NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 17/14-4

6 October 2017

The Hon Mark Speakman SC MP
Attorney General
Department of Justice
GPO Box 31
SYDNEY NSW 2001

Dear Attorney,

Strengthening child sexual abuse laws in NSW

Thank you for providing the NSW Bar Association (Association) with the opportunity to respond to the NSW Department of Justice's discussion paper, "Strengthening child sexual abuse laws in NSW" which was released on 1 September 2017 (the Discussion Paper).

The Discussion Paper poses 36 questions over 15 chapters touching on aspects addressed by the Royal Commission into Institutional Responses into Child Sexual Abuse in its Criminal Justice report published on 14 August 2017. The Association has considered the Discussion paper and provides the following response:

Chapter 2: Simplifying the legislative framework in NSW (questions 1 to 4)

The current child sexual abuse legislative framework is overly complicated. However, any reform would need to be very carefully considered so that it does not result in substantive changes (including changes to applicable maximum penalties for criminal conduct) that are not desired or desirable.

The current age categories have the consequence that there are increasing maximum penalties where the age of the child victim is lower. The Association would oppose any change that results in applicable maximum penalties being increased (that is, the maximum penalty for the lowest age category was used to determine the applicable maximum penalty for all offences).

At this time, the Association does not make a submission regarding whether new offences should be created or existing offences be repealed.

Chapter 3: Clarifying offences of sexual assault and sexual intercourse with a child (questions 5 and 6)

With respect to whether the offences *aggravated sexual assault* of a child under 16 years (section 61J(2)(d)) and *sexual intercourse with child* between 10 and 16 years (section 66C), should remain the

Association makes no submission at this time. However, it will respond to any proposed reform in this regard.

The Association would not support increasing the age of the victim with respect to the offence under section 66A to include children under 12 years.

Chapter 4: Clarifying offences of indecent assault and act of indecency (questions 7 and 8)

The legislation currently draws a distinction between non-penetrative sexual offences that involve unlawful touching and those that do not involve any contact. These are described as 'indecent assault' and 'acts of indecency'. The Association does not make a submission as to whether the description between these two types of conduct should be improved.

With respect to the term 'indecent' the Association considers that the law in this area is well settled and reflects societal norms. It should be for a tribunal of fact to determine, in cases that are ambiguous or equivocal, whether the conduct meets the applicable test.

Chapter 5: Simplifying aggravating factors (question 9)

In NSW some child sexual assault offences provide aggravating factors but aggravating factors do not apply to all child sexual abuse offences and where they do apply, the aggravating factors vary between offences. At this time, the Association makes no submission on whether aggravating factors should be removed as elements of child sexual assault offences.

Chapter 6: Addressing difficulties arising from historic child sexual offending (questions 10 to 13)

The Association acknowledges the difficulties which may arise from prosecution of historic child sexual abuse offences. The Discussion Paper suggests that a legislative provision could be introduced to allow the prosecution to rely on the offence with the lowest maximum penalty where there is uncertainty about the age of the victim at the time of the offence and the date range falls into more than one offence. This proposal would be consistent with the decision in *Gilson v The Queen* [1991] HCA 24 and such a proposal is one that the Association supports.

Additionally, the Association supports the submission made by the Law Council of Australia (LCA) in its October 2016 submission to the Royal Commission at paragraph 85:

> "The principle of non-retrospectivity holds that, where amending legislation increases the applicable maximum penalty for an offence, the increased penalty applies only to offences committed after the commencement of the amending legislation. The Law Council considers that the principle also has the application in cases where sentencing standards have changed over time. Ultimately, sentencing standards turn on the applicable law of sentencing. If that law has

> changed so as to increase sentences for a particular offence, the offender should be sentenced in accordance with the standards at the time of the offending."[1]

For these reasons, the Association submits, the Royal Commission's recommendation that in historic child sexual abuse matters an offender should be sentenced by applying current sentencing principles but in accordance with the historic maximum penalty, should not be adopted.

The Royal Commission recommended that legislation should be introduced to give the repeal of the limitation period with respect to certain sexual assault offences committed against females aged 14 and 15 years and the common law presumption that a male under 14 years is incapable of having sexual intercourse, be made retrospective. The Association opposes breach of the principle against retrospective laws with respect to both of these recommendations.

Chapter 7: Improving the offence of persistent child sexual abuse (questions 14 to 18)

The LCA October 2016 submission in response to the Royal Commission's Criminal Justice paper addresses the issue of persistent child sexual abuse offences in paragraphs 9 to 15 of its submission. The Association supports the submission made by the LCA in this regard and in answering questions 14, 15 and 18 of the Discussion Paper, the Association refers the Department to paragraphs 9 to 15 of the LCA submission.

The Association submits that an offender being sentenced for an offence of *persistent child sexual abuse* should receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse only if the ongoing abuse encompasses the isolated offence. The Association would not oppose a course of conduct charge be enacted in NSW, as introduced in Victoria.

Chapter 8: Improving the offence of grooming (questions 19 to 20)

With respect to the broader grooming offence, the Association supports the submission made by the LCA in its October 2016 submission to the Royal Commission at paragraphs 20 – 21.

The Association would not oppose the introduction of an offence of grooming a person other than the child, such as a parent, with intent to obtain access to children.

Chapter 9: Strengthening offences against young people under care (questions 21 to 22)

The Association makes no submission in this regard.

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[1] Law Council of Australia, "Criminal Justice: Royal Commission into Institutional Responses to Child Sexual Abuse" 17 October 2016. Accessed here: https://www.childabuseroyalcommission.gov.au/getattachment/a23750c1-6d01-431d-9069-9921e9a3fd9f/Law-Council-of-Australia on 5 October 2017.

Chapter 10: Introducing specific offences of failing to protect and failing to report (questions 23 to 26)

The Royal Commission has recommended that all jurisdictions should introduce a targeted offence covering failing to report institutional child sexual abuse, which would apply only to adults working as part of an institution that provides services to children. In the report the Royal Commission also suggested that such an offence contain certain elements. The Association at this time, makes no submission with respect to whether the Royal Commission's model for a targeted failure to report offence or targeted failure to protect offence be adopted or whether protection should be afforded to people who make disclosures of child sexual abuse.

The Association opposes breach of the principle against retrospective laws in relation to the issue of whether failure to report an offence should be made partially retrospective as the Royal Commission recommends.

Chapter 11: Introducing statutory defences (questions 27 to 28)

In NSW the defence of honest and reasonable mistake as to the age of the child is available at common law. There is no similar age defence. As a result, NSW legislation is not consistent with other jurisdictions.

The Association considers that a defence based on the terms of s9.2 of the Commonwealth Criminal Code should be enacted. With respect to whether a statutory defence of similar age be enacted, the Association would support a statutory defence of similar age.

Chapter 12: Decriminalising consensual 'sexting' (question 29)

The Association would not oppose the introduction of a defence to decriminalise consensual 'sexting' involving persons under 16 years. If a specific proposal was advanced, the Association would consider and respond to the proposal.

Chapter 13: Limiting circumstances where complainants give evidence on multiple occasions (question 30)

The Association considers that the current position in NSW with respect to the provision of evidence by child sexual abuse complainants is satisfactory.

Chapter 14: Tendency and coincidence evidence (question 31)

The Association considers, as does the LCA, that this issue should be subject to a review by the Australian Law Reform Commission. Such a review, would be assisted with involvement from the NSW Law Reform Commission. The Association submits that NSW should not unilaterally change the Uniform Evidence Law applicable in NSW.

Chapter 15: Improving and codifying jury directions (questions 32 to 35)

With respect to the questions in this chapter regarding jury directions, the Association supports the submission made by the LCA in its October 2016 submission to the Royal Commission. The Association refers the Department to paragraphs 74 to 79 of the LCA submission.

Chapter 16: Standard non-parole periods for indecent assault offences (question 26)

In 2008, the NSW Sentencing Council recommended that the statutory non-parole periods for sexual offences be consistently set within a narrow range of 40-60% of the maximum penalty. More recently, in 2013, the NSW Sentencing Council recommended that statutory non-parole periods for each offence be set using a common starting point of 37.5% of the maximum penalty and the figure be moved up or down as appropriate but not exceeding a ratio of 50%. It further recommended that for the offence of *indecent assault of child under 16 years* the maximum penalty be increased to 12 years and the statutory non-parole period reduced to 5 years. At this time, the Association makes no submission as to whether the 2013 recommendation by the NSW Sentencing Council should be adopted. However, the Association would support addressing the situation that currently exists between the maximum penalty and the non-parole period for offences under section 61M(2).

If you have any questions regarding the contents of this letter please contact the Association's Executive Director, Mr Greg Tolhurst on 02 9232 4055 or by email at gtolhurst@nswbar.asn.au.

Yours sincerely,

Arthur Moses SC
President

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