

In any case, if a specialist court was adopted, the rotation of specialist judges through that court and the general courts would ensure that any degree of expertise gained as a result of sitting on a specialist court would be spread throughout the general criminal courts as well.

5. Given the present demands on the courts in Australia's larger jurisdictions, greater efficiencies might be achieved if all judges remained generalists

The Royal Commission did not provide any evidence that efficiencies increase with generalists as opposed to specialist judges. The Commission has, in its Consultation Paper, indicated the likely increase in child sexual assault matters that will need to be dealt with by the police, prosecutors and the courts as a result of its inquiry and findings in relation to institutional child sexual abuse.

This means that the pressure on courts will increase, particularly in terms of disposition times for hearings. At the moment in NSW, as at the end of July 2016, there were 2042 criminal trials and 1195 sentencing matters outstanding in the District Court of NSW, an increase of more than 50 per cent since 2010.[7]

Since efficiencies will be required because of the expected increase in the number of child sexual assault matters coming before the courts, and since one way of reducing the caseload on courts is to increase guilty pleas, it can be expected a specialist court with specialist judges and prosecutors will develop a particular expertise in trial call-overs for identifying those cases where, based on the evidence, an early plea of guilt could be entered.

Since the NSW Bureau of Crimes Statistics and Research identified that another reason for the increase in the NSW District Court caseload was longer trials[8], resulting in greater demand for court time, a specialist court comprised of specialist judges and prosecutors with expertise in conducting child sexual assault cases and with a streamlined case management system is more likely than a generalist court to be able to reduce the length of such trials, thereby creating greater efficiencies in the system.

6. We have not heard much support for the creation of child sex offence specialist courts

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[7] http://www.smh.com.au/nsw/district-court-delays-to-criminal-cases-unlikely-to-ease-for-a-year-judge-warns-20160902-gr7nie.html; http://nswcourts.com.au/articles/justice-delayed-is-justice-denied-nsw-courts-in-crisis/; http://www.bocsar.nsw.gov.au/Pages/bocsar_news/Court-delay.aspx.

[8] http://www.bocsar.nsw.gov.au/Documents/CJB/Report_2015_Court_Delay_cjb184.pdf.

Arguably it is necessary to consider all options that may improve justice for victims of institutional child sexual abuse, irrespective of whether the Royal Commission has heard much support for a particular option such as the creation of specialist sex offences. This is, in fact, the approach the Commission has taken in relation to its favourable review of the use of intermediaries in child sexual assault trials despite the fact that 'professionals who were surveyed regarded the use of an intermediary as the least credible of the special measures' (p.381).

Because the phenomenon of specialist sex offences is not well known outside of academic circles, with many practitioners never having heard of such courts, it is likely very few participants in the criminal justice system have any knowledge or training about specialist courts and how they work. In fact, the Royal Commission noted on p.381 of its Consultation Paper that negative views about the use of intermediaries 'reflect[ed] a jurisdictional bias towards what is most commonly used in their state' and concluded:

> Given the very limited use of intermediaries in any Australian jurisdiction before 2016, it is possible that stakeholders will support the use of intermediaries if they have the opportunity to become familiar with their use.

Such a view applies with equal force to the issue of specialist courts. Since no jurisdiction in Australia has a specialist sex offences court, it is therefore likely that practitioners will favour what they know rather than what they don't know.

Contrary to the Royal Commission's views on the limitations of specialist courts in its Consultation Paper, Parkinson concluded in his literature review that:

> The evidence for the efficacy of the South African Sexual Offences Courts *is strong*, taking into account the complexities of its multiracial and multicultural society and the scale of its social needs. Evaluations over the years have identified many problems and challenges, not least in following the ambitious blueprint set out for these courts; but overall the evaluations have been positive (p.v; emphasis added).

As well, the National Child Sexual Assault Reform Committee, upon which Parkinson relied, recommended the introduction of a specialist court as did the Criminal Justice and Sexual Offences

Taskforce[9] and the recent report of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders.[10]

Neither Parkinson nor the Royal Commission engaged in an analysis of specialist courts, in terms of a needs-based approach to establishing sex offences courts which has been undertaken in overseas jurisdictions and is based on a close examination of a particular jurisdiction's existing laws and procedures.

Nor has an analysis been undertaken of the complex roles that courts are involved in from pre-trial hearings to sentencing to the monitoring of offenders post-sentence. In other words, courts do much more than merely hear and decide on the guilt or otherwise of a particular defendant. As well, specialist courts are a forum in which the specialist judges and prosecutors who have received specific training about the needs of vulnerable witnesses can deal with 'the ways in which existing aspects of the criminal justice system are particularly challenging for victims and survivors of child sexual abuse' (Consultation Paper, p.384).

8. A study tour to the New York Sex Offenses Courts

In order to consider the complex roles of courts, particularly specialist courts, I include a discussion which comes from a report I wrote in 2010 after a study tour of the New York Sex Offenses Courts which involved several lawyers and judges visiting the New York specialist courts to gain first-hand experience of how the courts work.

Included in this discussion are two case studies based on observations during the study tour:

1. Case study one: the Erie Sex Offenses Court;
2. Case study two: the Queens Sex Offenses Court.

When reform of the criminal justice system is being considered in light of the Royal Commission's objectives in Chapter 2, it seems that it would be necessary to specifically analyse the extent to which specialist courts might achieve those objectives, compared with generalist court proceedings.

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9 Criminal Justice and Sexual Offences Taskforce (2005) *Responding to Sexual Assault: The Way Forward*, Attorney-General's Department of NSW: Sydney.

10 Joint Select Committee on Sentencing of Child Sexual Assault Offenders (2014) *Final Report, Every Sentence Tells a Story - Report on Sentencing of Child Sexual Assault Offenders*, Sydney: Parliament of NSW.

In June 2010, the Center for Court Innovation[11] in New York sponsored an Australian study tour of the New York Sex Offenses Courts (SOC). Organised by Rebecca Thomforde Hauser from the Center and Dr Annie Cossins, the study tour included judicial officers, defence lawyers, victims advocates, prosecutors and a representative from the NSW Judicial Commission.

Member of the study tour included: Felicity Broughton, Deputy Chief Magistrate, Magistrates' Court, Victoria; Justice Richard Button SC, former NSW Public Defender, now NSW Supreme Court judge; Laura Christian, Senior State Prosecutor, Office of Director of Public Prosecutions, Western Australia; Dr Annie Cossins, Faculty of Law, University of New South Wales; Hugh Donnelly, Director of Research, NSW Judicial Commission; Judge Judith Gibson, District Court of NSW; Phillip Gibson, Partner, Nyman Gibson Stewart (Criminal Defence Lawyers), Sydney; Justice Robyn Layton, formerly of the Supreme Court of South Australia; Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre, Sydney; Judge Meryl Sexton, County Court, Victoria; Karen Willis, Executive Director, NSW Rape Crisis Centre.

Introduction

The first SOCs were established in New York State in February 2006 in collaboration with the Center for Court Innovation which developed a model court to provide more consistent management of sex offences cases and sex offenders and to improve victim services. As of August 2009, there were eight SOCs in operation in eight different counties in New York City and New York State.[12] As of 1 January 2009, seven of the courts had heard 2,079 cases. As of July 2015, there were nine SOCs in operation which together had heard 4,869 cases.[13]

The debate for introducing these particular problem-solving courts in Australia has both proponents and detractors.[14] Australian jurisdictions have made great progress in the past decade in relation to

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[11] The Center is a non-profit public-private partner of the New York State Court System which provides independent research and development for the courts (http://www.courtinnovation.org/).

[12] The Courts are part of each County's Supreme Court: Orange County Sex Offense Court, Westchester County Sex Offense Court, Nassau County Sex Offense Court, Suffolk County Sex Offense Court, Queens County Sex Offense Court, Oswego County Sex Offense Court, Erie County Sex Offense Court and Tompkins County Sex Offense Court.

[13] http://www.courtinnovation.org/sites/default/files/documents/soc_presentation.pdf.

[14] Proposals for introducing specialist sex offences courts in Australia have been discussed by: Victorian Law Reform Commission (2004) *Sexual Offences: Final Report*, Victorian Law Reform Commission: Melbourne; Criminal Justice and Sexual Offences Taskforce (2005) *Responding to Sexual Assault: The Way Forward*, Attorney-General's Department of NSW: Sydney; A Cossins (2010) *Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee*, University of NSW: Sydney); Australian Law Reform Commission and NSW Law Reform Commission (2010) *Family Violence—A National Legal Response*, Sydney: ALRC; Joint Select Committee on Sentencing of Child Sexual Assault Offenders (2014) *Final*

implementing reforms to protect adults and children when giving evidence in a sexual assault trial. There is, however, no evidence that these reforms have had an impact on reporting, attrition and conviction rates.

Part of the ongoing debate in Australia involves an assessment of whether Australian jurisdictions have particular problems to be solved and goals they wish to achieve when it comes to the detection, management and prosecution of sex offenders. It is important to ask, in relation to each particular jurisdiction, the extent to which there is a need to:

- Improve case management of sex offences in order to reduce disposition times;
- Provide victims with improved information and experiences;
- Promote consistency in court processes, procedures and sentencing;
- Promote offender accountability, including deterrence and treatment;
- Protect victims by decreasing the likelihood of re-offending;
- Increase the number of guilty pleas;
- Decrease the drop-out rate of sex offence cases; and/or
- Increase conviction rates.

These are some of the goals that specialist courts for prosecuting sex offences in New York, South Africa and Canada have been able to achieve[15] in recognition of the fact that traditional criminal justice responses have produced inconsistent sentencing of sex offenders, have not been able to improve the drop-out rate of sex offences, nor reduce the recidivism of convicted sex offenders.[16]

The New York sex offense court model follows a set of **key principles**[17] that are based on national research on sex offender management, best practices and an analysis of the court system's current

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Report, Every Sentence Tells a Story - Report on Sentencing of Child Sexual Assault Offenders, Sydney: Parliament of NSW.

15 A Cossins (2010) Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee, University of NSW: Sydney, pp 291-309 (http://www.law.unsw.edu.au/Staff/cossinsa/docs/NationalCSAReformCommitteeReport2010.pdf).

16 In a study by the John Jay College of Criminal Justice of the outcomes of sex offence cases in New York's 62 counties, 51% of cases resulted in a conviction—43% resulted in a conviction for a sex offence whilst 57% resulted in a conviction for a non-sex offence (John Jay College of Criminal Justice (2008) *Case Processing of Sex Offenses in New York State 2000-2005*, Criminal Justice Research Evaluation Center, John Jay College of Criminal Justice: New York.

17 This report draws on information gathered from site visits to the Erie Sex Offenses Court and the Queens Sex Offenses Court as well as documents provided by the Center for Court Innovation. These documents include: *Center for Court Innovation Site Visit: Australian Delegation (June 21-24, 2010)* and *Domestic Violence Court Toolkit: National Technical Assistance Program* (2008).

methods of addressing sex offense cases. I have also highlighted in yellow below, where these goals/objectives are consonant with the Royal Commission's objectives set out in Chapter 2.

These principles include:

- ***Dedicated judge and court*** to handle sex offense cases from identification through to disposition. (specialisation emphasises the just society principle and increases awareness)
- ***Training*** and education for judicial and non-judicial personnel is an integral part of the court's ability to handle complex sex offence cases in a consistent manner. Training includes issues related to sex offending behaviours to keep all personnel abreast of the latest research and best practices in the field. (increases the efficiency of a system and support of victims during the process through utilisation of vulnerable witness protections)
- ***Court jurisdiction*** which includes at a minimum all cases that are registerable sex offences;
- ***Case identification***: protocols for identifying eligible cases;
- ***Intensive judicial monitoring*** to promote offender accountability which includes:

(i) Regular dates for offenders to return to court to monitor compliance with parole or bail conditions, including modification of conditions;

(ii) Non-compliance is directly communicated to the court by parole/probation officers;

(iii) Swift responses by the court to violations of probation, parole and bail conditions as well as violations of the sex offenders registration legislation. (all for deterring future offending)

- ***Probation and parole agencies*** actively work with the courts to supervise offenders which includes (for deterring future offending):

(i) reparation of pre-sentence investigation reports for the court to assess risk;

(ii) specially trained probation officers to manage and supervise sex offenders;

(iii) the development of special sex offender parole/probation conditions;[18]

(iv) funding and development of sex offender treatment programs;

(v) use of polygraph testing to assist the offender in reducing risk taking behavior.

- ***Community liaison***: sex offenses courts depend on ongoing successful interaction with all stakeholders. Judicial monitoring and community supervision (deterring future offending) is more effective when the court, probation department, District Attorney's Office, defence lawyers and victim services agencies understand each other's role. This includes:

(i) regular stakeholder meetings with all relevant stakeholders during planning and post-implementation;

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[18] See Appendix B.

(ii) courts facilitate a victim's access to sexual assault services.

- ***Technical assistance***: technical assistance team is assigned to the court to guide them through the pre- and post-implementation stages.
- ***Planning document*****:** this is created during the planning and pre-implementation stages to ensure procedures conform to the mission statement and key principles.
- ***Evaluation*****:** in order to track cases and collect data, a special designed database and case management tool (called the Sex Offense Court Application) allows for evaluation of the sex offense courts.

Before sex offenses courts were implemented in the State of New York, each County engaged in a lengthy planning process of six to twelve months which included a consideration of whether such a court was desirable or needed in the first place. At the outset, this process involved:

- setting a realistic timeframe for planning; and
- creating a court planning team.

Planning team

The Center for Court Innovation considers that collaboration between judicial and non-judicial court personnel, as well as between representatives from court stakeholder agencies is vital to a successful planning process. During the Study Tour the need for involvement of all relevant stakeholders during this planning process was confirmed again and again by those who had actually been involved, in order to determine the nature, purpose and focus of the court. Those involved in court administration must also be part of the planning team in order to provide a realistic assessment of the administrative burden and resources involved in establishing a sex offences court.[19]

Who is a court stakeholder or partner for the planning team?

In relation to a sex offences court, court stakeholders will most likely include:

- interested judicial officers, including chief judges/magistrates;
- court administrative staff such as court registrars;
- the Office of the Director of Public Prosecutions;
- witness assistance services;

[19] The Center for Court Innovation conducts baseline interviews early in the planning process with all stakeholders which are then used to determine the shape of the SOC, how cases will be identified and handled, how resources will be allocated, how communication will be facilitated and to improve stakeholder understandings of the different roles of each agency.

- criminal defence lawyers;
- police, in particular members of specialist sex crimes squads;
- corrections agencies and probation officers;
- sex offender treatment providers;
- victim advocacy organizations such as sexual assault counselling services and non-government support groups for victims;
- children's advocates such as Children's Commissioners;
- child welfare agencies;
- academics with experience in the field; and[20]
- technology advisors.

Broad representation from all relevant agencies and services will not only ensure that court personnel benefit from working with government and community-based organizations but is vital to determining whether such a court is needed in a particular jurisdiction and to obtaining government and community support for the court. It is likely the planning team will discover opposing views are held by some members but, as one defence attorney recognized, that does not mean there is no common ground: "if all you do … is focus on the polarity, you will end up with paralysis. If you can focus on … the common ground then you can move forward".[21]

While it may be considered unusual to involve victims' services providers in the planning team, these agencies provide unique insights into the impact of sexual abuse on victims and victims' experiences with the criminal justice system, as well as the reasons why most victims do not report to police or why they may withdraw their complaint. Victims' services can also inform the planning team about the special needs of sexual abuse victims, including their need for regular information about the progress of the case against the defendant.

Initial activities for the planning team

It is possible for large planning teams to divide into sub-committees to discuss the following important issues:

- ***Analysis of court data*** to determine the objectives sought to be achieved in the particular jurisdiction regarding the prosecution of sex offences (e.g. increase reporting rates; reduce

[20] The Center for Court Innovation has developed a worksheet for determining which stakeholder groups and people should be members of the planning team.

[21] Robert Lonski, defense attorney and Executive Director of the Assigned Counsel Panel in Erie County.

attrition rates; reduce delays, increase the number of cases going to trial or minimise wrongful convictions);

- ***Operations*** of the court including eligibility criteria; case identification; case screening; the court's calendar; judicial compliance reviews;
- ***Services*** which will involve the development of protocols between stakeholders and the court to ensure the provision of immediate services; to facilitate communication with the court; to promote efficient processes for referrals;
- ***Training*** which includes the development and coordination of training programs for all court staff and stakeholders;
- ***Technology*** such as the identification of software programs for case identification; record keeping; statistical compilation for court evaluation; training of court staff in relation to use of technology;
- ***Security*** will involve an assessment of the security needs of the court, including identifying a safe waiting area for victims and their families/supporters; ensuring clear signs are posted and visible to the public entering the court; training of security staff about sex offences court policies and procedures.
- ***Sex Offender treatment***: its availability and quality, including the availability of evaluations of treatment programs.
- ***Development of a planning document*** which is the written version of all policies and procedures discussed during the planning process (see Appendix A).

Advisory board

This is a group that can be formed in addition to the planning team which can help build political support for the court, facilitate inter-agency cooperation, resolve potential conflicts and provide managerial oversight of the planning process. Generally the advisory board will be comprised of the designated sex offences court judge, executive level government personnel and policy makers and representatives from non-government agencies.

How the courts work in practice

After the planning team has examined a particular jurisdiction's current practices, current policies and gaps in practice[22] it will then be possible to devise the goals and objectives of a sex offences court, if

[22] The Center for Court Innovation uses a process called a SWOT Analysis to determine the strengths, weaknesses, opportunities, threats and, as a result, the gaps in current practice in relation to prosecuting certain offences. This allows the planning team to identify and prioritise areas of policy and practice that could benefit from a specialised sex offences court.

that is the recommendation made by the planning committee. These goals will define the overall mission and purpose of the court. Objectives explain how each goal will be achieved. The Center for Court Innovation considers they need to be specific, realistic and able to be measured, quantitatively.

The objectives of the court will determine its jurisdiction and its practices, including sentencing options. For example, six of the eight SOCs in New York State deal with all sex offence cases that involve a potential registerable offence. This means any case that involves a charge that could result in a defendant, if convicted, being placed on the New York sex offender registry. By comparison, the Queens and Tompkins SOCs are compliance courts that take cases post-disposition for the purposes of intensive monitoring; for example, cases where the defendant is on probation or where it is otherwise requested.

For the specialist courts in New York, the typical goals include increased victim safety and increased offender accountability. Decreasing recidivism might also be another goal for a sex offences court with the recognition that a custodial sentence, on its own, is an insufficient deterrent and that treatment is an essential part of reducing recidivism. Enhancing the guilty plea rate and reducing a court's caseload could be another goal, particularly in jurisdictions where the rates of guilty pleas and convictions are low.

Jurisdiction of the court

The planning team will need to decide whether the court will hear all cases involving a sex offence or only a selection of such cases. For example, a court could prosecute some or all of the following:

- cases involving victims under the age of 18;
- cases involving victims aged 18 years of age and over;
- cases involving both sex and non-sex offences (for example, a child might have been both sexually and physically abused);
- cases involving juvenile defendants; and/or
- summary or indictable offences or both.

In addition, the court could handle all hearings including bail hearings while the planning team will need to consider whether the court will be a diversionary model (offering mandated treatment to those who plead guilty[23]) and/or employ traditional sentencing methods.

[23] Cedar Cottage was a diversionary program that operated in NSW for intra-familial offenders (see Goodman-Delahunty, J (2009) *The New South Wales Pre-trial Diversion (Child Sex Offenders) Program: An*

The jurisdiction of the court will depend on the results of a caseload analysis which measures the potential workload of the court. Sex offence cases currently being heard in a particular jurisdiction's criminal courts will need to be identified. A method for case identification may already exist in jurisdictions that have a Sex Offence List (as is the case in Victoria), otherwise methods will need to be developed for identifying relevant cases.

Once a case identification method has been developed, it will be necessary to develop methods and protocols for screening cases in order to decide whether they are eligible for the sex offences court. This will involve decisions about who will carry out this administrative task. It will also be necessary to develop procedures to ensure that eligible sex offences cases are assigned as early as possible to the sex offences court.

Courthouse safety

Courthouse safety is another issue that may need to be addressed by the planning team to ensure that victims and defendants do not come into contact with one another within the courthouse. In NSW, for example, the District Court in Sydney has separate entrances for complainants into the area of the court where they give evidence. This area contains a safe waiting area and remote rooms for giving evidence via CCTV.

Compliance hearings

Based on the experience of the New York Sex Offenses Courts, the planning team will need to consider whether the court will include judicial compliance hearings in order to monitor defendants on bail, on parole and those subject to community service orders or home detention. Compliance hearings are one of the key features of the New York SOCs and are considered central to promoting offender accountability and victim safety. The frequency of compliance hearings may be weekly or bi-weekly soon after sentencing and decrease in frequency over time. Compliance hearings also allow offenders to request modifications to the probation conditions imposed on them.

Training

It is considered that an informed judiciary is vital to the effectiveness of a sex offences court. As well as training on issues such as sex offender behaviour, sex offender treatment programs and adults' and children's reponses to sexual assault, training could also include information about the specific

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Evaluation of Treatment Outcomes, Sydney West Area Health Service: Sydney, www.wsahs.nsw.gov.au/services/cedarcottage/index.htm).

evidentiary and procedural issues arising in sex offences cases. Training is also considered necessary for non-judicial court personnel and prosecutors.

Case study one: The Erie Sex Offenses Court

The Erie Sex Offenses Court in Buffalo has a much more comprehensive jurisdiction compared to the Queens SOC which is the subject of case study two. The jurisdiction of the Erie SOC encompasses all sex offenses that are registrable under the Sex Offender Registration Act, as well as the offence of failure to register as a sex offender and civil confinement cases under Article 10 of the Mental Hygiene Act. The Erie Court's jurisdiction does not include 'stand alone' misdemeanor sex offences which are handled in the local criminal courts.

Where other offences arise out of the same transaction, those offences are also dealt with by the Erie SOC. Where a sex offender, who has been convicted in the Erie SOC, is subsequently arrested on a felony offence, the new felony charge and the violation of probation hearing will be heard in the Erie SOC, regardless of the nature of the new offence.

The original planning committee of the Erie SOC has become the steering committee for the Court and it has an on-going role in improving the administration of the court where needed.

Presiding judge

There is one presiding judge with a back up judge in the event of absences. The benefits of one presiding judge include consistency in judicial decision-making and judicial expertise in relation to evidentiary and procedural matters. The presiding judge also plays a major leadership role in the development of the court and in encouraging collaboration between stakeholders.

Case identification

The Supreme Court Chief Clerk's Office screens and identifies cases that fall within the Erie SOC's jurisdiction. Applications by any party can be made to the Presiding Judge if a case has been inappropriately assigned to the SOC or if there is a desire to have a case heard by the SOC.

Case processing

1. A scheduled *pre-trial conference* discusses potential plea and sentence parameters. If a plea agreement is reached during the conference the defendant will enter his/her plea accordingly.

2. A *pre-sentence investigation* (PSI) is ordered by the court which provides information about the risk of recidivism and treatment recommendations.[24] A PSI will be ordered in relation to all registerable sex offences and will include victim input, recommendations about sentencing and requests for special probation conditions, such as protections for the victim and restitution.

Where a defendant does not plead guilty, the local criminal court will conduct a grand jury hearing (similar to Australia's committal hearings). If the defendant is subsequently indicted by the grand jury, he is then arraigned on indictment in the Erie SOC where a trial will be conducted. If he is found guilty, the Erie SOC will order a PSI before sentencing.

District Attorney's Office

The District Attorney's (DA) Office in Erie County has a specialised unit consisting of six specially trained assistant District Attorneys. A victim-centred approach means that one assistant DA handles a sexual assault case from start to finish. The specialised unit deals with all cases involving the sexual and physical abuse of children.

Sex offender conditions

For sex offenders, the length of probation and the type of conditions are enhanced in New York State. The maximum probationary period is 10 years which the Presiding Judge of the Erie SOC stated he always imposes on sex offenders.

An offender can apply to have probation discharged earlier than the 10 year period based on his progress and compliance.

There are thirty sex offender probationary conditions in addition to four general probationary conditions.[25] <u>These conditions are onerous in nature and have been developed to address the safety of the victim and that of other potential victims</u>, as well as to assist in the offender's rehabilitation by providing external behavioural controls until the offender is able to develop his own internal controls. They include prohibitions on any contact with the victim for the probationary period (usually ten years), prohibitions on contact with anyone under the age of 18 years and submissions to warrantless searches of home, vehicle and business.

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[24] The PSI is conducted by clinicians approved by the SOC upon the advice of the Department of Probation which contains a special Sex Offender Unit. Clinicians will have clinical experience and specialised training in evaluating and treating sex offenders.

[25] See Appendix B for the full list of general and special probationary conditions.

Department of Probation monitoring of offenders and compliance hearings

Convicted sex offenders are subject to intense supervision, compared to other types of offenders. Specially trained officers from the Sex Offender Unit of the Department of Probation in Erie County make frequent home inspections of sex offenders at any time of the day or night. Personal home computers are also periodically checked using a computer surveillance program.

Probation officers make frequent contact with the offender's treatment providers, as well as the offender's family and associates. Compliance hearings will be scheduled periodically, usually weekly, or as the SOC deems necessary for each particular offender.

The compliance hearing takes place in open court on the record in the presence of the defendant, his defence counsel, the Assistant DA and the defendant's probation officer. The purpose of compliance hearings is for the SOC to assess the level of the offender's co-operation with the Department of Probation, his conformity with the special conditions that are imposed on each sex offender (see Appendix B) and his progress under the sex offender treatment program.

Compliance hearings reinforce the fact that the court has an ongoing supervisory role over the offender. Regular compliance hearings also reinforce the consequences of non-compliance to the offender, as well as ensuring that breaches of conditions or violations of the Sex Offender Registration Act can be rectified early on, particularly if they involve contact with the victim or other potential victims. Failure to appear at a compliance hearing can result in a warrant for arrest.

Case study two: The Queens Sex Offenses Court

Compared to the Erie SOC, the Queens SOC in Queens County only processes misdemeanor sex offences, and offenders who are considered to pose a relatively low risk to the community. Thus, the Queens Court is akin to a diversionary scheme, such as the former Cedar Cottage Program in NSW (which diverted intra-familial offenders from the courts into an intensive sex offender treatment program if the offender pleaded guilty) or a restorative justice program. In fact, these two case studies represent two ends of the complex spectrum with respect to the roles that a specialist court can be tasked with.

At the time of the study tour, there were no written guidelines or criteria for the selection of cases for the Queens SOC. Decisions to divert cases to the SOC were made by the District Attorney's (DA) Office

based on various issues to do with the victim, the victim's family and the ability of the victim to give evidence. These cases typically involved intra-familial offenders. There was no diversion to the SOC without the victim's agreement.

The role of the Queens SOC is to divert low-risk sex offenders into probation options which involve treatment plans and strict conditions to be met by the offender. Weekly or bi-weekly compliance hearings conducted by the Court and intensive monitoring by probation officers are designed to ensure that offenders comply with these conditions. Judge Racini, the Presiding Judge of Queens SOC at the time, spoke of the necessity of the compliance hearings to give the defendant 'a sense of being watched'. The Court has the power to impose a custodial sentence if the offender does not complete the sex offender treatment program (which is 104 weeks long), if he is re-arrested or if there has been non-compliance with certain conditions.

Plea bargaining is an integral part of the functioning of the Queens SOC with the plea bargain being revealed to the judge during a sentencing hearing. In order to be processed by the SOC, a guilty plea to a sex offence is an essential part of the plea bargaining deal and for entry into the sex offender treatment program. The Probation Department liaises with the Court in relation to sentencing and violations of probation. In discussions, the Department revealed they only had a 14% violation rate by offenders during 2009. The Queens SOC was established with no extra funds provided by Queens County. This means that offenders are required to pay a fee to attend the sex offender treatment program.

Conclusion

In moving to a specialised court for sex offences, the Center for Court Innovation considers that such an approach depends on:

- a comprehensive planning process;
- effective case identification;
- rigorous judicial compliance reviews;
- judicial leadership;
- comprehensive training for all stakeholders;
- a dedication to working with victim services and treatment providers; and
- a commitment to evaluation of the specialist court model.

Each Australian jurisdiction has different challenges in relation to the investigation, prosecution and management of sex offenders due to their different population sizes, geography, and the number and type of remote communities in each state and territory. For some, it will not be viable, financially, to establish a separate, stand-alone sex offences court. Nonetheless, the above procedures and processes may still be relevant for establishing something less formal such as a sex offences list for the more efficient and timely management of sex offences cases, in order to improve disposition times, increase guilty plea rates and victim satisfaction with the criminal justice system.

Comments on Chapter 10

1. Whether or not the law in relation to tendency and coincidence evidence and joint trials should be reformed

I agree with the Consulation Paper's conclusions that reform of the law in relation to the admissibility of tendency/coincidence evidence should be reformed so as to ensure, as far as is practicable, that joint trials are held in relation to charges involving multiple complainants of institutional child sexual abuse.

In my opinion, the need for another test of relevance, in the form of the significant probative value test under ss97 and 98 of the UEL, is an unnecessary requirement since, logically speaking, if the evidence in question is considered to be relevant under s55, it is impossible to objectively measure whether the probative value of the evidence is significant or non-significant. Judges must rely on intuition and their subjective point of view in trying to deal with a test that is logically impossible to apply in practice. One person's significance will be another persons' insignificance based on their own, limited experiences and knowledge of child sexual abuse and child sex offender behaviour.

Reverting to a simple test of relevance will do away with the artificiality of the significant probative value test since the real issue in a child sexual abuse trial is the probative value of the evidence versus its likely prejudicial effect.

As one of the authors of the Jury Research Project, I agree that that research proves empirically that the imagined prejudicial or impermissible reasoning of jurors is just that—imagined as a result of many years of cases stating that there is a real risk that jurors will reason impermissibly in the face of tendency or coincidence evidence about the defendant, such that the repetition of the statement has become evidence of the proposition, a form of circular reasoning.

If the Royal Commission decided to recommend that the only test of admissibility for tendency/coincidence is the test of relevance, I think it is impossible to expect that judges will cease referring to the similarities in the evidence of two or more complainants, and cease looking for similarities that are striking (or other similar formulations). As such, a test of relevance, coupled with guidance as to the type and extent of the similarities required may avoid the situation where *different* jurisdictions focus on different aspects of the circumstances and the sexual acts so as to determine relevance.

Clearly, the Royal Commission is faced with two options: (i) recommend retention of the significant probative value test; or (ii) recommend its abolition.

(i) If the significant probative value test is to be retained, in 2010, the National Child Sexual Assault Reform Committee made the following three recommendations about the issue of similarities as they apply to ss97, 98 and 101 of the UEA:

> **Abolition of the Striking Similarities Test under the UEA**
>
> **Recommendation 3.12**
>
> **Insert the following sub-sections into s97 of the Uniform Evidence Act:**
>
> (3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].
>
> 4) In considering whether tendency evidence about the sexual behaviour of the defendant has significant probative value for the purposes of subsection (1), the court must not have regard to whether that evidence has striking similarities with other evidence about the sexual conduct of the defendant.
>
> (5) It will be sufficient for tendency evidence about the sexual behaviour of the defendant to have significant probative value if that evidence shows the defendant has committed a charged or uncharged act of a sexual nature of any kind against, or in the presence of, a child.
>
> **Insert the following sub-sections into s98 of the Uniform Evidence Act:**
>
> (3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging

sexual offences involving different complainants are joined in the same indictment [information, presentment].

(4) In considering whether evidence of two or more events which describe the sexual behaviour of the defendant has significant probative value for the purposes of subsection (1), the court must not exclude the evidence solely on the basis that there are insufficient similarities (or no 'striking similarities') in the sexual behaviour of the defendant.

(5) It will be sufficient for the evidence of two or more events to have significant probative value if the evidence shows that the defendant has committed charged or uncharged acts of a sexual nature against, or in the presence of, a child, irrespective of whether the acts involve the same or different sexual conduct on the part of the defendant.

Note: For example, if event 1 describes the commission of oral sex by the defendant on a witness and event 2 describes the commission of sexual penetration by the defendant on another witness, these events will have the required degree of similarity to satisfy the significant probative value test in sub-section (1).

Insert the following sub-sections into s101 of the Uniform Evidence Act:

(5) The following sub-section applies to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(6) In considering, for the purposes of subsection (2), whether the probative value of tendency or coincidence evidence about the sexual behaviour of the defendant substantially outweighs its prejudicial effect, the court must not have regard to whether that evidence has striking similarities with other tendency or coincidence evidence about the sexual behaviour of the defendant.

(ii) If the Royal Commission decides to recommend the abolition of the significant probative value test, so that the test of relevance becomes the only criterion of admissibility, the following provision **could be inserted into s55 of the UEA:**

(3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(4) In considering whether evidence about the sexual behaviour of the defendant could rationally affect (directly or indirectly) the assessment of the probability of the

existence of a fact in issue in the proceeding for the purposes of subsection (1), the court must not have regard to whether that evidence has striking similarities with other evidence about the sexual behaviour of the defendant.

(5) It will be sufficient for evidence about the sexual behaviour of the defendant to affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding if that evidence shows the defendant has committed a charged or uncharged act of a sexual nature of any kind against, or in the presence of, a child.

2. (i) Should issues of concoction, contamination or collusion be left to the jury?
(ii) Does any specific provision need to be made in favour of joint trials, in addition to any reform to the law in relation to admissibility of tendency and coincidence evidence?

In light of the decision by the High Court in *IMM*, it is now arguable that the issue of collusion, concoction or suggestion in relation to the evidence of a complainant of child sexual abuse is an issue of the reliability of the evidence, a matter that should be left to the jury.

In a child sexual abuse trial, the proposition that a complainant's or a witness's evidence is tainted by collusion, concoction or suggestion is similar to the argument that identification evidence is tainted by suggestion, the displacement effect or external factors (such as amount of light or foggy conditions) and is therefore unreliable (as argued in *Dupas v R* [2012] VSCA 328).

As the majority of the High Court observed in *IMM v R* [2016] HCA 14 at [36], the issue of admissibility of evidence arises 'at the point when a piece of evidence is tendered, which is normally before all of the evidence is admitted and the witnesses examined and therefore before the full picture has emerged'. This means the ability of a trial judge to assess the reliability and weight of a piece of evidence will be limited, with the inference that the tests under the UEA 'acknowledge these limitations'. In relation to the issue of relevance under s55 of the UEA, the words, 'if it were accepted', indicate that the trial judge must assume that 'the jury will accept the evidence' in question which 'necessarily denies to the trial judge any consideration as to whether the evidence is credible' and/or reliable (*IMM v R* [2016] HCA 14 at [39]). Under s 55 the trial judge is assessing the probative value of the evidence, that is, whether it has the capacity 'rationally, to affect findings of fact' (*IMM v R* [2016] HCA 14 at [40]).

Similarly, it can be argued that the evidence of a complainant of child sexual abuse should be 'taken at its highest' (*IMM v R* [2016] HCA 14 at [44]), that is, the trial judge is required to assess the

complainant's evidence of the alleged sexual acts as if the evidence will be accepted by the jury, as long as the evidence is not 'so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury' (*IMM v R* [2016] HCA 14 at [39]). This would mean that if the defence seeks to question the reliability of a complainant's evidence based on collusion, concoction or suggestion, those matters cannot be taken into account by the trial judge and are to be left to the jury for its consideration after those matters are put to the complainant during cross-examination. Only when the jury has heard all the evidence in the trial will it be in a position to assess the reliability of the complainant's evidence.

This approach is similar to that discussed by the Royal Commission in the Consultation Paper regarding the approach of the Criminal Justice Act (UK), that is, 'that the evidence is put to the jury for consideration as the triers of fact on the basis that section 109 states that, when considering the relevance or probative value of potential evidence, it is to be done on the assumption that the evidence is true' (p.425).

Nonetheless, it may be that a specific provision is needed to make it clear that the issue of collusion, concoction or suggestion is not a consideration that can be taken into account at the admissibility stage. For this reason, I set out two recommendations made by the National Child Sexual Assault Committee on this issue in 2010.

The first recommendation concerns a presumption in favour of joint trials (based on the Western Australian legislation) while the second concerns ss97 and 98 of the UEA:

> **Eliminating Concoction in Relation to Joint Trials and a Presumption in Favour of Joint Trials**
>
> **Recommendation 3.7**
>
> That the following provision be enacted to ensure the joinder of 2 or more counts of sex offences:
>
> (1) The powers in this section may be exercised by a court on its own initiative or on an application by an accused and may be exercised before or during a trial.
>
> (2) A court may amend or revoke an order made under this section.
>
> (3) If a court is satisfied that an accused is likely to be prejudiced in the trial of a prosecution notice or indictment because it contains 2 or more counts, the court may order—
>
> (a) that the accused be tried separately on one or more of the counts; and

(b) in consultation with the prosecutor, the order in which the counts will be tried.

(4) Despite sub-section (3) and any rule of law to the contrary, if 2 or more counts charging sexual offences are joined in the same indictment, it is presumed that those counts are triable together.

(5) The presumption created by sub-section (4) is not rebutted merely because:
(a) the evidence on one count is inadmissible on another count;
(b) the evidence against one of the accused is not admissible against another.

(6) In deciding whether to make an order under subsection (3), the court must have regard to whether the likelihood of the accused being prejudiced can be guarded against by a direction to the jury.

(7) In considering, for the purposes of sub-section (3), the likelihood of an accused being prejudiced in a trial by a jury of an indictment that contains 2 or more counts of a sexual nature, the court must not have regard to:
(a) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;
(b) the possibility that the evidence of a witness or the evidence of two or more witnesses may be the result of concoction, collusion or suggestion.

<u>If the Royal Commission recommends retention of the significant probative value test under ss97 and 98, it may be necessary to consider the following recommendations:</u>

Eliminating Concoction at the Admissibility Stage under the UEA

Recommendation 3.8

Insert the following sub-section into s97 of the Uniform Evidence Act:

In considering whether the evidence has significant probative value for the purposes of subsection (1), the court must not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

Insert the following sub-section into s98 of the Uniform Evidence Act:

In considering whether the evidence has significant probative value for the purposes of subsection (1), the court must not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

Insert the following sub-section into s101 of the Uniform Evidence Act:

In considering, for the purposes of subsection (2), whether the probative value of the evidence substantially outweighs its prejudicial effect, the court must not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

If the Royal Commission decides to recommend the abolition of the significant probative value test, so that the test of relevance becomes the only criterion of admissibility, the following provision **could be inserted into s55 of the UEA:**

> In considering whether evidence about the sexual behaviour of the defendant could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding for the purposes of subsection (1), the court must not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

3. In relation to tendency and coincidence evidence and joint trials, should any reforms apply specifically to child sexual abuse or institutional child sexual abuse offences, or should any reforms be of general application

The above suggested recommendations were drafted to apply specifically to sexual assault trials because the issues considered by the National Child Sexual Assault Reform Committee concerning the prosecution of child sex offences abuse were, largely, confined to trials involving those particular type of offences.

However, I cannot think of a sound reason to confine any proposed reforms to a specific *type* of child sexual abuse case. In fact, it would be detrimental for non-institutional child sexual abuse cases to be treated differently to institutional child sexual abuse cases such that the latter cases were subject to special rules compared to the former cases. In other words, it would not be in the interests of justice for the rules of evidence to discriminate between different types of child sexual abuse cases to the detriment of those complainants who were not sexually abused in an institutional setting. Because there is evidence to show that child sex offenders offend in a number of different contexts, it is not possible to reliably classify offenders according to the context in which they sexually abuse children (a school versus a home environment, for example).

I expect there will be many lawyers who will argue that the rules of evidence should apply to all criminal cases in the same way. However, the Consultation Paper has made out the case that child sexual abuse cases are a unique group of criminal cases that require special treatment not only because of the unique vulnerability of victims of child sexual abuse, but also because the secretive and hidden nature of the crime means that the usual types of corroborative evidence (medical, forensic, eyewitness) is typically unavailable such that these trials are often based on the word of the

complainant versus the word of the defendant. It is counterintuitive, therefore, to exclude what is usually the only available type of supporting evidence available—the evidence of other complainants.

APPENDIX A: Planning document

This document clarifies the mission and goals of the SOC and serves as a reference for all personnel. The Center for Court Innovation considers that it ought to contain the following basic information:

- Mission, goals and objectives of the court;
- Judges who will sit on the court;
- A list of members of the planning team, advisory board and other stakeholders;
- A draft staffing plan for the court, including additional court personnel needs and job descriptions of staff;
- A plan that describes all the services required by parties and victims (including victim advocacy, legal representation, counselling, sex offender treatment programs, substance abuse programs etc). It can also describe how to identify and vet service providers, where such services will be located, when they will be available and who will make referrals to them;
- Identification of who will track compliance of the offender with court orders;
- The training programs for judicial and non-judicial personnel;
- A plan for compliance hearings for offenders, including reporting requirements of probation officers and treatment providers and the court personnel who will liaise with those mandated to report to the court;
- Sanctions for non-compliance;
- Physical space plan of the court including waiting areas, remote rooms and other facilities;
- Technology and evaluation plans and needs, including the collection of baseline interviews and pre- and post-data related to the implementation of an SOC.

APPENDIX B: ERIE COUNTY GENERAL AND SPECIAL CONDITIONS OF PROBATION

General Conditions of Probation

While on probation, defendant will comply with the following conditions and any others the Court may impose at a later date, and will follow the instructions of the Probation Officer as to the way these conditions are carried out.

A. You shall refrain from violating any federal, state or local law; you shall notify the Probation Officer within 24 hours of any arrest, citation or questioning by any law enforcement official.

B. You shall report to the Probation Officer as directed and permit the Probation Officer to visit you at your residence or elsewhere.

C. You shall truthfully answer all reasonable questions asked by the Probation Officer.

D. You shall remain within the jurisdiction of the Court unless granted permission to leave by the Court of the Probation Officer.

Special Conditions of Probation

1. You shall not possess weapons of any kind including firearms, chemical sprays, explosive devices, ammunition, etc. or possess law enforcement or emergency services clothing, identification, equipment or police scanners.

2. You shall not purchase, possess or consume alcoholic beverages, illegal drugs or illegal prescription drugs. You shall not frequent any establishment where its main source of income is derived from the sale of alcohol.

3. You shall submit to alco-sensor/urinalysis testing as requested by your Probation Officer.

4. You shall submit to an alcohol/drug evaluation and follow all treatment recommendations, including in-patient, if deemed necessary by the Probation Officer.

5. You shall submit to a mental health evaluation and follow all treatment recommendations, including in-patient, if deemed necessary by the Probation Officer.

6. You shall follow through with any educational requirement including obtaining a high school diploma or GED. Participation in any educational program must have the approval of the Probation Officer based upon the outcome of the conviction/adjudication of a sexual offense.

7. You shall obtain/maintain legitimate verifiable employment if deemed capable by the Probation Officer. Employment must have the approval of the Probation Officer based upon the outcome of the conviction/adjudication of a sexual offense; employment will be in a business/agency that only employs persons over the age of 18. No employment in schools, day care centers, or places

where persons under the age of 18 are likely to be present. No illegal “under the table” employment and no self employment unless approved by the Probation Officer. You must notify your employer of your probation status.

8. You shall abide by any curfew if deemed necessary by the Probation Officer.

9. You shall pay all fines/surcharges and victim fees as ordered by the Court.

10. You shall comply with all DNA requirements, if applicable.

CONDITIONS REGARDING EVALUATION & TREATMENT

Justification: The following conditions address both the rehabilitation of the offender and the protection of the community. Providers approved by Probation meet or exceed the standards established by the Association of the Treatment of Sexual Abusers, which is the professional organization for those specializing in the treatment of sex offenders.

11. You shall submit to a risk assessment evaluation, as directed by the Probation Officer, by a Sex Offender treatment program approved by the Erie County Probation Department and participate in said program until successfully terminated. You shall not change treatment providers without the approval of the Probation Officer. Satisfactory participation requires regular attendance, progress toward reasonable goals, including payment for services and submission/payment for periodic polygraph examinations to monitor compliance. Based on the results of periodic risk assessment and compliance polygraph testing you may [be] directed to re-engage in treatment.

12. You shall sign a waiver of confidentiality form allowing the disclosure of information about your conviction/adjudication, participation and treatment among Probation, your counselor, the district attorney, and the Court. (*Youthful offenders must have a parent sign*).

13. You shall consult with your Probation Officer and your treatment provider about your daily schedule and any additional activities. You will avoid activities which your Probation Officer and treatment provider have determined might trigger your impulse to commit an additional offense.

CONDITIONS REGARDING CHILD AND/OR VICTIM CONTACT

Justification: The conditions address the safety of the victim of the present offense, as well as other potential victims. They are consistent with treatment contracts/requirements utilized by all approved providers and assist in the offender’s rehabilitation by providing behavioral controls until the offender can develop appropriate internal controls.

14. You shall not have any contact with persons under 17 years of age, including family members, unless under the direct supervision of a responsible adult who has been approved by the Probation Officer and treatment provider.

15. You shall not have any contact whatsoever with the victim of your offense or any satisfied matter; including, but not limited to physical, written, verbal, third party, telephonic, or electronic communication.

16. You shall not form a romantic interest or sexual relationship with a person with physical custody of a child or children under the age of 17 without the approval of the Probation Officer and treatment provider.

17. Pursuant to section 65.10(4a) of the New York Penal Law, you shall refrain from knowingly entering into or upon any school grounds (including any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school), or any other facility primarily used for the care or treatment of persons under the age of 18, or any area accessible to the public, including sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants, or any parked vehicle, located within one thousand feet of the real property boundary line comprising any such school, facility or institution, without the written permission of the Probation Officer and the superintendent or chief administrator of such facility, specifying the purpose of the visit. Written permission must specify the limited purpose of the authorization.

18. You shall not frequent places where children congregate such as malls, playgrounds, swimming pools, arcades, movie theaters, sports fields etc. without the permission of the Probation Officer.

CONDITIONS REGARDING RESIDENCE

Justification: Th[ese] conditions address the safety of the community, the probationer's family members under 17 years old, and that of any family friends under the age of 17. Until appropriate therapeutic intervention occurs, non-offending adult family members have not been adequately prepared to supervise contact between the offender and vulnerable persons.

19. You shall only reside in a residence, including temporary housing, approved by the Probation Officer and treatment provider.

20. You shall not live with persons under the age of 17 until a Sex Offender risk assessment has been completed by an approved treatment provider and approval for such residence has been given by the treatment provider and Probation Officer.

CONDITIONS REGARDING DISCLOSURE

Justification: These conditions address the safety needs of potential victims. Additionally, the conditions address and complement the treatment goals of accepting responsibility for one's actions and setting in place safeguards to relapse. The Probation Officer is under obligation to notify vulnerable populations.

21. You shall inform all persons with whom you have a significant relationship, with who[m] you are intimate, have a close affiliation or with whom you reside, of your sexual offending history as directed by the Probation Officer. You shall consent to contact with such person by the Probation Officer.

22. You shall disclose to your landlord, employer, school administrator, any physician/health care/treatment provider from whom you seek counseling or treatment, and/or other agencies where you are a participant the nature of your conviction/sexual offending and the conditions of probation included in this order.

CONDITIONS REGARDING PORNOGRAPHY, COMPUTERS, AND OTHER CONTRABAND

Justification: These conditions aid in the offenders' rehabilitation by imposing external controls under the probationer is able to exert internal controls.

23. You shall not own, possess, or have under your control materials deemed by the Probation Officer or treatment provider to be pornographic, sexually oriented, or sexually stimulating. These items include but are not limited to CD-ROMs, computer disks or other storage media, including video/digital cameras, cell phones, photographs, magazines and video tapes. Understand any material found during a search will be confiscated.

24. You shall not enter adult book stores, adult movie houses, or other businesses providing sexually oriented entertainment. You shall not call any explicit telephone services, telephone chat lines or telephonic dating services.

25. You shall not purchase, possess, control or have access to any computer of device with internet capabilities without the permission of the Probation Officer. Specific exceptions pertaining to your employment or educational program will be determined by your Probation Officer, and would require submission of user account and password for monitoring the account. Such computer hardware or software is subject to warrantless searches and/or seizure by Probation staff or their

designee. You will be required to sign a consent for all computers or devices capable of connecting to the internet to monitor compliance.

26. You shall not possess children's clothing, toys, games, video tapes/games, etc. without permission of the Probation Officer.

OTHER CONDITIONS

Justification: These conditions address legal mandates, enhance community safety, aid in the offender's rehabilitation, and/or assist Probation in adequately supervising this offender.

27. You shall submit to warrantless searches of your home, vehicles, and business performed by Probation staff or their designee in order to monitor your compliance with the Order and Conditions of Probation, and allow seizure of any items found to be in vilation of these conditions. You shall provide the Probation Officer copies of any cable, satellite, cell/telephone, and credit card bills upon request.

28. You shall not knowingly associate or have any contact with any sex offender, except during treatment sessions, or with any one involved in criminal activities.

29. You shall refrain from the use or possession of any medications or supplements designed for the purpose of enhancing sexual performance or treating erectile dysfunction, except with the written approval of the Probation Officer based on the recommendation of the treatment provider.

30. If convicted of a New York State Registerable Sex Offense, comply with the Sex Offender Registry Act, Article 6-C, of the New York State Corrections Law.