Submissions regarding consultation paper.

Failure to report.

I support the retention in New South Wales of the offence in s 316(1) of the Crimes Act. However I also support the creation of a specific offence targeting child sexual abuse offences. Even though that offence might be thought to be unnecessary if the offence in s 316 is retained, the creation of a specific offence should operate as a means of educating the community.

In the past the New South Wales Legislature has created specific offences covering certain conduct, where such conduct was already an offence under more general provisions, as a way of educating the community about the wrongfulness of such conduct. Offences of female genital mutilation were created despite the fact that such conduct would already have been an assault of one form or another.

Too long, many people aware of child sexual abuse offences having occurred have preferred to say nothing. The creation of a specific offence such as that already in existence in Victoria, would be very welcome.

Charge bargaining.

Although the criminal justice system depends on a high guilty plea rate, that must not come at the expense of offenders being sentenced for what they have actually done. Too often judges are forced to sentence on the basis of what is clearly a fabrication. Thus offences where the offender had sexual intercourse with a complainant become indecent assaults as statements of facts are amended. Often aggravating circumstances such as a person being under the authority of another are ignored. It is a fundamental part of a proper criminal justice system that offenders are sentenced for what they have actually done, and a sentencing judge should never be misled in assessing the criminality of a particular offender's conduct.

Tendency and coincidence evidence.

I agree that, particularly in cases of child sexual assault where ordinarily it is the word of the complainant against the word of the offender, tendency and coincidence evidence, where available, in necessary for a jury to make a proper assessment as to the credibility of both allegations and denials. As I said in a recent judgment:

> *In a case where the jury will need to evaluate the credibility of a student who alleges that the accused acted on a sexual interest in him in a particular way, it is significantly probative that other complainants, also students at the school where the accused held a position of authority, allege that the accused has acted on a sexual interest in them as well – even if the precise way in which the accused acted differs*.

I am not sure, however, whether any legislative change is required in New South Wales. Recent decisions of the Court of Criminal Appeal, including *Hughes v R* [2015] NSWCCA 330 demonstrate the extent to which the Crown is able to rely on tendency evidence in child sexual abuse cases. Of course the High Court has granted special leave in *Hughes* so things may change and legislation may be required after all.

Can I add my agreement with the proposition that a similarity in behaviour should not be required before tendency evidence is admitted. Evidence that an accused has had various forms of sexual connection with, for example, boys between the ages of 10 and 13, can be used to establish a sexual interest in boys of that age. It would be a rare offender who decided to give expression to that sexual interest in only one way. That is consistent with ordinary human behaviour - those who have a sexual interest in another person will ordinarily engage in quite dissimilar acts in expressing that sexual interest.

Sentencing.

I have always found it amazing that judges are required to sentence in accordance with sentencing standards which existed at the time of offending. Over the years there has come about an appreciation that judges have, in the past, failed to appreciate such things as the effect of sexual assaults upon the victim of such offences. To put it bluntly we now know that those old sentencing practices were

wrong. Current law in New South Wales requires judges to perpetuate the errors of the past. Surely it would be better to impose a sentence which we now think to be a correct one rather than to be forced to impose a sentence which we know to be wrong.

Limitation periods

At page 210 of the Criminal Justice Consultation Paper raised the effect of limitation periods in New South Wales. I can confirm that those limitation periods still operate. My judgment in *R v RL (No 2*) [2016] NSWDC 182 is a recent illustration of the problems which can arise.

There is one related aspect of the criminal law which has not been mentioned in the Consultation Paper. It concerns juvenile offenders, in particular boys under the age of 14. Although the common law presumption that a boy under the age of 14 was incapable of having sexual intercourse has been abolished, the presumption remains for offences committed before its abolition. An illustration of the application of the presumption can be found in another judgment of mine, *R v RL* (No 1) [2016] NSWDC 162 at [69] – [74].

That the presumption remains for offences committed in New South Wales before 1988 is surprising to many, even to many lawyers. The presumption is, of course, completely inappropriate and capable of causing injustice. Might I respectfully suggest therefore that the Commission examine whether the presumption remains for historical offences in any other Australian jurisdiction and recommend legislative change so that the presumption is abolished with retrospective affect.