

Discussion Paper

Strengthening child sexual abuse laws in NSW



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1. Introduction and purpose of this paper

- 1.1 The NSW Government is committed to the prevention of child sexual assault and appropriate punishments for perpetrators. An effective criminal justice response is essential for victims and the community, to punish offenders, prevent their future offending and deter other abuse.
- 1.2 The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) released its final Criminal Justice Report in August 2017. The report contains 85 recommendations for change, including many recommendations for reform of child sexual abuse laws.
- 1.3 This discussion paper covers the Royal Commission's legislative recommendations with the aim of seeking stakeholder views about what, if any, reforms are required in NSW. It discusses concerns with current child sexual abuse laws, presents arguments for and against change, summarises the Royal Commission's recommendations and provides some other possible options for reform.
- 1.4 This paper also discusses some issues with child sexual abuse laws not directly examined by the Royal Commission, which have arisen out of the Child Sexual Offences Review being conducted by the Department of Justice. The review is being conducted in response to recommendations 1-3 of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders.
- 1.5 The Department welcomes submissions from stakeholders and the community concerning issues raised in this paper. Submissions will be treated confidentially if requested by the author.
- 1.6 Victims of child sexual abuse can access information, services and support through the Victims Access Line on 1800 633 063.¹

Royal Commission into Institutional Responses to Child Sexual Abuse

- 1.7 The Royal Commission was established in January 2013 to investigate institutions that have failed to protect children or respond to allegations of child sexual abuse. Throughout its operation, it has held public hearings, taken evidence and testimony from survivors in private sessions, received written submissions, and released significant consultation papers, reports and research papers. From 2013 through to 2015 its focus was on civil litigation and redress, but since 2015 it has focused on the criminal justice systems of States and Territories and how they have responded to child sexual abuse.
- 1.8 The Royal Commission released a Consultation Paper on criminal justice in September 2016, and its final Criminal Justice Report with its recommendations in August 2017. The final report is a substantial document of over 2,000 pages that includes 85 recommendations, many of which propose changes to the criminal law.²
- 1.9 Stakeholder submissions to this discussion paper will inform how the Government responds to the Royal Commission's legislative recommendations on criminal justice and the final proposals for reform that will be implemented in NSW.

1. Information and contact details for other victim support services and sexual assault services can be found here: <http://www.victimsservices.justice.nsw.gov.au/sexualassault>.

2. The Royal Commission's Criminal Justice Report can be found here: <http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/criminal-justice>

Recommendations of the Joint Select Committee

- 1.10 The Joint Select Committee on Sentencing of Child Sexual Assault Offenders ('the Committee') was appointed by Parliament in August 2013 to report on whether current sentencing options for perpetrators of child sexual assault offences remain effective and whether greater consistency in sentencing and improved public confidence in the judicial system could be achieved through alternative sentencing options.
- 1.11 The Committee published its report, 'Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders' on 14 October 2014 and made 29 recommendations relating to child sexual assault offences and sentencing. The Government Response to the Committee's report tabled on 13 May 2015 confirmed that the Government fully endorses the underlying objective of the Committee's recommendations.
- 1.12 Relevant to this review, the Committee made the following three recommendations:
- (1) The Committee recommends that the NSW Government reviews all offences and other provisions in NSW which are particularly relevant to child sexual assault offences and offenders with a view to:
 - Consolidating and simplifying the current framework, where possible, so that it is more user-friendly for the legal community and victims.
 - Identifying areas where current offences could be consolidated or revised.
 - Identifying whether any new offences should be created, to fill any gaps in the existing framework.
 - (2) The Committee recommends that, as part of the review, the NSW Government consults with relevant stakeholders including but not limited to: the NSW Police Force; the Department of Police and Justice; NSW Courts; the Department of Family and Community Services; the Director of Public Prosecutions; and NSW Health.
 - (3) The Committee recommends that the review be carried out and finalised as a matter of high priority, taking into account similar legislative provisions relating to child sexual assault in other States and Territories within Australia and in overseas jurisdictions.³
- 1.13 To implement these recommendations, the Department of Justice is conducting a Child Sexual Offences Review, looking at the child sexual offences in the *Crimes Act 1900*. The Royal Commission has examined many of the issues within the scope of the Review, but some it did not directly consider. These additional issues have also been included in this discussion paper so stakeholder submissions can inform the final reform proposals arising from the Review, as well as the Government's position on the Royal Commission's recommendations.

3. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

Government already taking action to assist child abuse victims

- 1.14 The NSW Government has already taken steps to reform the criminal justice system in response to the Joint Select Committee. These and other reforms the NSW Government is pursuing are consistent with the recommendations of the Royal Commission. For example:
- In 2015, the NSW Government established the Child Sexual Offence Evidence Pilot ('the Pilot') to enable child witnesses to have their evidence pre-recorded and the assistance of witness intermediaries. The Pilot aims to reduce traumatisation of child sexual assault victims and the stress of giving evidence. The Pilot is already implementing the Royal Commission's recommendation for legislative reform to permit the pre-recording of evidence of child sexual abuse witnesses and the use of intermediaries.⁴ The Pilot has received positive feedback and an evaluation will be conducted at the conclusion of the Pilot to determine its effectiveness and any areas for improvement.
 - In August 2015, the NSW Government appointed two new District Court judges, who specialise in hearing child sexual assault cases from across NSW.
 - The NSW Government is committed to reducing delays in finalising serious criminal matters, and is already taking action by allocating \$93 million over three years to implement reforms to encourage earlier guilty pleas. This reform effort will address the Royal Commission's Recommendation 72 that governments should work towards reducing delays in child sexual abuse matters. The reforms will deliver faster, more certain justice and address some of the stress suffered by victims during criminal proceedings by reducing delays, providing early certainty about the charges that will proceed, and ensuring continuity of the senior prosecutor in the case.
 - In August 2017, the NSW Government amended the *Crimes (Sentencing Procedure) Act 1999* to ensure that victims in proceedings for prescribed sexual offences can access special measures such as a support person when reading their victim impact statement. This measure is consistent with the Royal Commission's Recommendation 78.
- 1.15 In March 2016, the NSW Government has also implemented the Royal Commission's recommendation to remove limitation periods in civil claims for child sexual abuse.
- 1.16 In addition, the NSW Government released a consultation paper in July 2017 encouraging the community to have their say on the civil litigation recommendations of the Royal Commission. The paper examines options for legislative change for removing legal barriers faced by victims and holding institutions accountable.
- 1.17 The NSW Government also continues to engage with the Commonwealth on the redress scheme for survivors of past institutional child abuse. The NSW Government recognises that redress offers survivors of child sexual abuse an important alternative to civil litigation.

4. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendations 52-55, 59-60.

How to make a submission

- 1.18 If you wish to comment on matters contained in this paper, you can make a written submission.

Please email or post your submission to:

Strengthening child sexual abuse laws – Submissions

Justice Strategy and Policy

Department of Justice

GPO Box 31

Sydney NSW 2001

Email: policy@justice.nsw.gov.au (with the subject 'Strengthening child sexual abuse laws')

- 1.19 Alternatively you can make a submission through the NSW Government 'Have Your Say' online portal at <https://www.nsw.gov.au/improving-nsw/have-your-say/>
- 1.20 Submissions need to be received by close of business on **Friday, 6 October 2017**.
- 1.21 Please note that all submissions and comments will be treated as public, and may be published, unless the author indicates that it is to be treated as confidential. All requests for the submission to be treated confidentially will be respected and the submission will not be published.

Questions

The following questions are raised in relation to child sexual abuse offences in this paper:

- Q1. Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?
- Q2. Should the number of age categories be reduced? If yes, what age categories should be used?
- Q3. Should any new offences be created?
- Q4. Should any offences be repealed?
- Q5. Should the separate offences of *aggravated sexual assault of child under 16 years* (section 61J(2)(d)) and *sexual intercourse with child between 10 and 16 years* (section 66C) remain? If yes, can their description be improved?
- Q6. Should the offence of *sexual intercourse with child under 10 years* (section 66A) be increased to include children under 12 years?
- Q7. Should the description of the offences of *indecent assault* and *act of indecency* committed against children under 16 years be improved? If yes, what option(s) is preferable?
- Q8. Should the term 'indecent' and the common law definition remain?
- Q9. Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?
- Q10. Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?
- Q11. Should NSW adopt the Royal Commission's recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?
- Q12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective as recommended by the Royal Commission?
- Q13. Should the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse be made retrospective?
- Q14. Should the NSW offence of *persistent child sexual abuse* be replaced by the model provision recommended by the Royal Commission?
- Q15. Should the offence of *persistent child sexual abuse* be retrospective as recommended by the Royal Commission?

- Q16. Should an offender being sentenced for an offence of *persistent child sexual abuse* receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?
- Q17. Should a course of conduct charge, as introduced in Victoria, be enacted?
- Q18. Should a course of conduct charge be available for historic offences?
- Q19. Should the law be amended to implement the Royal Commission's recommendation for a broader grooming offence? If yes, should the amendments be modelled on the provisions in Queensland or Victoria?
- Q20. Should an offence of grooming a person other than the child, such as a parent, with intent to obtain access to children be introduced as recommended by the Royal Commission?
- Q21. Should other specific relationships be included in the definition of 'special care'?
- Q22. Should 'special care' offences apply to all forms of sexual offences including indecent conduct?
- Q23. Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?
- Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?
- Q25. Should protection be afforded to people who make disclosures of child sexual abuse?
- Q26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?
- Q27. Should a defence of honest and reasonable mistake as to age be enacted? If yes, should it apply only where the complainant is 14 or 15 years of age and should the onus be on the accused?
- Q28. Should a statutory defence of similar age be enacted in NSW? If yes, how should it be framed?
- Q29. Should NSW introduce a defence to decriminalise consensual 'sexting' involving persons under 16 years? If yes, how should the defence work?
- Q30. Should the Royal Commission's recommendation to ensure that child sexual abuse complainants are not required to give evidence on multiple occasions be adopted? If yes, what is the best option to achieve this reform?
- Q31. Should the approach to tendency and coincidence evidence proposed in the draft legislation at Appendix E be adopted? If not, should aspects of that approach or any other option for reform be pursued in NSW?
- Q32. Should jury directions be partially codified as recommended by the Royal Commission?

- Q33. Are legislative amendments required to permit judges to give directions to juries earlier in the trial?
- Q34. Should the requirement to give a *Markuleski* direction be abolished?
- Q35. Should the Royal Commission recommendation to permit and require judges to inform the jury about children and the impact of child sexual abuse be adopted? If yes, what judicial directions should be given?
- Q36. Should the recommendation of the NSW Sentencing Council be adopted to increase the maximum penalty to 12 years and reduce the standard non-parole period to 6 years for the offence of *indecent assault of child under 16 years*? If not, is there another way to re-structure the maximum penalty and standard non-parole period for the offence?

Additional comments are welcome

- Q37. Submissions are also welcome about matters relating to child sexual abuse offences not covered in this paper.

2. Simplifying the legislative framework in NSW

In brief

Child sexual abuse offences in NSW are criticised as being unnecessarily complex and difficult to understand. They are interspersed with adult offences and contain four age categories. The Joint Select Committee has recommended a review of all child sexual assault offences, with a particular emphasis on improving the usability of the provisions, consolidating or revising provisions and identifying the need for any new offences.

- 2.1 There is a multitude of legislation in NSW dealing with sexual abuse and protection of children. Child sexual abuse offences are primarily contained in the *Crimes Act 1900*. The key child sexual assault offences are listed in the table in Appendix A. Child sexual assault offences can be distinguished from adult sexual assault offences as they contain age categories and do not require the prosecution to establish an absence of consent.
- 2.2 The general age of consent in NSW is 16 years of age and children below the age of 16 years are presumed to be unable to consent to sexual activity. Sections 77 and 78C(2) of the *Crimes Act 1900* provide that consent is not a defence to most child sexual abuse offences.
- 2.3 Consent of the child is a defence only for an offence under section 61J of *aggravated sexual assault*. Section 61J is a sexual assault offence of general application, meaning that it applies to both adult and children. This offence includes as one of the factors of aggravation that the victim was under 16 years. It is the only sexual assault offence where the Crown must establish a lack of consent by the juvenile complainant beyond a reasonable doubt. The concept of consent as it relates to sexual assault has been codified in section 61HA of the *Crimes Act 1900*.

Age categories

- 2.4 Child sexual assault offences refer to the age of the victim as an element of the offence. There are four age categories that are commonly referred to in the legislation:
 - child under 10 years.
 - child 10 or over but under 14 years (i.e. 10-13).
 - child 14 or over but under 16 years (i.e. 14-15).
 - child 16 or over but under 18 years (i.e. 16-17).

Four age categories are used inconsistently

- 2.5 The legislation uses these age categories differently. Not all offences refer to the same age categories and they are often merged. For example, the offence of *indecent assault* refers only to one age category (under 16 years), while *child prostitution* offences refer to two age categories (under 14 and 14-17 years). The offences relating to sexual intercourse with a child refer to three age categories, although they are not contained in the same section.
- 2.6 Where there are age categories for an offence, there are also differences in penalties. As the age of the child decreases, the maximum penalty increases. This is based on the policy that

the younger and more vulnerable the victim, the more serious the offence, and the wider the sentencing scope required.

- 2.7 Reducing the number of age categories and applying them uniformly to all child sexual abuse offences may improve consistency, simplify offences and enhance the community's understanding of the offences. However, collapsing the age categories would limit the use of existing sentencing case law.

Age categories in other jurisdictions are defined differently

- 2.8 In Victoria, there are two main age categories in the legislation, namely, child under 12 years and child 12 years or over but under 16 years. There is also a special category for under care or authority offences of children aged 16 or 17 years.
- 2.9 Queensland legislation contains three age categories, namely, under 12, 13-15 and 16-17 years. The age categories are not consistently applied to each offence. Similarly, legislation in South Australia, Western Australia, Northern Territory and Australian Capital Territory contains three main age categories.⁵
- 2.10 Legislation in Tasmania only has one age category, namely under 17 years.

Definition of 'child' varies

- 2.11 The reference to 'child' is defined in various NSW offences differently. For example, in sections 66EB (*grooming for unlawful sexual activity*), 80A (*sexual assault by forced self-manipulation*) and 91FA (*child abuse material*) 'child' is defined as a person under the age of 16 years, however, in sections 66EA (*persistent child sexual abuse*) and 80C (*sexual servitude*) 'child' is defined as a person under the age of 18 years.
- 2.12 The *Children and Young Persons (Care and Protection) Act 1998* defines a 'child' as a person under 16 years and a 'young person' as a person aged 16 years or older and under 18 years.⁶ However, it is common practice in the criminal justice system to refer to a defendant who is less than 18 years as a 'young person'. Referring to victims aged 16 and 17 years as 'young persons' in the *Crimes Act 1900* may cause confusion.

Structure of child sexual assault legislation

- 2.13 This part examines the structure of child sexual assault offences contained in the *Crimes Act 1900*. This includes the location of child specific sections compared with offences that refer to both adults and children. It also examines the inconsistencies in the definition of child and the location of provisions relating to attempts and alternative verdicts.

Child and adult sexual offences are mixed together

- 2.14 Child sexual assault offences are not contained in a separate division and are generally merged, to varying degrees, with adult sexual offences.

5. South Australia: under 14, 14-16 and 17 years. Western Australia: under 13, 13-15, 16-17 years. Northern Territory and Australian Capital Territory: under 10, 10-15 and 16-17 years.

6. *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 3.

- 2.15 When it comes to child sexual assault provisions, there are three different structures within the legislation:
- Some sections deal exclusively with sexual offences committed against children. For example, section 66C is concerned solely with sexual intercourse with child aged between 10 and 16 years. Section 66A is concerned solely with sexual intercourse with a child under 10 years of age.
 - Other sections refer to both adult and child victims depending on the subsection. For example, the offence of *act of indecency* contained in section 61N(1) relates to victims under the age of 16 years while section 61N(2) relates to adult victims.
 - The third form is where the child's age is a circumstance of aggravation that attracts a higher maximum penalty. For example, section 61J (*aggravated sexual assault*) includes a circumstance of aggravation where the victim is under 16 years.
- 2.16 This approach can make it difficult for victims and members of the legal profession and the community to navigate through the provisions. The DPP submitted to the Joint Select Committee that the legislative framework for sexual offences and their penalties is complicated and premised on concepts that are out of step with contemporary life.⁷
- 2.17 The NSW Sentencing Council recommended that child sexual abuse offences be separated as follows: Division 10 – Sexual assault adult; Division 10A – Sexual assault child; Division 10B – Sexual servitude.⁸

Attempts and alternative verdicts are dealt with inconsistently

- 2.18 The legislation provides specific provisions for an attempt to commit some child sexual abuse offences. These are usually contained in a subsection or in a separate section entirely. The maximum penalties that apply to attempts compared with completed offences are not always the same. For example, under section 73 a person who has, or attempts to have, sexual intercourse with a child aged 16 or 17 years who is under special care is liable to the same maximum penalty. In contrast, section 66B provides a specific offence of *attempt to have sexual intercourse with a child under 10 years* which carries a maximum penalty of 25 years imprisonment, while the offence of *sexual intercourse with a child under 10 years* is contained in section 66A and carries a maximum penalty of life imprisonment.
- 2.19 It should be noted that section 344A of the *Crimes Act 1900* provides that an offence of attempt to commit an offence contained in the Act attracts the same maximum penalty as a completed offence, unless an alternative maximum penalty is prescribed.
- 2.20 The legislation also contains provisions for alternative verdicts. These are contained in both subsections and separate sections.

Structure in other jurisdictions

Victorian offences

- 2.21 Victoria introduced major legislative reform to the adult and child sexual assault provisions contained in the *Crimes Act 1958* (Vic). The changes came into effect on 1 July 2015 and involved a significant restructuring of the provisions. Further amendments to adult and child sexual assault offences came into effect on 1 July 2017.

7. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

8. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

- 2.22 The general structure of the sexual assault provisions is clear and codified with the definitions, objectives and guiding principle contained at the beginning. Sexual penetration and touching are defined. Each section is clearly drafted in language that can be understood not only by the legal profession but also by complainants and the community. There is consistency of expression between the sections. Each element to be proved is distinctly identified.
- 2.23 There are separate subdivisions that relate to specific categories of offences, including rape and sexual assault, incest and sexual offences against children. Where a particular offence has defences or alternative verdicts available or the approval of the Director of Public Prosecutions is required, this is all contained within the same section as the offence. This avoids the need to read through all of the sexual assault provisions to determine if other relevant matters apply to a particular offence.

Other jurisdictions' offence structures vary

- 2.24 The legislation in Western Australia, and recently in Queensland prior to amendments, uses some archaic terminology, such as 'sodomise', 'carnal knowledge' and 'common prostitute or of known immoral character'. It is likely that such expressions do not represent the current views and practices of the community. Many sections are lengthy and combine multiple offences, making it difficult to understand the elements of each offence.
- 2.25 In the United Kingdom sexual assault offences are contained in a separate act.⁹ The legislation is clearly drafted to allow members of the legal profession and the community to easily navigate through the various provisions. Sections set out the elements of each offence in plain English and avoid any ambiguity.

Options for reform

- 2.26 The Joint Select Committee has recommended that the Review identify the areas where current offences can be consolidated or revised.¹⁰
- 2.27 Consolidation of offences may permit broader offences that capture a greater variety of conduct. It may eliminate offences that are infrequently charged or those that are outdated or no longer reflect community expectations. A reduction in the number of age categories may also streamline some offences.
- 2.28 On the other hand, an extensive range of offences allows for a charge to better reflect the criminality of the conduct. His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW, submitted to the Joint Select Committee that separate offences can assist in charge negotiation which can see more matters move from being defended to a plea of guilty.¹¹
- 2.29 The following options can be considered concerning the structure of the child sexual assault offences in NSW:
1. To leave the child sexual abuse provisions in the current form because members of the legal profession and judiciary are familiar with them.
 2. To move the current child sexual abuse offences into a separate part. This would require the sections that relate to both adult and child sexual offences to be redrafted and separated.

9. *Sexual Offences Act 2013* (UK).

10. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

11. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

3. To simplify and consolidate all child sexual abuse offences, including reducing the number of age categories, similar to the reform in Victoria.

Questions

Q1. Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?

Q2. Should the number of age categories be reduced? If yes, what age categories should be used?

Q3. Should any new offences be created?

Q4. Should any offences be repealed?

3. Clarifying offences of sexual assault and sexual intercourse with a child

In brief

A charge of *aggravated sexual assault* (section 61J) can apply to both adult and child victims. Where the offence relates to a child below the age of consent, namely below 16 years, the offence nevertheless requires this child to give evidence about a lack of consent. An alternative charge of *sexual intercourse with child between 10 and 16 years* (section 66C) is available and does not require the prosecution to establish the absence of consent. However, where the age of the victim is 14 or 15 years, it carries a significantly lower maximum penalty.

- 3.1 Sexual intercourse with a child under 16 years may be in contravention of a number of provisions. Where the complainant is 14 or 15 years of age, the prosecution often has to decide between pursuing a higher maximum penalty and avoiding the trauma of a young child having to give evidence about a lack of consent.

Details of applicable adult and child offences

Aggravated sexual assault of child under 16 years: section 61J(2)(d)

- 3.2 Section 61J (*aggravated sexual assault*) prohibits sexual intercourse with any person without their consent in circumstances of aggravation. The circumstances of aggravation include where the victim is under 16 years.¹² Lack of consent of a child under 16 years is an element of this offence. The maximum penalty for this offence is 20 years imprisonment.
- 3.3 This offence requires the prosecution to prove beyond reasonable doubt the absence of consent and knowledge of that absence of consent by the accused. In *McGrath v R*¹³ it was held that the provision:
- specifically makes the absence of consent and knowledge of that absence of consent elements of the offence. As a result, those matters must, irrespective of the victim's age, be proved beyond reasonable doubt for a person to be convicted of an offence against [section] 61J.¹⁴
- 3.4 This means that where an accused is prosecuted under section 61J, a child complainant will be questioned and cross-examined as to whether they consented to the sexual intercourse.

Sexual intercourse with child above 10 years and under 16 years: section 66C

- 3.5 Section 66C is a child specific offence of *sexual intercourse with child between 10 and 16 years*. The section has different age categories and provides for an aggravated version of the offence. Where a child is aged 10-13 years the maximum penalty is 16 years and where the child is aged 14-15 years the maximum penalty is 10 years imprisonment. Where the offence

12. *Crimes Act 1900* (NSW) section 61J(2)(d).

13. [2010] NSWCCA 48.

14. *McGrath v R* [2010] NSWCCA 48 at [11].

is committed in circumstances of aggravation, the maximum penalty is 20 years and 12 years, respectively (see Table 3.1 below).

- 3.6 Consent is not a defence to this offence.¹⁵ Furthermore, the mere lack of opposition is irrelevant and should not be treated as a mitigating factor.¹⁶
- 3.7 Conversely, a lack of consent cannot be taken into account in determining the appropriate sentence. This is because a court must disregard a matter if taking it into account leads to punishing an offender for a more serious offence than the one before the court.¹⁷ This is the *De Simoni* principle.
- 3.8 Where an accused is charged with *aggravated sexual assault of child under 16 years* (section 61J), it is not uncommon for a plea of guilty to be accepted to a charge of *sexual intercourse with child under 16 years* (section 66C). While it precludes the sentencing court from taking into account a lack of consent by the victim, such a plea also avoids the need for the victim to give evidence. The availability of a range of charges can assist in successfully resolving child sexual abuse matters without proceedings to trial.

Table 3.1: Provisions of section 66C(1) – (4)

Section	Provision	Maximum Penalty
66C(1)	Sexual intercourse with child aged 10-13	16 years
66C(2)	Sexual intercourse with child aged 10-13 in circumstances of aggravation	20 years
66C(3)	Sexual intercourse with child aged 14-15	10 years
66C(4)	Sexual intercourse with child aged 14-15 in circumstances of aggravation	12 years

Sexual intercourse with child under 10 years: section 66A

- 3.9 Section 66A makes it an offence to have sexual intercourse with a child less than 10 years of age. The offence carries a maximum penalty of life imprisonment. Consent is not a defence to this offence so it is not necessary for the prosecution to prove an absence of consent.¹⁸
- 3.10 In sentencing an offender, the court cannot take into account that the victim co-operated with the offender and did not struggle as a mitigating factor.¹⁹ Evidence of a victim's resistance or efforts by the offender to restrain the victim is relevant to the assessment of objective seriousness of the offence and would be an aggravating factor.²⁰ In contrast to section 66C, a lack of consent by the victim does not increase the maximum penalty for the offence and can be taken into account on sentence without breaching the *De Simoni* principle.

Difficulties with the current offences

- 3.11 Where the victim was aged 14 or 15 years at the time of the offence, there is a drastic difference in the maximum penalty between an offence under section 66C compared with section 61J. This may reflect the differences in criminality between sexual intercourse with a

15. *Crimes Act 1900* (NSW) section 77.

16. *R v Nelson* [2016] NSWCCA 130.

17. *The Queen v De Simoni* (1981) 147 CLR 383.

18. *Crimes Act 1900* (NSW) section 77.

19. *R v Woods* [2009] NSWCCA 55.

20. *R v Woods* [2009] NSWCCA 55.

child under 16 years with their agreement, albeit still unlawful, and sexual intercourse which is without the consent of the child.

- 3.12 In pursuit of a higher maximum penalty (20 years), the prosecution may choose the *aggravated sexual assault* offence under section 61J(2)(d) and thus require a complainant to give evidence, and be cross-examined, about a lack of consent. This is despite the statutory provision that the consent of a child under 16 years is not a defence to all other child sexual assault offences.²¹ Questions about consent can be distressing to a young complainant and add another complex element that the prosecution must prove beyond reasonable doubt. This is inconsistent with the intention of Parliament to avoid inflicting trauma on vulnerable complainants and to make it easier for children to give evidence.²²

Options for reform

Sentencing Council proposal to change section 66C

- 3.13 In response to a number of submissions in relation to this issue, the NSW Sentencing Council suggested that section 66C be amended to provide as follows:
- (i) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with another person who is of or above the age of 10 years but under the age of 16 years is liable to imprisonment for 14 years.
 - (ii) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with another person under the age of 16 years in circumstances of aggravation is liable to imprisonment for 25 years.
 - (iii) In this section circumstances of aggravation mean circumstances in which:
 - a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;
 - b) at the time of immediately before or after the commissions of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;
 - c) the alleged offender was in the company of another person or persons;
 - d) the alleged offender was in position of authority of the alleged victim;
 - e) the alleged victim has a serious intellectual disability;
 - f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; and
 - g) the presence of the alleged victim being secured by kidnapping.²³
- 3.14 The aim of this proposal was to include consensual and non-consensual sexual intercourse without the need for different age categories as the age of the victim and the disparity between the age of the victim and offender is to be taken into consideration on sentence.²⁴ Opposition by the victim is also a matter to be taken into account on sentence.²⁵

21. Crimes Act 1900 (NSW) sections 77, 78C(2).

22. Upton G, NSW Attorney General, Second Reading Speech, NSW Legislative Council, *Criminal Procedure Amendment (Child Sexual Offences Evidence Pilot) Bill 2015*, 22 October 2015.

23. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

24. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

25. *R v Nelson* [2016] NSWCCA 130.

- 3.15 One of the potential difficulties with implementing the above proposal is that it contains circumstances of aggravation different to those contained in section 61J(2) (*aggravated sexual assault*) and section 61M(3) (*aggravated indecent assault*). This may create confusion and further inconsistencies in aggravating factors. This is contrary to the recommendations of the Joint Select Committee to simplify the current offences.

Other options to amend the current offences

- 3.16 The changes to the current age categories, as discussed in Chapter 2, may alleviate some of the current difficulties if this involved amending the offence of *sexual intercourse with child under 10 years* (section 66A) to also apply to children aged 10 and 11 years. This would avoid the need for children under 12 years of age being required to give evidence about consent, as the prosecution would not need to charge the section 61J offence in order to make available the higher maximum penalty.
- 3.17 One further option is to increase the available maximum penalties for the offence of *sexual intercourse with child between 10 and 16 years* (section 66C). Consequently the offence of *aggravated sexual assault* (section 61J(2)(d)) could be amended to remove the age of the victim as a circumstance of aggravation. The prosecution would then rely on the child specific offence, where a lack of consent is not an element of the offence. This would avoid young victims giving evidence and being cross-examined about consent.
- 3.18 Overall, the four options that can be considered in relation to these provisions are:
1. Maintain the offences in their current form in order to reflect the differences in criminality.
 2. Remove the circumstance of aggravation of victim under 16 years from the *aggravated sexual assault* offence (section 61J(2)(d)) and increase the maximum penalties for *sexual intercourse with child between 10 and 16 years* offences (section 66C).
 3. Amend the offences of *sexual intercourse with child between 10 and 16 years* (section 66C), for example, as suggested by the NSW Sentencing Council.
 4. Amend the offence of *sexual intercourse with child under 10 years* (section 66A) to apply to children under 12 years.

Question

Q5. Should the separate offences of *aggravated sexual assault* of child under 16 years (section 61J(2)(d)) and *sexual intercourse with child between 10 and 16 years* (section 66C) remain? If yes, can their description be improved?

Q6. Should the offence of *sexual intercourse with child under 10 years* (section 66A) be increased to include children under 12 years?

4. Clarifying offences of indecent assault and act of indecency

In brief

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'. These categories apply to offences committed against adult and child victims. This distinction can lead to complex legal arguments.

Distinction between indecent assault and acts of indecency

- 4.1 Sexual conduct with a child under the age of 16 years that does not involve penetration may involve the commission of offences of *indecent assault* or *act of indecency*. The former offence requires unlawful touching by the offender of the victim whereas this element is not required for the latter offence. Both offences require that the conduct be 'indecent'.

Indecent assault of child under 16 years

- 4.2 Offences involving physical sexual contact between the offender and a child without penetration are commonly referred to as an 'indecent assault'.
- 4.3 Section 61M(2) of the *Crimes Act 1900* refers to the commission of an assault upon a child under 16 years where at the time or immediately before or after the assault, an act of indecency is committed in the presence of the child. The prosecution can rely upon the same act to establish both the assault and the act of indecency. The maximum penalty is 10 years imprisonment and there are no circumstances of aggravation. There is only one age category (under 16 years) and hence there are no distinctions in the provision or maximum penalty depending on the age of the child.

Act of indecency with child under 16 years

- 4.4 Offences involving indecent acts without unlawful physical contact with a child are generally termed 'acts of indecency'. These offences are contained in sections 61N and 61O and relate to both adult and child victims. The maximum penalty ranges from imprisonment for 2 years to 10 years, depending on the age of the child and any aggravating factors.

Table 4.1: Indecent assaults and acts of indecency

Section	Provision	Maximum Penalty
61L	Indecent assault	5 years
61M(1)	Aggravated indecent assault (in company, under authority, physical disability, cognitive impairment)	7 years
61M(2)	Aggravated indecent assault toward victim under 16 years	10 years
61N(1)	Act of indecency with or toward victim under 16 years	2 years
61N(2)	Act of indecency with or towards victim over 16 years	18 months
61O(1)	Aggravated act of indecency with or towards victim under 16 years (in company, under authority, physical disability, cognitive impairment)	5 years
61O(1A)	Aggravated act of indecency with or towards victim under 16 years	3 years
61O(2)	Aggravated act of indecency with or towards victim under 10 years	7 years
61O(2A)	Aggravated act of indecency with or towards victim under 16 years and being filmed for production of child abuse material	10 years

The difficulty in distinguishing between indecent assault and act of indecency

- 4.5 It is sometimes not easy to work out the difference between an offence of *indecent assault* and *act of indecency* when the touching is encouraged. Consider this example: An 18 year old male convinces his 10 year old sister to come to his room, where he undresses and exposes his penis. He then asks the young child if she would touch his penis. The girl complies.
- 4.6 What offence has been committed? An *act of indecency* is committed by exposing the penis. However, the touching of the penis is less obvious. As there was no penetration, a charge of *aggravated sexual assault* is not available. While there was physical contact between the accused and the child, it is arguable that there was no unlawful touching by the accused of the child as required for the charge of *indecent assault*. It was the child that touched the accused, albeit upon his request, and the correct charge may be *incite an act of indecency*, which carries a significantly lesser penalty of 2 years imprisonment.
- 4.7 It can be a complex exercise to determine the appropriate charge which appropriately reflects the criminality of the offence. The above example involves serious criminal conduct which may not be sufficiently reflected in a charge of *incite act of indecency*.

The term ‘indecent’ is not defined

- 4.8 The term ‘indecent’ is not defined in the legislation. The common law defines ‘indecent’ as contrary to the ordinary standards of respectable people in the community and it must have a sexual connotation or overtone. It is a matter for the fact finder to determine the standards prevailing in the community.
- 4.9 The Model Criminal Code Officers Committee of the (then) Standing Committee of Attorneys-General recommended that ‘indecent’ be defined in similar terms, namely, that it is to be determined by the trier of fact according to the standards of ordinary people.²⁶

26. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

4.10 The NSW Sentencing Council recommended that ‘act of indecency’ be defined as follows:

An act of indecency means an act that:

- (a) is of a sexual nature; and
- (b) involved the human body, or bodily actions or functions; and
- (c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian Community.²⁷

4.11 This definition was previously contained in section 50AB of the *Crimes Act 1914* (Cth) and was repealed in April 2010 when the *child sex offences outside Australia* were strengthened.²⁸ The term ‘indecent’ is not currently used in the *Crimes Act 1914* (Cth).

4.12 In contrast, the term ‘indecent’ has been removed from the adult version of the Victorian offence on the grounds that it is an anachronistic description. The term ‘sexual touching’ is now used instead.²⁹ The introduction of a new modern term may more accurately reflect the current standards, however, it would also require fresh interpretation and development of common law. A narrow definition may stop the law from adapting with changing community standards.

Legislation in other jurisdictions varies

4.13 In Victoria it is an offence to touch a child under 16 years if the touching is sexual and contrary to community standards of acceptable conduct or to engage in a sexual activity in the presence of a child under 16 years.³⁰ Similar offences apply to children aged 16 and 17 years that are under care, supervision or authority.³¹

4.14 In the Australian Capital Territory, it is an offence to commit an indecent act with, or in the presence of, a child.³² These provisions do not distinguish between touching and non-touching offences.

4.15 Legislation in the Northern Territory refers to having sexual intercourse or committing an act of gross indecency upon a child.³³ Queensland and Western Australia refer to “indecently deal” with a child.³⁴ Tasmanian legislation refers to an indecent act with, or directed at, a child.³⁵ In South Australia it is an offence to indecently assault a child under 14 years.³⁶ The legislation also provides that it is an offence to commit an act of gross indecency with, or in the presence of, a child under 16 years.³⁷

4.16 New Zealand legislation refers to having a “sexual connection” and doing an indecent act with a child.³⁸

4.17 In Canada it is an offence to touch any part of the body of a child for a sexual purpose.³⁹ ‘Sexual purpose’ is not defined and it appears that indecently touching a child for the

27. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

28. *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

29. Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction*, June 2015, Part 5.2.

30. *Crimes Act 1958* (Vic) sections 49D, 49F.

31. *Crimes Act 1958* (Vic) sections 49E, 49G.

32. *Crimes Act 1900* (ACT) sections 61, 61A.

33. *Criminal Code Act 1983* (NT) sections 127, 128.

34. *Criminal Code Act 1899* (Qld) section 210(1)(a); *Criminal Code Act Compilation Act 1913* (WA) section 320(4).

35. *Criminal Code Act 1924* (Tas) sections 124(3), 125B.

36. *Criminal Law Consolidated Act 1935* (SA) section 56.

37. *Criminal Law Consolidated Act 1935* (SA) section 58.

38. *Crimes Act 1961* (NZ) sections 132, 134.

39. *Criminal Code 1985* (Canada) sections 151, 153.

purposes of intimidation or control would not be prohibited by this section. It is also an offence to expose genital organs to a child.⁴⁰

- 4.18 The legislation in the United Kingdom refers to sexual touching of a child.⁴¹ It is also an offence to engage in a sexual activity in the presence of a child for the purposes of sexual gratification.⁴²

Options for reform

- 4.19 The following options for reform (or combination of options) are possible for the offences of indecent assault and acts of indecency involving children under 16 years:
1. Merge the offences of *indecent assault* and *act of indecency*.
 2. Amend the offence of *indecent assault* to include any sexual touching between the victim and the offender.
 3. Replace the term 'indecent' with a more modern term such as 'sexually deal' and/or introduce a statutory definition.

Question

Q7. Should the description of the offences of *indecent assault* and *act of indecency* committed against children under 16 years be improved? If yes, what option(s) is preferable?

Q8. Should the term 'indecent' and the common law definition remain?

40. *Criminal Code 1985* (Canada) section 173.

41. *Sexual Offences Act 2003* (UK) sections 7, 9.

42. *Sexual Offences Act 2003* (UK) section 11.

5. Simplifying aggravating factors

In brief

In NSW some child sexual assault offences provide aggravating factors. Sometimes it is the age of the child that aggravates an offence. Aggravating factors do not apply to all child sexual abuse offences and where they do apply, the aggravating factors vary between offences. This can be confusing and may result in additional cross-examination of a child. It can also create appealable error.

Inconsistencies in aggravating factors

- 5.1 A number of child sexual abuse offences provide a list of aggravating factors. Where these apply, the applicable maximum penalty is increased as the offence is deemed to be objectively more serious than the non-aggravated offence. The table below summarises the aggravating factors that apply to some child sexual abuse offences.

Table 5.1: Aggravating factors in child sexual abuse offences

Section	Provision	Aggravating factors
61O	Aggravated act of indecency	<ul style="list-style-type: none"> • In company • Under authority • Victim has a serious physical disability • Victim has a cognitive impairment
66C	Sexual intercourse with child between 10 and 16 years	<ul style="list-style-type: none"> • Inflict actual bodily harm • Threaten to inflict actual bodily harm • In company • Under authority • Victim has a serious physical disability • Victim has a cognitive impairment • Took advantage of the victim being under the influence of alcohol or drug • Deprived victim of their liberty • Offender breaks and enters into building with intent to commit an offence

- 5.2 The legislation also provides for adult sexual assault offences that are aggravated if the victim is a child. Similarly, these offences attract a higher maximum penalty to reflect the increase in objective seriousness. The table below summarises the sexual assault offences where at least one of the circumstances of aggravation is that the victim is a child or young person.

Table 5.2: Sexual assault offences where victim is a child is a circumstance of aggravation

Section	Provision	Aggravating factor
61J(2)(d)	Aggravated sexual assault	Victim under 16 years
61M(2)	Aggravated indecent assault	Victim under 16 years
61N(1)	Act of indecency	Victim under 16 years
80A(1)(d)	Sexual assault by forced self-manipulation	Victim under 16 years
80C(a)	Sexual servitude	Victim under 18 years
91J(4)(a)	Voyeurism	Victim under 16 years
91K(4)(a)	Filming a person engaged in private act	Victim under 16 years
91L(4)(a)	Filming a person's private parts	Victim under 16 years

- 5.3 On 29 June 2015, aggravating factors were removed from section 66A of the *Crimes Act 1900* of sexual intercourse with child under 10 years to implement recommendation 5 of the report of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders. The maximum penalty of the redrafted offence is now the same as the aggravated form of the repealed provision to give the court a wider sentencing scope. This does not preclude a sentencing judge from taking into account former aggravating factors as features that increase the objective seriousness of an offence.
- 5.4 In Victoria the legislation does not provide a list of aggravating factors that apply to child sexual abuse offences. Previously the age of the child and being under care or authority were the only circumstances that aggravated a sexual offence and increased the available maximum penalty. The former section 60A of the *Crimes Act 1958* (Vic) also provided that where a sexual offence against a child or adult is committed while the offender is carrying an offensive weapon, the offender is liable to a further 2 years imprisonment. The sentence needed to be cumulative on any other sentence and could not be suspended. However, this provision and other aggravating factors were removed during recent legislative reform, which resulted in some offences being split into multiple offences and an increase in the maximum penalty for the offence of sexual penetration of a child aged 12 years or older and under 16 years.
- 5.5 The removal of aggravating factors in NSW would require the maximum penalty for the non-aggravated version of the offence to be increased to the same penalty as the aggravated offence. This may have a negative impact on pleas of guilty and limit the scope for charge negotiations.

Options for reform

- 5.6 The following options are possible in relation to aggravating factors in child sexual assault offences:
1. Leave the current aggravating factors where they apply to child sexual abuse offences.
 2. Prescribe the same aggravating factors to apply to all aggravated child sexual abuse offences. This can either be contained within each section or in a separate provision.
 3. Remove aggravating factors from child sexual abuse offences and increase the maximum penalty of the non-aggravated offence to the same penalty as the aggravated form of the offence. Aggravating factors would then either:

- a. be generally considered at sentence as part of the court's determination of the seriousness of each offence; or
 - b. be contained in a separate section, which must be considered by the court, where applicable, in determining the appropriate sentence.
4. Remove aggravating factors from child sexual abuse offences into a separate section and where they apply it would increase the available maximum penalty, similar to the provision in Victoria.

Question

Q9. Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?

6. Addressing difficulties arising from historic child sexual offending

In brief

The prosecution of historic child sexual abuse offences frequently raises complex legal and evidentiary issues. There is often a delay in disclosure, lack of physical or forensic evidence and diminished memory. Determining the appropriate charges can be challenging for the prosecution, particularly where the date of the offence cannot be specified. If convicted, sentencing an offender in accordance with historic sentencing principles is often a difficult task for the court.

- 6.1 It is common for survivors of child sexual abuse not to disclose the offences until decades later and delay is more common in this area of law than in any other. Complainants may not feel comfortable reporting the matter to police until they are more mature or may be fearful of the accused. Survivors may be embarrassed or think that they will not be believed. It is not unusual for there to be a period of 15 or 20 years between the commission of the offence and any court proceedings. Longer delays are more prevalent where the abuse occurs in an institutional setting.⁴³
- 6.2 Disclosure to police does not necessarily equate to the commencement of legal proceedings. In 2014, only 19% of reported child sexual assault incidents resulted in the commencement of legal proceedings, with a greater likelihood of charges being laid where there had been delay in reporting.⁴⁴

Prosecuting and defending historic child sexual offending

Need for particulars creates difficulties for the prosecution

- 6.3 Delays in reporting of child sexual abuse matters can create a number of challenges for the prosecution. Complainants of historic child sexual abuse frequently have difficulties recalling the particulars of individual offences perpetrated upon them. This is for a number of reasons. Often the victims are young and the passage of time hinders their recall of mundane details. These difficulties do not mean that the allegations of child sexual abuse are untrue. While a complainant may remember exactly what the accused did to them, they may not recall the layout of the room or what pyjamas they were wearing at the time. Defence counsel commonly ask such questions when cross-examining complainants of child sexual abuse with the aim of testing their credibility and reliability.
- 6.4 A complainant who was the subject of one or two offences may be able to recount each event with the required specificity. However, a victim that was subject to a long period of offending may only be able to describe the offences in a general manner, without being able to identify unique incidents and specify a timeframe.⁴⁵ The current law requires a charge to

43. Freiberg A, Donnelly H & Gelb K, *Sentencing for Child Sexual Abuse in Institutional Context*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2015.

44. Cashmore J, Taylor A, Shackel R & Parkinson P, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, August 2016.

45. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*, *Current Issues in Criminal Justice*, Volume 26, Number 1, July 2014.

have sufficient particularity. Consequently, where the now adult complainants cannot recall a distinct sexual act, the prosecution cannot establish an offence. The only exception to this is a charge of *persistent child sexual abuse* under section 66EA of the *Crimes Act 1900*. This offence is not without its difficulties and is discussed in the following chapter.

- 6.5 The requirement for specificity also requires the prosecution to establish all of the elements of each offence beyond a reasonable doubt. Complainants are frequently asked if they can recall if penetration occurred. This is a difficult question for a complainant to answer about painful and traumatising abuse that occurred many years before.⁴⁶ Penetration can be a difficult concept for a child to grasp. Yet the answer to this question will determine if a charge involving penetration will be preferred or if the allegation is one of indecent assault, with a significant difference in maximum penalties.

Delay also creates issues for the defence

- 6.6 Delay in reporting can also hamper an accused's ability to defend the charge against them. For example, the accused may not be able to present alibi evidence because relevant records are no longer available or the accused and potential alibi witnesses cannot recall where they were at a particular time.
- 6.7 Where there has been long delay the accused can make an application for a permanent stay. This will only be granted where the circumstances are exceptional and generally delay by itself is not sufficient.⁴⁷

Date of offence can be difficult to pinpoint

- 6.8 Even when a survivor of historic child sexual abuse can recall a particular offence, they must be able to say with some accuracy when the offence occurred. It is common for the prosecution to phrase the indictment in terms of a date range, rather than refer to a particular date. For example, the complainant may recall that the offence occurred when she was in a particular grade at school and hence the indictment will refer to the offence occurring between the start and finish of the school year. Such a range can create a number of issues. Firstly, it may result in the offence falling across two offences depending on when during that date range it was committed. For example, if the allegation is of sexual penetration and the complainant turned 10 years during the period of time particularised in the indictment, the offence is either have *sexual intercourse with child under 10 years* (section 66A) or the offence of *sexual intercourse with child 10 years or older and under 14 years* (section 66C(1)).
- 6.9 When looking at historic offences, the date range can coincide with a change of legislation and the same elements may constitute different offences. For example, fellatio was previously considered to be an indecent act but since legislative change in 1991 it is now considered to be sexual intercourse. There are no legislative provisions as to how the prosecution should proceed in these matters.
- 6.10 Case law provides some guidance on this issue, however, it has not been satisfactorily resolved. In *NW v R*⁴⁸ it was held that a conviction cannot stand where there was significant statutory change, including to the definition and elements, of a charge during the period covered by the indictment. However there is no unfairness where the change in legislation during the time particularised in the indictment and the essential elements of both offences

46. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directors*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

47. *Walton v Gardiner* (1993) 177 CLR 378; *Jargo v District Court of New South Wales* (1989) 168 CLR 23; *Glennon* (1992) 172 CLR 592; *Dupas* (2010) 241 CLR 237; *TS* [2014] NSWCCA 174.

48. [2014] NSWCCA 217.

are the same.⁴⁹ In *Gilson v The Queen*⁵⁰ the offender was charged with one count of *shoplifting and larceny* and one count of *receiving* where the prosecution evidence relied on the doctrine of recent possession. It was held that:

If the jury conclude beyond a reasonable doubt that the accused committed one or other of the offences changed... The trial judge, rather than directing the jury to return a verdict of guilty of the offence which they consider to have been more probable, should direct them that, if they are satisfied beyond a reasonable doubt that the accused either stole the property or received it knowing it to have been stolen, but they are unable to say which, then they should return a verdict of guilty to the less serious offence.

The trial judge should also direct the jury which of the offences they should regard as the less serious.⁵¹

- 6.11 It is common that during a trial the dates of the alleged offence will be refined or significantly changed.⁵² A complainant may recall more details about the time of the offence or it may become apparent that they were mistaken about the time. For example, the complainant may have thought the offence occurred when she was in grade 8 and had just become friends with Sally, however, school records later establish that Sally did not attend the school until grade 9 and thus the offence must have occurred outside of the date range contained in the indictment. The prosecution can make an application to amend the indictment, however, this requires either leave of the court or consent of the defence. Where there is no consent and the application is refused, the accused must be acquitted.

Options for reform

- 6.12 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 would be consistent with the decision of *Gilson v The Queen*⁵³ as discussed above.

Question

Q10. Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?

Sentencing historic child sexual assault offenders

- 6.13 The purposes of sentencing are punishment, deterrence, community protection, rehabilitation, denunciation and acknowledgement of harm.⁵⁴ Balancing these objectives, while maintaining an instinctive synthesis approach to sentencing, is a complex task. It is made all the more difficult in historic child sexual assault matters. The court must sentence the offender in accordance with the sentencing trends and principles that existed at the time

49. *MJ v R* [2013] NSWCCA 250.

50. [1991] HCA 24.

51. *Gilson v The Queen* [1991] HCA 24.

52. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directors*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

53. [1991] HCA 24.

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 3A.

of the offence.⁵⁵ This is based on the principle that an offender should not be exposed to a harsher penalty than which existed at the time of the offence. However, where the change in law has been to the benefit of the offender, such as the introduction of a discount for a plea of guilty, the offender is entitled to the benefit of that change.⁵⁶

- 6.14 The legislation provides that where there has been an increase in the maximum penalty for an offence, that increase only applies to offences committed after the amendment, however, where there has been a reduction in the maximum penalty after the commission of an offence the offender is entitled to the benefit of that change.⁵⁷

Historic sentencing principles may not reflect current standards

- 6.15 Where there is lengthy delay between the offence and conviction for a historical child sexual abuse matter, it is a daunting task for the court to apply historic sentencing trends principles and tariffs with few written judgements and little statistical analysis from earlier periods. The general approach appears to be to accord the offender a discount on the basis that a couple of decades ago sentences for child sexual abuse offences were generally more lenient. Very lenient sentences are generally imposed when a court follows sentencing practices that existed at the time of the offence.⁵⁸

- 6.16 The current approach has been the subject of criticism for being unjust as it fails to reflect community standards. For example, His Honour Judge Berman SC of the District Court stated:

Authority which binds me says that the offender is to be sentenced by me for an offence committed in 1987 according to the tariff which existed at the time he would have faced sentence for such misconduct. Cleverer people than me have commented on the inappropriateness of that rule of sentencing. It is undeniable that the last thirty years has seen an increase in awareness on the part of the Courts of the harm that sexual offences, particularly against children, can cause. ...

The Courts have only belatedly understood the seriousness of conduct such as that for which the offender must now be sentenced. Thus to sentence the offender according to standards which existed in the late 1980s is to perpetuate the errors that were made by sentencing Courts at that time. Offenders such as Ms Gaven benefit from earlier mistakes made by sentencing Courts even when we now know that these earlier decisions were wrong.⁵⁹

- 6.17 Similar views were expressed in *R v Pemble*.⁶⁰

- 6.18 In *MPB*⁶¹ it was highlighted that sentencing patterns can be difficult to obtain, published cases may not represent the sentencing practices of that time, any statistics should be approached cautiously and judicial memory may be unreliable. The Royal Commission noted that a sentencing court may be prevented from considering some aggravating features that are presently recognised, such as grooming.⁶²

55. *MJR* (2002) 54 NSWLR 368; *Moon* (2000) 117 A Crim R 497.

56. *MJR* (2002) 54 NSWLR 368.

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 19.

58. Freiberg A, Donnelly H & Gelb K, *Sentencing for Child Sexual Abuse in Institutional Context*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2015.

59. *Gaven* [2014] NSWDC 189 at 11-12.

60. [2015] NSWDC 168.

61. [2013] NSWCCA 213.

62. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 308.

United Kingdom approach uses current sentencing principles

- 6.19 In England and Wales, according to a Sentencing Guideline issued by the Sentencing Council, an offender must be sentenced for a sexual offence according to the sentencing regime applicable at the date of the sentence, not the offence.⁶³ However, the maximum penalty that is applicable is the lower of the current penalty or the maximum applicable at the time of the offence.⁶⁴ The seriousness of the offences, determined by the offender's culpability and the harm caused or intended, is the main consideration for the court.⁶⁵ The Guideline expressly states that the court should not attempt to establish the likely sentence the offender would have received had they been convicted soon after the offence.⁶⁶ It further provides that the court must consider the passage of time carefully as it has the potential to mitigate or aggravate the offence, for example, where the offender has continued to offend against the victim or others.⁶⁷
- 6.20 The Royal Commission in its Consultation Paper noted it is necessary to consider whether the approach of England and Wales reduces guilty pleas.⁶⁸ If accused persons fear that they may be subject to greater penalties, they may be more reluctant to enter pleas of guilty, which may increase the length of the court process and the trauma to victims. The Royal Commission did not receive any submissions about negative impacts on pleas of guilty and observed it is unclear whether the higher penalties imposed through this approach have resulted in fewer guilty pleas.⁶⁹

Royal Commission recommends adopting UK approach

- 6.21 The Royal Commission has recommended that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing, but with the sentence limited to the maximum sentence available for the offence at the time of offending.⁷⁰
- 6.22 Retaining the maximum penalty from the time of the offence would create a balance between the complex sentencing task and the right of an offender not to be subject to a more severe penalty than applied at the time the offence was committed.⁷¹ However, the Royal Commission observed that this compromise would not always result in significantly longer sentences or in sentences that adequately reflect community standards.⁷²

63. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 1.

64. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 2.

65. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 4.

66. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 4.

67. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 7.

68. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016, page 512.

69. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, pages 319-320.

70. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 76.

71. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 321.

72. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 321.

- 6.23 The Royal Commission noted that a discount for the utilitarian benefit of a plea would still apply where a defendant pleads guilty and this may provide sufficient motivation to enter a guilty plea despite the likelihood of a higher penalty.⁷³
- 6.24 In July 2015, Mr David Shoebridge MLC, Greens member of NSW Parliament, gave notice to introduce the *Crimes (Sentencing Procedure) Amendment (Child Sexual Offences) Bill 2015*. The purpose was to provide that, in determining the appropriate sentence and non-parole period for a child sexual offence, the court is to have regard to the sentencing practices applicable at the time of sentencing rather than at the time of the commission of the offence.⁷⁴ The Bill has not yet been considered by Parliament.

Question

Q11. Should NSW adopt the Royal Commission's recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?

Limitation period for prosecution of some offences

- 6.25 Section 78 of the *Crimes Act 1900* (repealed) provided for a limitation period of 12 months for the prosecution of certain sexual assault offences if they are alleged to have been committed against a female child aged 14 or 15 years. This limitation period applied to selected child sexual offences, which changed over time. Originally it related to offences of *carnal knowledge* (section 71), *attempted carnal knowledge* (section 72) and *indecent assault with a girl* (section 76). These offences existed at a time when sexual offending against male children was dealt with under now repealed homosexual offences. On 14 July 1981 the provision was amended and the offence of *act of indecency* was added (section 61E). On 23 March 1986 the section was further amended with the addition of offences of *sexual intercourse with child* (section 66C(1)) and *attempt to have sexual intercourse with child* (section 66D).

Repeal of the limitation period was not retrospective

- 6.26 The section was eventually repealed effective from 3 May 1992, to reflect the modern understanding of the lengthy delays that can be involved in disclosing child sexual abuse. The repeal was not retrospective. This means that certain serious child sexual assault offences that occurred prior to 3 May 1992, where the victim was a girl aged 14 or 15 years at the time of the offence, are now statute barred. Historical offences against male children under the homosexual offences are not statute barred.

Statute of limitations has been removed in civil actions

- 6.27 The statute of limitations for civil actions for damages that relates to death or personal injury resulting from child abuse was abolished in NSW by the *Limitation Amendment (Child Abuse) Act 2016*. The Act commenced on 17 March 2016. Child abuse is broadly defined to include abuse perpetrated against a person under the age of 18 that is sexual abuse or

73. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 320.

74. Parliament of NSW, Bills, <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2930>.

serious physical abuse. The removal of the limitation period for commencing civil proceedings is retrospective and so an action can be commenced even where the previous limitation period has expired. This legislation gives effect to the recommendation made by the Royal Commission⁷⁵ and aims to remove one of the barriers to justice for survivors of child abuse.⁷⁶

- 6.28 Similar legislation has been passed in Victoria to remove the limitation period for civil action by survivors of child abuse.⁷⁷ The amendments are also retrospective.

Royal Commission recommends retrospective repeal

- 6.29 The Royal Commission has recommended that legislation should be introduced to give the repeal of the limitation period retrospective effect with respect to criminal matters.⁷⁸ However, such amending legislation should not revive any offences that are no longer criminalised, such as consensual homosexual sexual acts.⁷⁹

- 6.30 In South Australia, Victoria and Australian Capital Territory the repeals of limitation periods were retrospective.⁸⁰

- 6.31 A retrospective repeal of the limitation period may create uncertainty in the mind of perpetrators who may be exposed to prosecutions for offences that were previously statute barred. However, where such offenders have preyed on vulnerable victims, who lack the understanding of the wrongdoing done to them or fear reporting the matter, it does not accord with principles of justice that they should now be able to rely on delay in disclosure to avoid prosecution. In rejecting the argument of Legal Aid NSW that injustice would arise if the limitation period was removed retrospectively, the Royal Commission stated that:

Where a perpetrator has sexually abused a child, they should not retain the benefit of an immunity from prosecution for the offences which was granted at a time when the nature and impact of such offending was so poorly understood.⁸¹

- 6.32 The repeal of the limitation period for criminal proceedings in certain child sexual assault matters contained in section 78 would recognise that survivors of sexual abuse often take many years to gain the strength to report the matter to police. Section 78 represents the outdated notion that complainants of sexual abuse should not be believed unless their complaint was made immediately or shortly after the abuse.

- 6.33 A retrospective repeal of section 78 would permit cases that occurred prior to 1992 to be prosecuted, although, as with all cases of historic child sexual abuse, there may be difficulties in achieving many successful prosecutions due to the passage of time. The Royal Commission recognised this and noted that removing the limitation period cannot guarantee that a prosecution will be brought.⁸²

- 6.34 Apart from the limited application of section 78, there are no other limitation periods that apply to child sexual assault prosecutions as there is no time limitation on the prosecution of

75. Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 14 September 2015.

76. Second Reading Speech, Legislative Assembly, *Limitation Amendment (Child Abuse) Bill 2016*, 16 February 2016.

77. *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).

78. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 31.

79. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 128.

80. *Criminal Law Consolidated Act 1935* (SA) section 72A; *Criminal Procedure Act 2009* (Vic) section 7A; *Crimes Act 1900* (ACT) section 441.

81. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 129.

82. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 128.

indictable offences. This is consistent with the common law principle of *nullum tempus occurrit regi* (time does not run against the King). The retrospective removal of the limitation period contained in the now repealed section 78 would bring it into line with the current approach in NSW that justice for serious offences can be done regardless of the amount of time that has passed.

Question

Q12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective as recommended by the Royal Commission?

Common law presumption relating to boys under 14 years

- 6.35 Under the common law, males under the age of 14 years are presumed to be “under a physical incapacity to commit the offence” of sexual assault.⁸³ That is, they are presumed to be physically incapable of sexual intercourse. This presumption could not be rebutted even where there is direct evidence that the boy was capable of having sexual intercourse at the time of the offence. It follows that under this principle that boys below the age of 14 years cannot be found guilty of sexual assault offences.

Repeal of the presumption was not retrospective

- 6.36 This presumption was abolished in NSW in March 1991 by the introduction of section 61S into the *Crimes Act 1900*, which provides that a person is not to be presumed incapable of having sexual intercourse by reason solely of their age.⁸⁴ This amendment recognised that the common law was factually incorrect. The provision abolishing the presumption does not operate retrospectively and thus the common law presumption continues to apply to those offences committed in NSW before 1991.

Royal Commission recommends considering retrospective repeal

- 6.37 The Royal Commission recommended that jurisdictions should consider whether the abolition of the presumption should be given retrospective effect and whether any immunity which has arisen as a result of the presumption should be abolished.⁸⁵ If the presumption was abolished, the principle of *doli incapax* would continue to apply. This would mean that the prosecution would still need to prove beyond reasonable doubt that an accused who was aged between 10 and 13 years at the time of the offence understood that the conduct was seriously wrong.⁸⁶
- 6.38 The Royal Commission observed that the common law presumption has the potential to cause real injustice to complainants and prevents alleged perpetrators from being prosecuted.⁸⁷ However, a retrospective repeal may expose persons to criminal liability in

83. *R v Waite* [1892] 2 Q B 600 [601].

84. *Crimes (Amendment) Act 1989* (NSW), Schedule 1.

85. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 83.

86. *RP v The Queen* [2016] HCA 53.

87. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 419.

situations where the operation of the presumption protected them from prosecution for sexual offences at the time of their conduct.⁸⁸

Question

Q13. Should the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse be made retrospective?

88. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 420.

7. Improving the offence of persistent child sexual abuse

In brief

Diminished recall of particulars by victims of child sexual abuse is common and understandable, particularly where the abuse stretched over an extended period of time. This problem led to the introduction of the offence of *persistent child sexual abuse* (section 66EA) in 1999. However, this provision is rarely used. Complainants continue to be required to provide particulars in relation to each isolated offence, without which an accused cannot be prosecuted. The Royal Commission has recommended that the NSW offence be amended and improved.

- 7.1 Survivors of child sexual abuse, particularly those subjected to ongoing abuse, may have difficulties recalling particular dates and details of individual incidents. This can be for numerous reasons, including:
- the offences happened a long time ago and it is now difficult to remember
 - the abuse was persistent and it is hard to distinguish between the various occasions, and
 - the victim was very young when the abuse happened and may have had a poor understanding of the times and places the abuse occurred.⁸⁹
- 7.2 Research on memories of child sexual abuse victims shows that children's memories for details that reoccur across numerous events are strengthened and reporting of repeated events are highly accurate.⁹⁰ However, errors are common concerning specific or unique features of frequently repeated events.⁹¹
- 7.3 This can often be fatal to a successful prosecution, where the prosecution is required to particularise each offence and the complainant must be able to identify and give evidence about each particular incident. The most extensive cases of child sexual abuse can often be the most challenging to prosecute. In an attempt to overcome these difficulties and in line with the recommendations of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, the offence of *persistent child sexual abuse* was introduced effective from 15 January 1999.⁹²

Current form of the offence in NSW

- 7.4 The offence of *persistent child sexual abuse* is contained in section 66EA of the *Crimes Act 1900*. It requires the prosecution to establish that a person, on three or more separate

89. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 10.

90. Goodman-Delahunty J, Nolan M A & Van Gijn-Grosvenor E L, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complaints' Evidence*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2017.

91. Goodman-Delahunty J, Nolan M A & Van Gijn-Grosvenor E L, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complaints' Evidence*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2017.

92. *Crimes Legislation Amendment (Child Sexual Offences) Bill 1998* (NSW), Explanatory Notes.

occasions occurring on separate days during any period, engaged in conduct in relation to a particular child that constitutes a sexual offence. The maximum penalty is imprisonment for 25 years. The section provides a list of offences that are sexual offences and defines child as a person under the age of 18 years.⁹³ It does not need to be the same sexual offence on each occasion.⁹⁴ It further provides that it is not necessary to specify or prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred.⁹⁵ The section requires that the period during which the offences occurred be specified with reasonable particularity and the nature of the separate alleged offences must be described.⁹⁶ Where there are more than three occasions of sexual abuse towards a child, the jury must be satisfied about the same three occasions.⁹⁷

- 7.5 If at least one of the occasions occurred in NSW, it is immaterial that the conduct of any of the other occasions occurred outside of NSW.⁹⁸ Where child sexual abuse offences are committed in NSW and in other jurisdictions, the accused can be prosecuted for all of those offences together and a vulnerable complainant is spared from giving evidence on multiple occasions.
- 7.6 The offence of *persistent child sexual abuse* is rarely used in NSW. In the 10 year period between April 2006 and March 2016, the offence was charged on a total of 42 occasions.⁹⁹

Problems with the current offence

- 7.7 The limited use of this section may be due to a number of reasons. The charge is complex and thus it may offer little advantage to the prosecution while complicating the case. If the jury cannot agree on the same three sexual offences, the Crown must rely on alternative verdicts, which will still require specific events to be identified with sufficient particularity. Where there are more than three sexual offences alleged, it is not clear how a sentencing judge is to determine which three occasions were settled upon by the jury.
- 7.8 Despite the original legislative intention of Parliament, case law has pared back the effectiveness of the provision. The prosecution is still required to establish at least three occasions and the circumstances of each act with some degree of specificity. In *KRM v The Queen*,¹⁰⁰ the High Court held that the provision “relieves the complainant of the need, or the prosecution of the requirement, to prove the ‘dates or the exact circumstances of the alleged occasions’”. But ‘occasions’ there must still be.”¹⁰¹
- 7.9 Proceedings for *persistent child sexual abuse* can only be instituted with the sanction of the Director of Public Prosecutions.¹⁰² Such a requirement may be unnecessarily burdensome and hence prohibitive to the proper application of the offence.¹⁰³

93. *Crimes Act 1900* (NSW) section 66EA(12).

94. *Crimes Act 1900* (NSW) section 66EA(2).

95. *Crimes Act 1900* (NSW) section 66EA(4).

96. *Crimes Act 1900* (NSW) section 66EA(5).

97. *Crimes Act 1900* (NSW) section 66EA(6)(c).

98. *Crimes Act 1900* (NSW) section 66EA(3).

99. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

100. [2001] HCA 11.

101. [2001] HCA 11 at [92].

102. *Crimes Act 1900* (NSW) section 66EA(11).

103. NSW Law Reform Commission, *Family Violence – A National Legal Response*, NSWLRC Report 123, Volume 1, October 2010.

Using the offence does not result in a higher sentence

- 7.10 Even where such a charge is successful, it does not result in a higher penalty being imposed. In *R v Fitzgerald*¹⁰⁴ it was held that there is nothing in section 66EA:
- to suggest that Parliament intended that the sentence for a course of conduct which has crystallised into a section 66EA conviction, should be more harsh in outcome than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences.¹⁰⁵
- 7.11 It has been argued that this overlooks the aggravating factor that the offender engaged in a persistent pattern of abuse of a child and this should merit additional sanction.¹⁰⁶
- 7.12 The section is not retrospective and only applies to offences committed after its commencement in 1999.¹⁰⁷ It does not assist many of the alleged offences that are now being prosecuted that pre-date this provision.¹⁰⁸

The offence may make it difficult to ensure a fair trial

- 7.13 Principles of procedural fairness require that an accused person knows the case alleged against them and be given an opportunity to respond. This requires the prosecution to provide particulars including the time, place and nature of the alleged offence. Without sufficient particulars a defendant may be unable to present their defence or properly test the complainant's evidence. In some circumstances a lack of particulars can result in the matter being stayed.
- 7.14 *Persistent child sexual abuse* offences have been criticised by the judiciary as they create:
- an offence which may offend the sensibilities of an experienced criminal lawyer. Lack of particularity in a presentment and in proof can result in unfairness, for it largely deprives the defence of the ability to test the complainant's evidence against a context of surrounding circumstances.¹⁰⁹
- 7.15 In *KBT v R*,¹¹⁰ Justice Kirby stated that the Queensland offence ongoing sexual abuse:
- provides that the prosecution must prove that the offender has done an act constituting an offence of a sexual nature on three or more occasions. This statutory prerequisite must be given full effect. This is because it amounts to a parliamentary recognition of the risks involved in the offence. Those risks include the exposure of a person to conviction upon generalised evidence which it may be difficult or impossible to disprove, which need not be confirmed by testimony other than that of the complainant and which may result in a trial involving little more than accusation and denial. These risks provide reasons, quite apart from the general rule of construction ordinarily applied to a criminal statute, for adopting an approach to the preconditions laid down by parliament which is rigorous and defensive of the fair trial of the accused.¹¹¹
- 7.16 The concern is that to ensure a fair trial, an accused person should be entitled to the highest degree of particularity, without which the accused may be at a forensic disadvantage.¹¹²

104. [2004] NSWCCA 5.

105. *R v Fitzgerald* [2004] NSWCCA 5.

106. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

107. *Crimes Act 1900* (NSW) section 66EA(6)(d).

108. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

109. *The Queen v KRM* [1999] VSCA 91 at [18].

110. [1997] HCA 54; (1997) 149 ALR 693.

111. *KBT v R* [1997] HCA 54; (1997) 149 ALR 693 at [704].

112. *KRM* [2001] HCA 11.

Approach adopted by other jurisdictions

- 7.17 All Australian jurisdictions have offences relating to ongoing sexual abuse of a child, however, the maximum penalties for this offence vary markedly from 7 years (for example, where the individual acts are indecent assaults) to life imprisonment (for example, where one of the offences carries a penalty of more than 20 years imprisonment). In all jurisdictions the approval of the Director of Public Prosecutions, the Attorney-General or equivalent is required before a prosecution can be commenced. The provisions apply retrospectively only in South Australian and Tasmania.¹¹³
- 7.18 The offence is commonly used in Queensland and Tasmania and to a lesser extent in South Australia.¹¹⁴ Tasmanian legislation requires the prosecution to establish that the defendant maintained a sexual relationship with a young person who is under the age of 17 years involving the commission of unlawful sexual acts on at least three occasions.¹¹⁵ The offence has been used to prosecute ‘consensual’ child sexual assault offences.¹¹⁶ The charge is rarely prosecuted in the other jurisdictions, which contain similar provisions to those in NSW, except perhaps where there is a plea of guilty following negotiations.¹¹⁷

The Queensland offence focuses on an unlawful sexual relationship

- 7.19 Legislation in Queensland provides that it is an offence to maintain an unlawful sexual relationship, involving more than one unlawful sexual act, with a child.¹¹⁸ The jury must be unanimously satisfied beyond reasonable doubt of an unlawful sexual relationship with a child.¹¹⁹ While more than one unlawful sexual act is required to establish an unlawful sexual relationship, the actus reus of the offence is the unlawful sexual relationship and not the particular unlawful sexual acts.¹²⁰ The prosecution is not required to allege the particulars of any sexual act, as they would if it was charged as a separate offence. All members of the jury are not required to be satisfied about the same acts.¹²¹ The maximum penalty for the offence is life imprisonment.¹²²
- 7.20 This offence was introduced in 2003 with a “focus on the unlawful relationship or course of conduct, rather than on the separate sexual acts comprising the relationship”.¹²³ The intention of parliament was to remove:

the requirement to provide three particular acts of a sexual nature. Instead the offence is established by proof of the relationship. For a person to be convicted on the offence, the jury must be satisfied beyond a reasonable doubt that the evidence establishes that an

113. *Criminal Law Consolidated Act 1935* (SA) section 50(6); *Criminal Code Act 1924* (Tas) section 125A(1).

114. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 32-34.

115. *Criminal Code Act 1924* (Tas) section 125A.

116. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 34.

117. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 34.

118. *Criminal Code Act 1899* (Qld) section 229B.

119. *Criminal Code Act 1899* (Qld) section 229B(3).

120. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 23.

121. *Criminal Code Act 1899* (Qld) section 229B(4).

122. *Criminal Code Act 1899* (Qld) section 229B(1).

123. Hon R J Welford, Attorney-General, *Sexual Offences (Protection of Children) Amendment Bill 2002* (Qld), Second Reading Speech, Legislative Assembly, Queensland, 6 November 2002.

unlawful sexual relationship exists, but they do not have to agree unanimously on particular acts comprising it.¹²⁴

- 7.21 The key element of the offence is the unlawful relationship.¹²⁵ It includes a consideration of the duration of the relationship, the number of acts and the nature of the acts. In *R v DAT*¹²⁶ it was held that seven instances of sexual touching over a period of five years did not amount to maintaining a relationship.
- 7.22 The offence is not retrospective and so cannot be used in relation to historic sexual assault where victims struggle to recall particulars.¹²⁷

Victoria has introduced a course of conduct charge

- 7.23 Victoria provides for an offence of persistent sexual abuse of a child under 16 years which carries a maximum penalty of 25 years imprisonment.¹²⁸ To establish the offence the prosecution needs to prove that over a particular period, when the victim was under 16 years, the accused sexually abused the victim on at least three occasions.¹²⁹ This is similar to the previous offence which required the prosecution to establish that an act constituting a sexual offence took place on three or more occasions.¹³⁰ The acts do not need to be of similar nature and it is not necessary to prove the acts with the same degree of specificity as to date, time, place and circumstances or occasion as would be required to establish a charge for each act.¹³¹ This provision “has not been very effective in practice”¹³² in Victoria as it still requires a high degree of specificity about each occasion.
- 7.24 To address this issue, a ‘course of conduct charge’ was introduced in 2014.¹³³ The prosecution is required to prove beyond a reasonable doubt that the incidents of an offence, taken together, amount to a course of conduct having regard to their time, place or purpose and any other relevant matter.¹³⁴ However, there is no requirement to prove each incident with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if charged for an isolated incident.¹³⁵ The legislation explicitly provides that it is not necessary to provide any particular number of incidents, distinctive features differentiating any of the incidents or general circumstances of any particular incident.¹³⁶
- 7.25 The course of conduct charge is not specific to child sexual assault and can relate to two broad categories of offences, namely, sexual assault and fraud.¹³⁷ To establish a course of conduct charge the legislation requires the following elements:
- More than one incident on more than one occasion over a specific period of time.
 - Each incident constitutes an offence under the same provision, however, it can be more than one type of act.
 - Each incident relates to the same victim.

124. Hon R J Welford, Attorney-General, *Sexual Offences (Protection of Children) Amendment Bill 2002* (Qld), Second Reading Speech, Legislative Assembly, Queensland, 6 November 2002.

125. *R v LAF* [2015] QCA 130.

126. [2009] QCA 181.

127. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 30.

128. *Crimes Act 1958* (Vic) section 49J.

129. *Crimes Act 1958* (Vic) section 49J(1).

130. See previous *Crimes Act 1958* (Vic) section 47A.

131. *Crimes Act 1958* (Vic) section 49J(3)-(4).

132. Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction*, June 2015, page 23.

133. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A as introduced by *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

134. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(8).

135. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(9).

136. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(10).

137. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(1).

- The incidents taken together amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter.¹³⁸
- 7.26 A course of conduct charge explicitly amends the common law to permit the complainant to give evidence about what would regularly occur.¹³⁹ The charge is more likely to be established when there are systematic and repeated acts of abuse, where it is more difficult for victims to provide particulars and specifics of each incident.¹⁴⁰ However, offences of a different kind, such as penetrative sexual assault and indecent assault, cannot be alleged under one course of conduct charge.
- 7.27 A course of conduct charge is a single offence and an application for a separate trial is not possible.¹⁴¹ A course of conduct charge is a procedural mechanism to prosecute repeated criminal acts. It is available irrespective of when the incidents took place.¹⁴² As the conduct subject to a course of conduct charge must have been an offence at the time of commission, the accused is not prejudiced by the application of the charge to historic offences.
- 7.28 In sentencing an offender for a course of conduct charge the court must impose a sentence that reflects the totality of the offending that constitutes the course of conduct and must not impose a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence.¹⁴³ Orthodox sentencing principles apply to course of conduct charges and the maximum penalty remains a ‘yardstick’.¹⁴⁴
- 7.29 The consent of the Director of Public Prosecutions is required for a course of conduct or persistent child sexual abuse charge.¹⁴⁵ The Director’s Policy also provides a list of criteria that should be taken into account in determining whether to use a course of conduct charge including:
- substantive charges are preferable
 - the charge should adequately reflect the criminality of the offending, and
 - there must be a reasonable explanation as to why the evidence or allegation of the victim lacks detail as to dates and circumstances.¹⁴⁶
- 7.30 A “course of conduct charge is not to be used simply to overcome the evidentiary deficiencies of a superficial investigation”, however, it can be utilised to overcome an otherwise overloaded indictment.¹⁴⁷
- 7.31 The Victorian course of conduct charge was considered by the Victorian Court of Appeal in relation to the offence of obtaining financial advantage by deception.¹⁴⁸ It has not been tested in the High Court. A similar charge exists in the United Kingdom and New Zealand.¹⁴⁹

138. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(1)-(3).

139. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 38.

140. Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction*, June 2015, Part 11.

141. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(6).

142. *Criminal Procedure Act 2009* (Vic) section 445.

143. *Sentencing Act 1991* (Vic) section 5(2F).

144. *Poursanidis v The Queen* [2016] VSCA 164.

145. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(12), *Crimes Act 1958* (Vic) section 47A(7).

146. Office of the Director of Public Prosecutions Victoria, *Director’s Policy: Course of Conduct Charges*, 4 June 2015.

147. Office of the Director of Public Prosecutions Victoria, *Director’s Policy: Course of Conduct Charges*, 4 June 2015.

148. *Poursanidis v The Queen* [2016] VSCA 164.

149. *Criminal Procedure Rules 2010* (UK) Rule 14.2, *Criminal Procedure Act 2011* (NZ) sections 17, 20.

Options for reform

Sentencing Council's proposal for reform

- 7.32 The NSW Sentencing Council recommended that the offence of *persistent child sexual abuse* (section 66EA) be amended:
- in order that it be made clear that a separate offence has been created by this section, the gravamen of which is the fact that the accused has engaged in a course of persistent sexual abuse of a child, and that the appropriate sentence to be imposed is one that is proportionate to the seriousness of the offence.¹⁵⁰
- 7.33 This proposal would address the issue in relation to sentencing for persistent child sexual abuse and may create an advantage for the prosecution to charge this offence. However, it would not address the remainder of the issues previously discussed.

Royal Commission recommends a strengthened offence of persistent child sexual abuse

- 7.34 The Royal Commission concluded that there needs to be an offence in each jurisdiction that will enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively.¹⁵¹ It stated that an accused's entitlement to know the case against them "should not impose requirements that operate to effectively prevent the prosecution of some of the more serious cases of child sexual abuse".¹⁵²
- 7.35 The Royal Commission expressed the view that the Queensland offence provides the best option. It recommended that each state and territory should amend its offence of persistent child sexual abuse so that:
- i. The actus reus is the maintaining of an unlawful sexual relationship.
 - ii. An unlawful sexual relationship is established by more than one unlawful sexual act.
 - iii. The trier of fact must be satisfied beyond a reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts.
 - iv. The offence applies retrospectively but only where the unlawful relationship is established by sexual acts that were unlawful at the time they were committed.
 - v. On sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.¹⁵³
- 7.36 The Royal Commission, with the assistance of the NSW Parliamentary Counsel's Office, has provided a model offence and recommended that legislation to the effect of the draft provision should be introduced (see Appendix B).¹⁵⁴ It is based on the Queensland unlawful

150. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008, Recommendation 4.

151. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016, page 192.

152. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 66, 68.

153. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 21.

154. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 22 and Appendix H.

sexual relationship offence, however, has retrospective application and requires regard to be had to the lower maximum penalties where appropriate.

- 7.37 The Royal Commission considered that such offences should operate retrospectively so that they can apply to conduct that occurred before the commencement of the provision.¹⁵⁵ This is particularly important given the lengthy delays to disclose child sexual abuse. While it would be unjust to later punish conduct that was not unlawful at the time it was committed, a persistent child sexual abuse offence would only apply to conduct that was unlawful at the time it was committed.¹⁵⁶ The Royal Commission stated that the retrospective operation of the offences in South Australia or Tasmania had not appeared to result in unfairness to an accused.¹⁵⁷
- 7.38 To avoid any unfairness arising from this retrospectivity, the Royal Commission recommended that where an offender is being sentenced for a persistent child sexual abuse offence that is applied used retrospectively, the sentencing court should have regard to the maximum penalties that applied at the time of the individual acts.¹⁵⁸
- 7.39 The Royal Commission expressed its concern about the name of the Queensland offence and noted that while the term 'relationship' does not sit easily with the exploitation involved in the sexual abuse of children, it may achieve the most effective form of offence.¹⁵⁹

Royal Commission recommends a course of conduct charge be considered

- 7.40 The Royal Commission recommended that state and territory governments (other than Victoria) should also consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.¹⁶⁰ Such a course of conduct charge would exist in parallel with a strengthened offence of persistent child sexual abuse.
- 7.41 The Royal Commission also recommended that state and territory governments should consider providing for any of the two or more unlawful sexual acts that are particularised for the persistent child sexual abuse offence to be particularised as course of conduct.¹⁶¹
- 7.42 However, the Royal Commission noted that a significant limitation of the course of conduct charge that exists in Victoria is the requirement that each charge can only apply to offending that falls within the same provision.¹⁶² A further limitation of the charge is that a higher penalty will not be imposed because of the number of individual counts.¹⁶³

155. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 68-69.

156. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 69.

157. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 69.

158. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 69.

159. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 71.

160. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 23.

161. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 24.

162. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 70.

163. *Poursanidis v The Queen* [2016] VSCA 164.

Question

Q14. Should the NSW offence of *persistent child sexual abuse* be replaced by the model provision recommended by the Royal Commission?

Q15. Should the offence of *persistent child sexual abuse* be retrospective as recommended by the Royal Commission?

Q16. Should an offender being sentenced for an offence of *persistent child sexual abuse* receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?

Q17. Should a course of conduct charge, as introduced in Victoria, be enacted?

Q18. Should a course of conduct charge be available for historic offences?

8. Improving the offence of grooming

In brief

A variety of behaviours can be involved in grooming children to engage in sexual acts. Technological development now permits grooming to occur via the internet, social media or mobile phones. The grooming of parents can also occur to facilitate the perpetrator's access to their children. Some conduct only becomes apparent as grooming after a more serious sexual offence has occurred. The Royal Commission has recommended that a broad grooming offence be introduced in NSW and that it apply to grooming of persons other than the child.

Offences that apply to grooming in NSW

- 8.1 'Grooming' occurs where an adult gains the trust of a child, and perhaps other people such as the child's parents, in order to engage in sexual activity with the child or take sexual advantage of the child.¹⁶⁴ This is a predatory stage of child sexual abuse and it can be a long and complex process. Some instances of grooming involve overt behaviour, for example showing pornography to a child. However, often the behaviour of a perpetrator is only identified as grooming with the benefit of hindsight after there is actual sexual offending against a child.¹⁶⁵
- 8.2 Grooming behaviour is a common practice of child sexual abuse predators, particularly those in institutional settings.¹⁶⁶ Despite this, the offence of *grooming* is rarely prosecuted as proof normally relies on the commission of substantive offences. In those circumstances it is the substantive offences that are prosecuted.

NSW legislation

- 8.3 Section 66EB of the *Crimes Act 1900* provides a number of offenses involving the grooming of a child under 16 years for the purposes of unlawful sexual activity. These are summarised in the table below.

164. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 75.

165. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 76.

166. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

Table 8.1: Grooming offences

Section	Provision	Maximum Penalty
66EB(2)	Intentionally procure a child for unlawful sexual activity – victim under 14 years	15 years
66EB(2)	Intentionally procure a child for unlawful sexual activity – victim aged 14 or 15 years	12 years
66 EB(2A)	Meeting or travelling to meet a child who has been groomed with the intention or procuring the child for unlawful sexual activity – victim under 14 years	15 years
66 EB(2A)	Meeting or travelling to meet a child who has been groomed with the intention or procuring the child for unlawful sexual activity – victim aged 14 or 15 years	12 years
66EB(3)	Expose a child to indecent material or provide a child with an intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity – victim under 14 years	12 years
66EB(3)	Expose a child to indecent material or provide a child with an intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity – victim aged 14 or 15 years	10 years

- 8.4 A ‘child’ in this section is defined as a person under the age of 16 years.¹⁶⁷ For the purposes of section 66EB(2A), a child is groomed if they were exposed to indecent material.¹⁶⁸ The section also provides that a reference to a child includes a person pretending to be a child if the accused believed that person to be a child.¹⁶⁹ This enables police to charge predators after undercover operations.¹⁷⁰
- 8.5 It is a defence to a charge under section 66EB if the accused reasonably believed that the other person was not a child.¹⁷¹ Consent is not a defence to this offence.¹⁷²

Commonwealth legislation overlaps with NSW offences

- 8.6 Commonwealth legislation provides offences in relating to using carriage or postal services to procure or groom a child under 16 years.¹⁷³ The legislation refers to “transmitting a communication” to a child under 16 years with the intention of procuring, or making it easier to procure, that child to engage in a sexual activity. The same provisions are in place for causing an article to be carried by a postal or similar service.

Convictions for grooming are rare

- 8.7 Grooming convictions are rare and the offence is generally charged where the accused is also facing substantive child sexual abuse offences.
- 8.8 NSW Bureau of Crime Statistics and Research data indicates that grooming was charged on 129 occasions between April 2006 and March 2016, with an increased use of the charge

167. *Crimes Act 1900* (NSW) section 66EB(1).

168. *Crimes Act 1900* (NSW) section 66EA(2B).

169. *Crimes Act 1900* (NSW) section 66EB(5).

170. Second Reading Speech, *Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007*, 28 November 2017.

171. *Crimes Act 1900* (NSW) section 66EB(7).

172. *Crimes Act 1900* (NSW) section 77.

173. *Criminal Code Act 1996* (Cth) sections section 471.24-471.26, 474.26-474.27A.

over the last 5 years.¹⁷⁴ The data also shows that in the last 5 years the accused was charged with another sexual offence under a different provision in over 80% of matters.¹⁷⁵

- 8.9 The majority of prosecutions for grooming in other Australian jurisdictions involve police undercover operations and online and electronic communication.¹⁷⁶

Broad versus narrow grooming offence

- 8.10 The NSW grooming offences commenced on 18 January 2008 to target the increase in predatory sexual behaviour towards children as a consequence of technological developments, although it is not limited to electronic communication.¹⁷⁷ The provisions have broader application than the Commonwealth legislation, covering various forms of grooming and not only those occurring online.
- 8.11 The purpose of the legislation was “to capture the kinds of grooming activities commonly engaged in by paedophiles, whether online, through electronic communications or through any other means or activities”.¹⁷⁸
- 8.12 The current grooming offence is only available where the accused has engaged in specific conduct, namely, either exposed a child to indecent material or provided a child with an intoxicating substance. This narrow approach may not capture the variety of conduct that can be used by predators. For example, providing gifts or money, obtaining the trust of the child and/or their parents may not be covered by the current offences.
- 8.13 A narrow approach has some benefits. It covers conduct that is overtly sexual or improper and is unlikely to have an innocent explanation. This makes it easier to establish the intent of the accused, as required for a successful prosecution. It also prevents discouraging adults from forming healthy adult-child relationships for fear of prosecution.¹⁷⁹ For example, a teacher may be reluctant to provide additional assistance to a student falling behind in class for fear of being falsely accused of grooming.
- 8.14 A broader offence relying solely on the intent of the accused would require greater prosecutorial discretion to ensure that innocent conduct by adults towards children, such as a teacher providing additional assistance to a student falling behind in class, is not prosecuted. As grooming is an inchoate offence, an expansion of the definition may make it difficult to discern the motivation of an accused.

174. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

175. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

176. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016; Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 86.

177. Hatzistergos J, NSW Attorney General and Minister for Justice, Second Reading Speech, NSW Legislative Council, *Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007*, 7 November 2017.

178. Hatzistergos J, NSW Attorney General and Minister for Justice, Second Reading Speech, NSW Legislative Council, *Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007*, 7 November 2017.

179. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016, page 205.

Other jurisdictions

- 8.15 The majority of other jurisdictions in Australia have offences that target grooming.

Australian Capital Territory

- 8.16 In the Australian Capital Territory it is an offence to use electronic means to suggest to a child that they take part in, or watch, a sexual act.¹⁸⁰ It also prohibits using electronic means to send or make available pornographic material to a young person. These offences specifically target grooming conduct that occurs on line or via electronic means.

Northern Territory

- 8.17 The Northern Territory does not have a specific offence relating to grooming. Section 131 of the *Criminal Code Act 1983* (NT) creates an offence of attempting to procure a child to engage in a sexual act. This may catch some grooming behaviours.

Queensland

- 8.18 Queensland has grooming offences that relate to conduct and electronic communication. Section 218B of the *Criminal Code Act 1899* (Qld) prohibits “any conduct” in relation to a child under 16 years with intent to facilitate the procurement of the child to engage in a sexual act or to expose the child to indecent matter. Section 218A relates to using electronic communication with intent to procure a child under 16 years to engage in a sexual act.

South Australia

- 8.19 In South Australia the grooming offence is contained in section 63B(3) of the *Criminal Law Consolidation Act 1936* (SA). It is an offence to make a communication with the intention of procuring a child to engage in sexual activity or “for a prurient purpose” with the intention of making the child amenable to sexual activity.

Tasmania

- 8.20 In Tasmania it is an offence to make a communication by any means with the intention of procuring a child to engage in an unlawful sexual act.¹⁸¹ It also provides for an offence of making a communication by any means with the intention of exposing a child to any indecent material.¹⁸² It does not require that the exposure of indecent material to a child be done with intent to commit a child sexual abuse offence.

Victoria

- 8.21 The grooming offence in Victoria applies to communications, by words or conduct, with a child under 16 years or their carer with the intention of facilitating the child’s involvement in a sexual offence.¹⁸³ It includes electronic communication to reflect the development of

180. *Crimes Act 1900* (ACT) section 66.

181. *Criminal Code Act 1924* (Tas) section 125D(1).

182. *Criminal Code Act 1924* (Tas) section 125D(3).

183. *Crimes Act 1958* (Vic) section 49M.

technology and that the majority of grooming happens via the internet.¹⁸⁴ The legislation also provides offences covering encouraging a child under 16 years, or a child aged 16 or 17 years who is under care, supervision or authority, to engage or be involved in sexual activity.¹⁸⁵

- 8.22 This broad grooming offence was introduced in 2014 and is intended to cover variety of predatory behaviours. It includes the grooming of a person who has care, supervision or authority of the child. The Royal Commission “heard evidence of parents being groomed in order to facilitate the perpetrators’ access to their children”.¹⁸⁶ While the Victorian offence prohibits the grooming of parents, proving the unlawful intentions of the perpetrator may be difficult without evidence of a completed child sexual abuse offence or other overt attempts to commit such an offence.

Western Australia

- 8.23 In Western Australia, section 204B of the *Criminal Code Act Compilation Act 1913 (WA)* provides for an offence of using electronic communication to procure a child to engage in sexual activity or to expose a child to indecent matter. This provision is based on the Queensland legislation and commenced in 2006.¹⁸⁷

Canada

- 8.24 Canadian law contains separate provisions for grooming conduct over the telephone and online. It is an offence to transmit, make available, distribute or sell sexually explicit material to a child for the purpose of facilitating the commission of a child sexual abuse offence.¹⁸⁸ It prohibits communication or the making of an agreement or arrangement, by any means of telecommunication, with a child for the purpose of facilitating the commission of a child sexual abuse offence.¹⁸⁹

New Zealand

- 8.25 In New Zealand it is an offence to expose a child to indecent material.¹⁹⁰ It is also an offence to meet, intend to meet or arrange to meet a child, having previously met or communicated with that child, with the intention of committing a child sexual abuse offence.¹⁹¹

United Kingdom

- 8.26 In the United Kingdom it is an offence if a person who, for their own sexual gratification, causes a child to watch a sexual act or a pornographic film.¹⁹² Section 15 of the *Sexual Offences Act 2003 (UK)* makes it an offence to meet, or travel with intent to meet, a child, having communicated with that child on at least two prior occasions, and with the intention of committing a child sexual abuse offence. The prior meetings or communications need not have an explicit sexual content.¹⁹³ Under section 61 it is an offence to administer a

184. Victoria Criminal Law Review, *Review of Sexual Offences: Consultation Paper*, September 2013.

185. *Crimes Act 1958 (Vic)* sections 49K-49L.

186. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 75.

187. Western Australia Legislative Assembly, *Parliamentary Debates*, 20 October 2005, p 6725b-6726a.

188. *Criminal Code 1985 (Canada)* section 171.1.

189. *Criminal Code 1985 (Canada)* sections 172.1, 172.2.

190. *Crimes Act 1961 (NZ)* section 124A.

191. *Crimes Act 1961 (NZ)* section 131B.

192. *Sexual Offences Act 2003 (UK)* section 12.

193. United Kingdom Home Office, *Explanatory Notes: Sexual Offences Act 2003*.

substance without a person's consent with the intent of enabling a sexual act with that person. This provision is not specific to children. The legislation provides offences of causing, inciting or facilitating the commission of a child sexual assault offence.¹⁹⁴

Royal Commission recommends a broad grooming offence

- 8.27 The Royal Commission concluded that while broad grooming offences are likely to be very difficult to prove, they may have educative benefits.¹⁹⁵ It recommended that any state or territory that does not already have a broad grooming offence should introduce legislation to adopt a broad grooming offence that captures any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence.¹⁹⁶ It also supported an offence that includes grooming of persons other than the child, such as the child's parent.¹⁹⁷
- 8.28 While it is not anticipated that a broader grooming offence would be charged outside of the circumstances to which a narrow offence would apply, a broader grooming offence could help to emphasise the wrongfulness of the grooming behaviour and provide an educative function for institutions, their staff, parents, children and the broader community.¹⁹⁸
- 8.29 The Royal Commission did not consider there is any risk in grooming offences being charged in circumstances involving entirely innocent conduct as the prosecution will still be required to provide that the accused had an unlawful state of mind.¹⁹⁹
- 8.30 The Royal Commission considered that, alongside a broader grooming offence, institutions should also prohibit staff and volunteers from engaging in conduct that could potentially constitute grooming.²⁰⁰ This could be done through a code of conduct. Prohibiting risky conduct may reduce the opportunities for grooming and abuse and be a more effective tool than a criminal offence on its own.
- 8.31 The Royal Commission did not recommend any particular form of grooming offence, however, considered the Victorian and Queensland provisions could provide a useful model.

Question

Q19. Should the law be amended to implement the Royal Commission's recommendation for a broader grooming offence? If yes, should the amendments be modelled on the provisions in Queensland or Victoria?

Q20. Should an offence of grooming a person other than the child, such as a parent, with intent to obtain access to children be introduced as recommended by the Royal Commission?

194. *Sexual Offences Act 2003* (UK) sections 10, 14.

195. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 96.

196. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 25.

197. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 97.

198. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 96.

199. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 96-97.

200. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 95-96.

9. Strengthening offences against young people under care

In brief

It is an offence for a person to have sexual intercourse with another person aged 16 or 17 years and who is under their special care. Consent is not a defence to this offence. The legislation provides an exhaustive list of circumstances where the victim is considered to be under the special care of the accused. The offence does not require abuse of the authority. Instead, the existence of the relationship of authority is sufficient. The Royal Commission supports this approach and does not consider that the categories of special care relationships should be narrowed.

- 9.1 Section 73 of the *Crimes Act 1900* provides for offences of having sexual intercourse with a person aged 16 or 17 years who is under their special care. Where the victim is 16 years the maximum penalty is 8 years and where the victim is 17 years the maximum penalty is 4 years. Effectively this provision increases the age of consent to 18 years in circumstances where one person is in a position of dominance or authority over another and may exploit their position.
- 9.2 Special care is defined in the legislation and provides the following exhaustive list of relationships:
- (a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim
 - (b) the offender is a school teacher and the victim is a pupil of the offender
 - (c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim
 - (d) the offender is a custodial officer of an institution where the victim is an inmate
 - (e) the offender is a health professional and the victim is a patient of the health professional.²⁰¹
- 9.3 Consistent with the Royal Commission's recommendations, the offence does not require proof of an abuse of the position of authority.²⁰² Instead, it is the existence of the relationship of authority that defines the offence.
- 9.4 Section 73(4) provides that where a person attempts to commit an offence under this section, they are liable to the same maximum penalty. Consent is not a defence to this offence.²⁰³ Marriage is the only defence.²⁰⁴
- 9.5 The purpose of this section is to protect children aged 16 and 17 years against misuse of authority in particular relationships where there is an apparent power imbalance between the parties.²⁰⁵

201. *Crimes Act 1900* (NSW) section 73(3).

202. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 117-118.

203. *Crimes Act 1900* (NSW) section 77.

204. *Crimes Act 1900* (NSW) section 73(5).

205. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

Problems with the under special care offence

- 9.6 The Royal Commission noted that institutional child sexual abuse often involves perpetrators who are in a position of authority in relation to their victim and such abuse can be especially harmful and result in particularly lengthy delays.²⁰⁶ While not all cases of child sexual abuse that occur in an institutional context will involve a violation of a position of authority, a relationship of authority can place vulnerable young people at risk of exploitation.
- 9.7 The Royal Commission considered special care offences and made recommendations for jurisdictions to improve their offences, including:
- offences should not require proof of abuse of authority, instead the existence of the relationship of authority should be sufficient
 - consent should be negated where the victim is 16 or 17 and there is a relationship of authority.²⁰⁷
- 9.8 The NSW offence already reflects these recommendations. However, there may still be opportunities for the NSW offence to be improved.

Special care offences are rarely prosecuted

- 9.9 The offence of *sexual intercourse with person aged 16 or 17 years under special care* is rarely prosecuted in NSW. In the 10 year period from July 2006 to June 2016 a total of 24 people were charged with this offence in relation to a complainant aged 16 years and 8 people were charged in relation to a complainant aged 17 years.²⁰⁸ During the same period only 14 offenders were sentenced for this offence as the principal offence.²⁰⁹

Overlap with aggravating factors for other offences

- 9.10 Special care offences should be distinguished from child sexual abuse offences where the offence is aggravated if the offender is in a position of authority over the victim. For example, it is a circumstance of aggravation where the victim is under the authority of the offender for some child sexual abuse offences, including *act of indecency* and *sexual intercourse with child between 10 and 16 years*.²¹⁰
- 9.11 A person is under authority of another person if the person is in the care, or under the supervision or authority, of the other person.²¹¹ The provision is concerned with whether a particular relationship existed and not whether the offender exploited his or her position of advantage.²¹²
- 9.12 Section 21A of the *Crimes (Sentencing Procedure) Act 1999* provides aggravating and mitigating factors that the court is to take into account, where relevant, in determining the appropriate sentence for any criminal offence. Section 21A(2)(k) provides that where an offender abused their position of trust or authority in relation to the victim, this is an aggravating factor that is to be taken into account in determining the appropriate sentence.

206. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 98.

207. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 27 and 28.

208. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14707.

209. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14707. Where an offender is found guilty of more than one offence, the offence which received the most serious penalty is the principal offence.

210. *Crimes Act 1900* (NSW) sections 61O(1), 66C(2), 66C(4).

211. *Crimes Act 1900* (NSW) section 61H(2).

212. *R v Howes* [2000] VSCA 159.

Other jurisdictions

- 9.13 All jurisdictions in Australia, except for Queensland and Tasmania, have specific offences in relation to positions of trust or authority.
- 9.14 In Queensland consent is not freely given if it is obtained by the offender exercising their authority over the victim.²¹³ Similarly, in Tasmania consent is not freely obtained where the victim is overborne by the nature and position of another person.²¹⁴ While these are not specific offences that apply to young people that are above the age of consent, they may nevertheless apply to negate consent where the accused abuses their position of trust or authority.

Victoria

- 9.15 In Victoria it is an offence to take part in an act of sexual penetration with, sexually touch or commit a sexual activity with or in the presence of, a child aged 16 or 17 years who is under their care, supervision or authority or to encourage them to engage in sexual activity.²¹⁵ The maximum penalty ranges from 5 to 10 years imprisonment. It is a defence to these offences if the accused reasonably believed that the child was 18 years or over or that they were married to, or not more than 5 years older and in a domestic partnership with, the child.²¹⁶ The legislation provides a non-exhaustive list of circumstances where a child is under the care, supervision or authority of a person. It includes persons who are the child's parent, step-parent, teacher, responsible parent, out of home carer, religious or spiritual guide or leader, employer, youth worker, sports coach, counsellor, health professional, police officer or employee at a remand centre or similar.²¹⁷
- 9.16 The category of religious minister was broadened in the amendments introduced in 2006. The Victorian Criminal Law Review stated that the intention was to:
- include any religious official or spiritual leader who provides religious care or religious instruction to the child...
- This expansion is intended to include lay people who are involved in a religious organisation and who provide religious instruction or care other than pastoral care to a child. An example would be the leader of a church youth group.²¹⁸
- 9.17 In 2017 the category was further broadened to include "a religious or spiritual guide, or a leader of officer (including lay member) of a church or religious body, however any such guide, leader, official, church body is described, who provides care, advice or instruction" to the child or has authority over the child.²¹⁹

South Australia

- 9.18 It is an offence in South Australia to have sexual intercourse with a person under the age of 18 years while being in a position of authority.²²⁰ The following people are in a position of authority:
- (a) teacher engaged in the education of the child

213. *Criminal Code Act 1899* (Qld) section 348(2)(d).

214. *Criminal Code Act 1924* (Tas) section 2A(2)(e).

215. *Crimes Act 1958* (Vic) sections 49C, 49E, 49G, 49I, 49L.

216. *Crimes Act 1958* (Vic) sections 49X, 49Y.

217. *Crimes Act 1958* (Vic) section 37.

218. Victoria Criminal Law Review, *Review of Sexual Offences: Consultation Paper*, September 2013.

219. *Crimes Act 1958* (Vic) section 37(1)(i).

220. *Criminal Law Consolidated Act 1935* (SA) section 49(5).

- (b) foster parent, step-parent or guardian of the child
- (c) religious official or spiritual leader (however described and including lay members and whether paid or unpaid) providing pastoral care or religious instruction to the child
- (d) medical practitioner, psychologist or social worker providing professional services to the child
- (e) correctional institution employee
- (f) employer of the child.²²¹

9.19 Consent is not a defence to this offence.²²² The offence does not apply to persons who are married.²²³

Western Australia

9.20 In Western Australia it is an offence to engage in sexual conduct with a child aged 16 or 17 years who is under their care, supervision or authority.²²⁴ The legislation does not define the relationships covered by the term 'care, supervision or authority'.

Northern Territory

9.21 Northern Territory provides an offence of sexual intercourse or act of gross indecency with a child aged 16 or 17 years and under the person's special care.²²⁵ The victim is under special care in the following situations:

- (a) step-parent, guardian or foster parent of the victim
- (b) school teacher and the victim is a pupil of the offender
- (c) established personal relationship with the victim in connection with the care, instructions (for example, religious, sporting or musical) or supervision (for example, in the course of employment) of the victim
- (d) officer at a correctional institution where victim is detained
- (e) health professional or provider where victim is a client.²²⁶

9.22 Marriage is a defence to this offence.²²⁷

Australian Capital Territory

9.23 In the Australian Capital Territory it is an offence to engage in sexual intercourse with, or commit an act of indecency on, or in the presence of, a young person aged 16 or 17 years and who is under their special care.²²⁸ The legislation provides a list of circumstances where a young person is under special care of another, however, it is not exhaustive. It includes teachers, step-parents, legal guardians, persons who provide religious instruction, employers, sports coaches, counsellors, health service providers and custodial officers of or to the young person.²²⁹

221. *Criminal Law Consolidated Act 1935* (SA) section 49(5a).

222. *Criminal Law Consolidated Act 1935* (SA) section 49(7).

223. *Criminal Law Consolidated Act 1935* (SA) section 49(8).

224. *Criminal Code Act Compilation Act 1913* (WA) section 322.

225. *Criminal Code Act 1983* (NT) section 128.

226. *Criminal Code Act 1983* (NT) section 128(3).

227. *Criminal Code Act 1983* (NT) section 128(4).

228. *Crimes Act 1900* (ACT) sections 55A, 61A.

229. *Crimes Act 1900* (ACT) sections 55A(2), 61A(2).

- 9.24 There are defences of marriage, similar age and reasonable belief that the victim was 18 years or over available.²³⁰

Options for reform

Broadening the relationships covered by the offence

- 9.25 In its Consultation Paper the Royal Commission sought submissions on whether there are any gaps in the recognition of relationships of authority.²³¹ No gaps were identified and the Royal Commission considered the current categories of 'special care' relationships contained in the NSW offence are appropriate and should not be narrowed or removed.²³²
- 9.26 However, the list of relationships contained in the NSW offence (see 9.2) does not cover all forms of relationships where the accused can be in a position of authority or power over the victim. For example, where the perpetrator is a teacher but does not teach the child who attends the same school, it may be considered that there is a power imbalance, however, sexual intercourse in those circumstances would be lawful provided the child was 16 years or older and it was consensual.
- 9.27 The definition of 'special care' does not cover biological or adoptive parents. Biological parents are covered under the *incest* offence.²³³ Adoptive parents are not specifically referred to in the definition but it can be argued that they fall within the scope of the provision.²³⁴ Although such arguments can prove difficult and unnecessarily complicate the matter.²³⁵
- 9.28 The broadening of relationships where it is considered that there is a power imbalance may afford greater protection to persons aged 16 and 17 years. However, if the circumstances where the offence applies are not clearly defined it can result in uncertainty. The categories should not be so broad as to criminalise ordinary peer-to-peer consensual sexual activities. The Model Criminal Code Officers Committee of the Standing Committee of Attorney-General recommended that the offence should be limited to a discrete set of relationships, similar to those implemented in the NSW legislation.
- 9.29 The Royal Commission recommended that if there is a concern that one or more categories of persons in a position of authority may be too broad and may capture sexual conduct that should not be criminalised when the child is above 16 years, consideration could be given to introducing defences such as a similar age defence.²³⁶ The defence of similar age is considered in Chapter 11.

Broadening the types of sexual conduct covered by the offence

- 9.30 The current offence only applies to sexual intercourse and does not cover non-penetrative sexual acts with persons aged 16 and 17 years. This may fail to protect some young people who are in a relationship where there is a power imbalance. For example, a teacher who

230. *Crimes Act 1900* (ACT) sections 55A(3)-(4), 61A(3)-(4).

231. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016, page 213.

232. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 117-119.

233. *Crimes Act 1900* (NSW) section 78.

234. For example, *Lab v R* [2006] NSWCCA 202.

235. For example, *R v Miller* [2001] NSWCCA 209.

236. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 29.

engages in indecent touching or fondling with their student does not commit an offence under this provision, provided the conduct is consensual and the student is 16 years or older.

- 9.31 The Model Criminal Code Officers Committee of the Standing Committee of Attorney-General recommended that any such offence apply to acts of indecency and indecent assault.²³⁷

Question

Q21. Should other specific relationships be included in the definition of 'special care'?

Q22. Should 'special care' offences apply to all forms of sexual offences including indecent conduct?

237. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

10. Introducing specific offences of failing to protect and failing to report

In brief

In NSW there is a broad offence of *concealing a serious indictable offence* (section 316) which is not specific to sexual offences against children and does not always reflect the complexities in such matters. There is also legislation in relation to mandatory reporting by certain professional groups. The legislation does not provide an offence of failing to protect a child from sexual abuse.

- 10.1 Although the criminal law generally requires a person to refrain from doing a particular act, it rarely imposes a duty on a person to act, particularly where that person has not themselves committed an offence.²³⁸
- 10.2 The Royal Commission noted that there may be good reasons for the criminal law to require a third party to act in relation to child sexual abuse, including:
- victims often take a long time to disclose the abuse and it can result in the perpetrator going undetected for many years
 - children are less able to report the abuse to police or protect themselves
 - other children may be exposed to potential abuse, and
 - to deter others due to a fear of detection.²³⁹

Failure to report

- 10.3 Only NSW and Victoria have offences that apply to failures to report child sexual abuse, and the NSW offence is a more general offence of concealing a serious indictable offence.²⁴⁰
- 10.4 All Australian jurisdictions have mandatory reporting laws which require the reporting of child sexual abuse allegations by certain professionals to child protection agencies, such as the Secretary of the Department of Family and Community Services.²⁴¹ In NSW, there are currently no criminal penalties for failure to comply with mandatory reporting obligations. Such penalties were removed from child protection legislation in response to recommendations of the 2008 Special Commission of Inquiry into Child Protection Services of NSW, which found the power to prosecute for failing to report had not been exercised and may result in overly cautious reporting.²⁴²

238. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 133.

239. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, pages 133-134.

240. *Crimes Act 1900* (NSW) section 316; *Crimes Act 1958* (Vic) section 327.

241. For example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 27; *Children, Youth and Families Act 2005* (Vic) section 184.

242. The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, recommendation 6.2.

NSW offence of conceal serious indictable offence

- 10.5 Section 316(1) of the *Crimes Act 1900* provides the following offence:
- If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.
- 10.6 Section 316(2) provides a maximum penalty of 5 years imprisonment if an offence under section 316(1) is committed by a person who accepts any benefit for themselves or another person. A serious indictable offence is an indictable offence that carries a maximum penalty of 5 years imprisonment or more.²⁴³
- 10.7 The Attorney General must approve the prosecution of an offence against section 316(1) if the knowledge or belief that an offence has been committed was formed or the information was obtained in the course of practising a profession, calling or vocation.²⁴⁴ This function has been delegated to the Director of Public Prosecutions. The occupations covered by this provision are legal practitioner, medical practitioner, psychologist, nurse, social worker including support worker and counsellor, member of the clergy, researcher, school teacher, arbitrator and mediator.²⁴⁵
- 10.8 Section 316 replaced the common law offence of misprision of felony, which was extinguished on 25 November 1990.
- 10.9 In 1999 the NSW Law Reform Commission recommended that section 316(1) be repealed and amendments made to section 316(2).²⁴⁶
- 10.10 This paper focuses on the effectiveness of this offence when applied to the disclosure of sexual abuse against children. The general operation of section 316(1) is beyond the scope of this paper.

Difficulties applying the NSW offence to child sexual abuse reporting

- 10.11 The offence in section 316 can be used to prosecute concealing most serious crimes but it is rarely used in relation to concealing child sexual abuse.²⁴⁷ It only applies when a person knows or believes an offence has been committed, not when they merely suspect that there might have been an offence. It also only applies when the offence in question is a serious indictable offence (and was a serious indictable offence at the time it was committed).
- 10.12 A person's conduct will only be an offence under section 316 if they do not have a 'reasonable excuse'. The Royal Commission discussed the fact that it may be difficult to determine what amounts to a 'reasonable excuse' in different situations.²⁴⁸ It may be that, when the victim has indicated that they do not want the matter to be reported to Police, this would be a reasonable excuse for a third person not to report the offence. This may be appropriate in some situations (for example, when the victim is now an adult and has made an informed decision free from coercion) but not others (when the victim may be subject to direct or indirect pressure from members of the institution to conceal the offence).

243. *Crimes Act 1900* (NSW) section 4.

244. *Crimes Act 1900* (NSW) section 316(4).

245. Crimes Regulation 2015 (NSW) cl 4.

246. NSW Law Reform Commission, *Review of section 316 of the Crimes Act 1900 (NSW)*, Report 93, December 1999.

247. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 156.

248. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 154.

10.13 As the offence in section 316 has general application, it does not cater to the nuances that may arise in circumstances of child sexual abuse. The offence may discourage victims from disclosing the abuse to their friends and family due to a concern that they will have to report the matter to police. Furthermore, the obligation to report suspected abuse to the police under section 316 applies to children, who may themselves be survivors of sexual abuse.

Victoria uses a more specific offence

10.14 Victorian legislation contains a specific offence relating to a failure to disclose a sexual offence committed against a child under 16 years (see Appendix C).²⁴⁹ It is an offence for an adult who forms a reasonable belief that a sexual offence has been committed against a child under 16 years by another adult to fail to disclose that information to a police officer, unless there is a reasonable excuse for not doing so.²⁵⁰ The offence is not specific to adults who work in institutions or other positions of authority – it applies to all adults with a reasonable belief that a sexual offence has been committed against a child.

10.15 There are a number of exceptions to this offence. It is not an offence if the information came directly or indirectly from the victim, the victim was 16 years or older at the time of providing the information and the victim requested that the information not be disclosed.²⁵¹ It does not apply in circumstances where a person was a child at the time they came into possession of the relevant information.²⁵² It provides exemptions for communications that are privileged or confidential.²⁵³ It prevents the interests of the offender or the reputation of the institution being placed before the interests of the child and the community.

10.16 This offence is relatively new, having commenced on 27 October 2014, and with few prosecutions, it is too early to determine the effectiveness of the provision.

Royal Commission recommends a failure to report institutional child sexual abuse offence

10.17 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.²⁵⁴ The Royal Commission recommended that the offence be confined to institutional contexts to ensure that it only applied to people who could be expected to be aware of the offence and their obligations. It noted that such an offence is particularly important in the institutional context, to ensure that an institution's duty to protect children is prioritised over an institution's interest in protecting its reputation.²⁵⁵

10.18 The Royal Commission recommended the new offence should have the following features:

- It should apply to any adult person who is an owner, manager, staff member or volunteer at a relevant institution, and any person who requires a working with children check for their work at the institution.
- 'Relevant institution' should include any institutions that operate facilities or provide services for children in circumstances where a child is under the care, supervision or control of the institution.

249. *Crimes Act 1958* (Vic) section 327.

250. *Crimes Act 1958* (Vic) section 327(2).

251. *Crimes Act 1958* (Vic) section 327(5).

252. *Crimes Act 1958* (Vic) section 327(7)(a).

253. *Crimes Act 1958* (Vic) section 327(7)(b)-(c).

254. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Recommendation 33.

255. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 176.

- The offence should capture a person if they fail to report relevant information to police where they know, suspect or should have suspected (to a standard of criminal negligence) that an adult associated with the institution was sexually abusing (or had sexually abused) a child.
- The offence should only apply if:
 - the child being abused is under 18, or
 - the suspected perpetrator is still associated with the institution or is known or believed to be associated with another relevant institution, or
 - the suspected abuse may have occurred within the last 10 years.
- There should be no exception for the clergy or for knowledge or suspicions formed (or that should have been formed) on the basis of a religious confession.
- Foster and kinship services should be included, but not individual foster or kinship carers.²⁵⁶

10.19 The recommended new offence would significantly lower the threshold compared with the existing NSW offence in section 316, as it would apply where a person suspects or *should have* suspected that abuse was occurring, rather than just when they know or believe an offence has occurred. The Royal Commission stated that this lower threshold is necessary to address the types of non-reporting uncovered by the Royal Commission, and ensure that members of institutions take their duty to report seriously. It noted that the offence would only apply to a person who *should have suspected* (but did not in fact suspect) that abuse was occurring where there was a 'great falling short of what would be expected of a reasonable person'.²⁵⁷

10.20 The Royal Commission's recommended offence focuses on whether there is a current risk to children, and so requires reporting (whether or not the victim wants the allegations reported) unless the suspected abuse was more than 10 years ago, the suspected victim is now an adult and the suspected perpetrator is no longer known or believed to be associated with any relevant institution. This may require members of institutions to report to police even where this is directly contrary to the wishes of an adult victim who is free from coercion.

10.21 Blind reporting is the practice of reporting information to police about an allegation of child sexual abuse without providing the name or identifying details of the victim. Blind reporting by institutions would only be legally possible in circumstances not covered by the recommended offence. This is because under the proposed offence a reporter would be required to disclose to police all information relevant to the alleged offence and this would include the identity of the victim. This may discourage victims from reporting abuse to members of institutions, and so limit the information available to police and hamper police investigations. Even though blind reporting means that police do not have the victim's name, they will at least have some information that could trigger an investigation or inform a related investigation. However, under the Royal Commission's proposal, blind reporting would still be available to any person or organisation that is not connected to the alleged perpetrator of the abuse.

10.22 Due to their focus on the current risk posed to children, the Royal Commission also recommended that the new offence should be made retrospective in circumstances where the suspicion was formed before the new offence was introduced, but:

- the child in question is still under 18, or

256. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Recommendation 33 and 35.

257. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, pages 209-210.

- the suspected perpetrator is still associated with the institution or known or believed to be associated with a relevant institution.

10.23 Beyond these aspects, the Royal Commission did not make recommendations on some of the specifics of the new offence. If such an offence were to be introduced in NSW, a number of issues would need to be addressed, including:

- the appropriate maximum penalty
- what offences should amount to ‘child sexual abuse’ for the purposes of the offence, or alternatively how this would be defined
- whether the offence would require reporting to police, or whether reporting under the mandatory reporting scheme should be sufficient to avoid criminal liability,²⁵⁸
- what amendments, if any, should be made to section 316, and
- whether it is appropriate that any offence should be limited to situations where the alleged offender is still associated with the institution.

Protection of those that disclose child sexual abuse

10.24 The Royal Commission acknowledged that protection of whistleblowers who disclose child sexual abuse, particularly in institutional settings, may encourage reporting.²⁵⁹

10.25 In NSW the *Public Interest Disclosures Act 1994* provides some protection for those that make disclosures that are in the public interest. It is an offence for a person to take detrimental action against another that is substantially in reprisal for making a public interest disclosure.²⁶⁰ However, this legislation is mainly concerned with the public sector and the protection does not specifically apply to those who disclose child sexual abuse.

10.26 Victoria provides protection to those who disclose child sexual abuse, providing that disclosures made in good faith do not constitute unprofessional conduct, breach of professional ethics and do not contravene medical confidentiality legislation.²⁶¹

10.27 The Royal Commission has not yet made recommendations on this issue, but has indicated that it intends to make recommendations in its final report in December 2017.²⁶²

Question

Q23. Should the Royal Commission’s model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?

Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?

Q25. Should protection be afforded to people who make disclosures of child sexual abuse?

258. The Royal Commission recommended that each jurisdiction should consider whether its mandatory reporting arrangements should be considered sufficient to discharge the person’s obligation under the new offence: Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Parts III-VI, Recommendation 34.

259. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016, page 239.

260. *Public Interest Disclosures Act 1994* (NSW) section 20(1).

261. *Crimes Act 1958* (Vic) section 328.

262. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 134.

Failure to protect

- 10.28 A duty to protect, and any consequent offence of failing to comply with that obligation, is aimed at preventing child sexual abuse. This is different to the offence of failing to report, where the sexual harm to the child has already occurred. The Royal Commission has heard many examples where persons were either allowed to work with a particular child or were allowed to work with other children after concerns were raised and they continued to abuse that particular child and/or other children.²⁶³
- 10.29 There is no offence of failing to protect in NSW. Such an offence was recently introduced in Victoria. The Royal Commission has recommended that all jurisdictions should introduce a targeted offence of failure to protect a child against institutional child sexual abuse.²⁶⁴

Victorian offence of failure to protect

- 10.30 Victoria introduced a new offence, which commenced on 1 July 2015 of failing to protect a child from risk of sexual abuse.²⁶⁵ Amendments to the offence commenced from 1 July 2017. The offence provides that a person commits an offence if:
- the person occupies a position within, or in relation to, a relevant organisation; and
 - there is a substantial risk that a relevant child will become a victim of a sexual offence committed by another person who is an adult associated with the organisation; and
 - the person knows the risks exists and has the power or responsibility to reduce or remove that risk; and
 - the person fails to reduce or remove that risk.²⁶⁶
- 10.31 The offence carries a maximum penalty of 5 years imprisonment.²⁶⁷ The standard of care is that which a reasonable person would exercise in the circumstances.²⁶⁸ It also requires knowledge that there is a substantial risk to the child, mere suspicion will not be enough.
- 10.32 The offence applies to organisations that exercise care, supervision or authority over children and include, but are not limited to a church, religious body, school, hospital, government department, sporting group, youth organisation or charity.²⁶⁹

Offences of criminal neglect or harm may apply

- 10.33 In NSW it is an offence to intentionally take action that results, or appears likely to result, in the child suffering significant harm, as a result of physical injury or sexual abuse, or emotional or psychological harm.²⁷⁰ While the offence can apply to instances of child sexual

263. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016, page 245.

264. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Recommendation 36.

265. See former *Crimes Act 1958* (Vic) section 49C.

266. *Crimes Act 1958* (Vic) section 49O(1).

267. *Crimes Act 1958* (Vic) section 49O(2).

268. *Crimes Act 1958* (Vic) section 49O(3).

269. *Crimes Act 1958* (Vic) section 49O(7).

270. *Children and Young Persons (Care and Protection) Act* (NSW) section 227.

abuse, it does not cover circumstances where individuals or organisations fail to take action to protect children. Other jurisdictions also have similar provisions.²⁷¹

10.34 In South Australia a person is guilty of an offence if:

- (a) a child or vulnerable adult (the victim) dies or suffers serious harm as a result of an unlawful act; and
- (b) the defendant had, at the time of the act, a duty of care to the victim; and
- (c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and
- (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.²⁷²

10.35 A person had a duty of care to the victim if they are the victim's parent or guardian or have assumed responsibility for the victim's care.²⁷³ This offence is generally not charged in relation to child sexual abuse.²⁷⁴

Royal Commission recommends a failure to protect offence

10.36 The Royal Commission found that a failure to protect offence is necessary to supplement even a broad offence of failure to report. In some situations, reporting suspicions to police will not be enough to prevent child sexual abuse. The Royal Commission determined that a person should be criminally liable if they negligently fail to take other available steps to reduce the risk to the child.²⁷⁵ The Royal Commission was particularly concerned to address the many instances it uncovered of institutions, when faced with concerns about a particular person, moving the person to a different role or institution that still provided contact with children.²⁷⁶

10.37 The Royal Commission commented favourably on the Victorian offence, and suggested that Victoria's legislation could be adopted by other jurisdictions as a model that would target the problem without being so onerous that it prevents institutions from continuing to provide services to children.²⁷⁷

10.38 Adapting the Victorian model, the Royal Commission recommended that a new offence targeting failure to protect should have the following features:

- it should apply where an adult person knows there is a substantial risk that another adult person associated with the institution will commit a sexual offence against a child under 16, and the person has the power or responsibility to remove the risk
- the offence should capture a person where they negligently fail to reduce or remove the risk

271. For example, *Children, Youth and Families Act 2005* (Vic) section 493; *Children and Community Services Act 2004* (WA) section 101(1); *Children, Young Persons and Their Families Act 1997* (Tas) section 91.

272. *Criminal Law Consolidated Act 1935* (SA) section 14(1).

273. *Criminal Law Consolidated Act 1935* (SA) section 14(3).

274. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

275. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 234.

276. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 246.

277. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 247 and Recommendation 36.

- it should also capture situations where there is a substantial risk of abuse to a child aged 16 and 17 where the person posing the risk is in a position of authority over the child
- the offence should apply to any institutions that operate facilities or provide services for children in circumstances where a child is under the care, supervision or control of the institution
- the offence should not apply to individual foster carers and kinship carers.²⁷⁸

Question

Q26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

278. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Recommendation 36.

11. Introducing statutory defences

In brief

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.

- 11.1 NSW currently does not have any statutory defences to the offences of sexual intercourse, indecent assault and act of indecency with a child under 16 years. This is contrary to all other Australian jurisdictions as well as Canada, New Zealand and United Kingdom, which all have a statutory defence of honest and reasonable mistake of age, or a similar age defence, or both.

Defence of honest and reasonable mistake of age

- 11.2 Honest and reasonable mistake as to fact is a basic principle of criminal responsibility rather than a defence. The principle is that a person is not criminally liable for an act or omission if he or she holds an honest and reasonable belief in a state of facts, which, if true, would make the act or omission innocent.²⁷⁹

Common law applies in NSW

- 11.3 There is no statutory defence of honest and reasonable mistake in NSW for offences of sexual intercourse, indecent assault and act of indecency with a child below the age of consent. However, the defence is available at common law. Where raised by defence at an evidentiary level, it is for the Crown to disprove the defence beyond a reasonable doubt.²⁸⁰
- 11.4 A limited statutory defence of honest and reasonable mistake as to age was previously available in NSW under section 77(2) of the *Crimes Act 1900*. The defence was only available where the sexual act was consensual, the victim was aged 14 or 15 years and the accused reasonably believed that the victim was 16 years or older. It also required the sexual activity be heterosexual. The burden of proof was on the accused to establish the defence on the balance of probabilities. That section was repealed in 2003 when the age of consent for all sexual intercourse was changed to 16 years.
- 11.5 In *CTM v R*²⁸¹ it was held that following the repeal of section 77(2) the common law defence of honest and reasonable mistake as to age applied to a charge of child sexual abuse. It was held that the defence required an honest and reasonable belief in a state of affairs which, had it existed, would be such that the accused's conduct was innocent. Thus it would be a defence to a charge of sexual intercourse with a child aged 14 or 15 years if the accused honestly and reasonably believed that the complainant was 16 years or over. However, it would not be a defence to a charge of sexual intercourse with child under 14 years if the accused believed that the victim was 15 years of age, for if the child was that age, the

279. For example see, *R v Tolson* (1889) 23 QBD 168; *Proudman v Dayman* [1941] HCA 28; *He Kaw Teh v The Queen* [1985] HCA 43; *Jiminez v The Queen* [1992] HCA 14; *Macleod v The Queen* [2003] HCA 24; *CTM v The Queen* [2008] HCA 25.

280. *CTM v The Queen* [2008] HCA 25.

281. [2008] HCA 25.

conduct would still be an offence. Of course, if the sexual intercourse was not consensual, the accused can be still charged with a general sexual assault offence.

- 11.6 The prosecution does not need to prove that the accused knew or believed that the victim was under the age of 16 years to establish a child sexual abuse offence. However, if there is sufficient evidence adduced at trial on the issue of honest and reasonable mistake of fact in relation to the victim's age, the prosecution must prove beyond a reasonable doubt that the accused did not reasonably and honestly hold that belief.²⁸² This can be contrasted with the position under the repealed statutory defence which places the onus on the accused to establish the defence on the balance of probabilities and limited the defence to charges that relate to complainants who are aged between 14 and 16 years.²⁸³ Below the age of 14 years, the statutory defence of honest and reasonable mistake was unavailable.

The defence varies across other jurisdictions

- 11.7 The defence of honest and reasonable mistake is available in other jurisdictions in Australia and overseas. The particulars of the offence and the minimum age of the child where the defence is available varies between the jurisdictions.
- 11.8 In the Australian Capital Territory, a defence of reasonable mistake as to age is available for certain offences.²⁸⁴ For example, consent is a defence to a charge of sexual intercourse or act of indecency with a child if the accused believed that at the time of the offence the child was 16 years or older.²⁸⁵
- 11.9 Legislation in the Northern Territory provides a defence of reasonable mistake as to age for certain offences.²⁸⁶ For example, it is a defence to a charge of sexual intercourse or act of gross indecency with a child if at the time of the offence the child was 14 years or over and the accused believed that the child was 16 years or over.²⁸⁷ However, unless it is expressly stated, the fact that an accused did not know that the child was under a particular age or believed that the child was over a particular age is not a defence.²⁸⁸
- 11.10 In Queensland there is a defence of reasonable mistake as to the victim's age for particular offences.²⁸⁹ For example, it is a defence to an offence of sodomise with child aged 12 or old and under 18 years if the accused believed that the victim was over 18 years of age. However, unless specified, it is immaterial that the accused did not know that the victim was under a particular age or believed that the person was not under a particular age.²⁹⁰
- 11.11 South Australian legislation provides for a limited defence of reasonable mistake as to victim's age.²⁹¹ For example, it is a defence for an offence of sexual intercourse with child between 14 to 16 years, if the child was 16 years at the time of the offence and the accused reasonably believed that the child was 17 years or older.²⁹² This is in contrast to the offence of indecent assault of child under 14 years where the prosecution does not need to establish that the accused knew or was reckless as to the age of the child.²⁹³
- 11.12 A limited defence of mistake as to age is contained in the Victorian law.²⁹⁴ For example, it is a defence to an offence of sexual penetration of a child under 16 years if at the time of the

282. *CTM v R* [2008] HCA 25; *He Kaw Teh v R* [1985] HCA 43.

283. *CTM v R* [2008] HCA 25; *Crimes Act 1900* (NSW) section 77(2).

284. *Crimes Act 1900* (ACT) sections 55(3)(a), 55A(4), 61(3)(a), 61A(4).

285. *Crimes Act 1900* (ACT) sections 55(3)(a), 61(3)(a).

286. *Criminal Code Act 1983* (NT) sections 127(4), 131(3), 131A(6), 132(5).

287. *Criminal Code Act 1983* (NT) section 127(4).

288. *Criminal Code Act 1983* (NT) sections 139, 202E.

289. *Criminal Code Act 1899* (Qld) sections 208(3), 210(5), 215(5).

290. *Criminal Code Act 1899* (Qld) section 229.

291. *Criminal Law Consolidation Act 1935* (SA) section 49(4).

292. *Criminal Law Consolidated Act 1935* (SA) section 49(4).

293. *Criminal Law Consolidated Act 1935* (SA) section 56(2).

294. *Crimes Act 1958* (Vic) sections 49W, 49X.

offence the child was aged 12 years or older and the accused reasonably believed that the child was aged 16 years or older.²⁹⁵ It is also a defence to an offence of sexual touching or sexual activity with or in the presence of a child under 16 years if the child was 12 years or older and the accused reasonably believed that the child was aged 16 years or older.²⁹⁶ The burden is on the accused to establish the defence on the balance of probabilities.²⁹⁷

- 11.13 In Western Australia the defence of reasonable mistake as to the victim's age is available in limited circumstances.²⁹⁸ For example, it is a defence to an offence of show offensive material to child under 16 years or persistent sexual conduct with child under 16 years if the accused reasonably believed that the child was 16 years or older and the accused was not more than three years older than the child.²⁹⁹ In contrast, a reasonable mistake about the age of the victim in child exploitation material is not a defence to any of the child exploitation offences.³⁰⁰
- 11.14 In New Zealand the defence of reasonable mistake as to age is available for some offences, such as expose child under 16 years to indecent material and sexual conduct with child aged 12 to 15 years. However it requires the accused to have taken reasonable steps to find out that the child was 16 years or older and must have had a reasonable belief that the child was 16 years or over.³⁰¹ The defence is not available for the offence of having a sexual connection or doing an indecent act with a child under 12 years.³⁰²
- 11.15 In Canada it is a defence to some offences that the accused believed the victim was 16 years or over (or 18 years or over as the case may be) at the time of the offence only if the accused took all reasonable steps to ascertain the age of the complainant.³⁰³
- 11.16 Legislation in the United Kingdom does not contain a specific defence of reasonable mistake about the age of the child. Rather, it is an element of some offences that the accused did not reasonably believe that the child was at least 16 years (or 18 years where applicable).³⁰⁴ The onus is generally on the prosecution. However, for matters involving a position of trust or family connection, the accused is presumed to not have reasonably believed that the child was 18 years or older unless sufficient evidence is adduced to raise this issue.³⁰⁵

The case put for a statutory defence of honest and reasonable mistake

- 11.17 The common law defence of honest and reasonable mistake as to age is not limited to an age range and may lead to unjust results. For example, consent would be a defence to sexual intercourse with a 10 year old child if the accused honestly and reasonably believed that the child was 16 years or older. While in most instances it is unreasonable to believe that such a young child is above the age of consent, there may be circumstances where such a defence is raised and cannot be negated by the Crown beyond a reasonable doubt.
- 11.18 The introduction of a limited statutory defence could place parameters on this defence depending on the age of the child. This defence would not negate the need to obtain the consent of the child prior to engaging in sexual activity. This would also be consistent with

295. *Crimes Act 1958* (Vic) section 49W(1).

296. *Crimes Act 1958* (Vic) section 49W(1).

297. *Crimes Act 1958* (Vic) section 49W(4).

298. *Criminal Code Act Compilation Act 1913* (WA) sections 321(9), 321A(9), 322(7).

299. *Criminal Code Act Compilation Act 1913* (WA) sections 204A(4), 321A(9).

300. *Criminal Code Act Compilation Act 1913* (WA) section 221A(1A).

301. *Crimes Act 1961* (NZ) sections 124A(3), 134A.

302. *Crimes Act 1961* (NZ) section 132(4).

303. *Criminal Code 1985* (Canada) sections 150.1(4)-(6), 163.1(5).

304. *Sexual Offences Act 2003* (UK) sections 9(1)(c)(i), 10(1)(c)(i), 15(1)(d).

305. *Sexual Offences Act 2003* (UK) sections 16(4), 17(3), 18(3), 19(3), 25(2), 26(2).

other jurisdictions. Such a defence was also recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.³⁰⁶

- 11.19 One option would be a two-stage test to ensure fairness and justice for the accused and the child. First, the jury would consider whether the accused genuinely believed that the complainant was 16 years or over. If a positive finding is made, the jury would then consider whether this belief was reasonable. Only if both elements are established will the defence be made out.
- 11.20 If the defence similar to that contained in the repealed section 77(2) is reintroduced, the burden of proof could be on the accused to establish the defence on the balance of probabilities. Alternatively, it could require that the defence be reasonably raised by the accused, upon which it must be negated by the Crown beyond a reasonable doubt.
- 11.21 The defence could also require that reasonable steps be taken to ascertain the age of the child. This would emphasise the need to make appropriate enquiries about the child's age. Assumptions or carelessness would not be sufficient.

Options for reform

- 11.22 The following options for reform of the defence of honest and reasonable mistake are available:
1. Leave the current common law defence of honest and reasonable mistake as it applies to child sexual abuse matters. This would mean that were an accused honestly and reasonably believed that the complainant was above the age of 16 years and the conduct was consensual, they would not be guilty of a child sexual assault offence. The onus will remain on the Crown to disprove the defence if raised on an evidentiary level by the accused.
 2. Introduce a defence of honest and reasonable mistake as to age that is only available where the complainant was 14 or 15 years of age at the time of the offence. The statutory defence would be narrower than the current common law defence as it would not be available where the complainant was 13 years or younger at the time of the offence. The onus is on the accused to establish the defence on the balance of probabilities. The jury would need to be satisfied that the accused genuinely believed the complainant was 16 years or above and the belief was reasonable in the circumstances. The defence could be made to apply from the date of commencement or from the date section 77(2) was repealed.
 3. Abolish the common law defence and make the age of the complainant in a child sexual assault matter an element of absolute liability. This may encourage people to take more care to determine the age of another person before engaging in sexual activity. However, it may result in an accused person being convicted of child sexual assault offence in circumstances where they truly and reasonably believed that the complainant was at least 16 years old and the conduct was consensual.

Question

Q27. Should a defence of honest and reasonable mistake as to age be enacted? If yes, should it apply only where the complainant is 14 or 15 years of age and should the onus be on the accused?

306. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

Defence of similar age

- 11.23 In child sexual assault matters, the defence of similar age refers to circumstances where the victim and the accused engaged in consensual sexual conduct and are of a similar age. This defence is often termed the ‘young love defence’. It provides the minimum age of the child and the maximum age difference between the child and the accused. There is generally a ‘no defence age’, where consent of the child to a child sexual abuse offence will not be a defence regardless of the age of the accused.
- 11.24 There is no statutory or common law defence in NSW for child sexual assault offences involving parties of a similar age.
- 11.25 The NSW Police Force has internal guidelines in relation to voluntary sexual activity between two children, both who are under 16 years and within two years of each other.³⁰⁷ In determining whether charges should be laid, police must consider the ages of the children and their maturity, any imbalance in age or power, whether consent was freely given, and the impact of any substance misuse. These guidelines do not provide a defence. Instead, they afford police discretion not to charge in matters involving voluntary sexual activity between peers of similar age.

The defence in other jurisdictions

- 11.26 The defence of similar age is available in Australian Capital Territory,³⁰⁸ Victoria,³⁰⁹ South Australia,³¹⁰ Tasmania³¹¹ and Canada³¹² for child sexual abuse offences. The particulars of the offence and the minimum age of the child and age difference where the defence is available varies between the jurisdictions and is summarised in the table below.

Table 11.1: Particulars of similar age defence in other jurisdictions

Jurisdictions	Minimum age of the child	Age difference
Australian Capital Territory	10 years	2 years
South Australia	16 years	1 year
Victoria	12 years	2 years
Tasmania	12 years 15 years	3 years 5 years
Canada	12 years 14 years	2 years 5 years

The case put for a statutory defence of similar age

- 11.27 A defence of similar age was recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.³¹³ In 2013 the Department of Attorney General and Justice recommended that it consult stakeholders on whether a similar age

307. Guidelines to the investigation of Adolescent Peer Sex, provided by NSW Police.

308. *Crimes Act 1900* (ACT) sections 55(3)(b), 55A(3), 61(3)(b), 61A(3).

309. *Crimes Act 1958* (Vic) sections 49U, 49V.

310. *Criminal Law Consolidation Act 1935* (SA) sections 49(4).

311. *Criminal Code Act 1924* (Tas) sections 124(3), 125B(3), 127(2).

312. *Criminal Code 1985* (Canada) sections 150.1(2)-(3).

313. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

defence for young people close in age engaging in consensual sexual activity should be introduced in NSW³¹⁴.

- 11.28 Current legislation prohibiting children under 16 years from engaging in sexual acts recognises that children are vulnerable and may not understand the consequences of their actions, such as pregnancy and sexual transmitted infections. They may find it difficult to say 'no' when pressured or give into the 'everyone else is doing it' attitude. It protects children who, despite being of similar age, were influenced or subject to predatory behaviour to engage in sexual acts.
- 11.29 An argument in favour of the defence is that the criminal law should recognise that young people engage in voluntary sexual activity. It may not be in the best interests of children if two 15 year old children who engage in consensual sexual activity are both charged with a criminal offence.³¹⁵ A conviction might have long-term consequences on their future careers, travel and employment opportunities. Prosecutorial discretion may not be sufficient.
- 11.30 If the defence was to be adopted, it would apply to all child sexual assault offences and be limited by the minimum age of the children and the maximum age difference between them. Consent of the child is required to establish this defence and it does not permit non-consensual sexual conduct between young people.
- 11.31 Child sexual assault offences, with the exception of *aggravated sexual assault* where the complainant is under 16 years, do not require the prosecution to prove a lack of consent (see paragraphs 2.1-2.3). This avoids young complainants giving evidence and being cross-examined about consent. The introduction of the similar age defence may introduce the issue of consent into these offences. Where the accused relies on a similar age defence, complainants will be required to give evidence about consent. Where there is no dispute that the sexual conduct was consensual and the parties were of a similar age, a prosecution would not be commenced.
- 11.32 If a similar age defence is to be introduced in NSW, consideration as to the onus of proof is required. At common law, the accused generally bears the evidentiary onus of establishing the basis of a defence and the prosecution bears the onus of negating the defence beyond reasonable doubt. A similar age defence could operate analogously by placing the onus on the prosecution to rebut the defence, when raised, beyond a reasonable doubt. Another option is to legislatively reverse the onus, as was previously the case for the honest and reasonable mistake of age defence discussed earlier in this chapter (repealed section 77(2)). This would place the onus on the accused to establish the defence on the balance of probabilities.
- 11.33 The Royal Commission in its *Criminal Justice Report* does not specifically cover the similar age defence. However, it suggested that such a defence could be introduced for under special care offences where the similarity in age may reduce the probability of inequality and exploitation.³¹⁶

Question

Q28. Should a statutory defence of similar age be enacted in NSW? If yes, how should it be framed?

314. Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, October 2013.

315. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

316. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2016, Part III-VI, page 119.

12. Decriminalising consensual ‘sexting’

In brief

The sharing of nude or sexually explicit messages and images is a common practice among young people. Although ‘sexting’ amongst young people is generally consensual and does not result in negative repercussions, it falls within the definition of ‘child abuse material’ and can result in children being charged, with long term ramifications.

‘Sexting’ in the current legal framework

- 12.1 Over the last few years there has been an integration of technology and social media by young people into their lives, including their personal and sexual relationships. The sharing of sexually explicit messages and images among young people has received much attention and has raised concerns that minors and young adults engaging in this behaviour may be charged with child pornography offences.
- 12.2 ‘Sexting’ is generally defined as the digital recording of nude or sexually suggestive or explicit images and their distribution by mobile phone messaging or through social media platforms such as Facebook, Instagram and Snapchat.³¹⁷ The definition can sometimes extend to sexually explicit texts. It is an evolving term that encompasses a wide range of behaviours and practices.³¹⁸

‘Sexting’ may fall within the scope of child abuse material

- 12.3 There are currently no legislative provisions specifically referring to ‘sexting’ in NSW. Under the current law the practice of ‘sexting’ may constitute an offence under sections 91G-91H if the sexually explicit image or text relates to a child under 16 years. For example, it is an offence for a child under 16 years to take or send a sexual explicit image of themselves. It is also an offence for another person to be in possession of such an image. While ‘sexting’ between persons aged 16 years and above is not criminalised by NSW child pornography provisions, such behaviour involving persons under 16 years, even if consensual, may constitute an offence relating to child abuse material.

Definition of child abuse material

- 12.4 The definition of child abuse material is contained in section 91FB of the *Crimes Act 1900* and is as follows:
- (1) In this Division:
- Child abuse material means material that depicts or describes, in a way that reasonable persons would regard as being, in all circumstances, offensive:
- (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or

317. Australian Institute of Criminology, *Sexting amount young people: Perceptions and practices*, Lee M, Crofts T, McGovern A, Milivojevic S, November 2015.

318. Law Reform Committee of Victoria 2013, *Inquiry into sexting*, Parliament of Victoria.

- (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
 - (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
 - (d) the private parts of a person who is, appears to be or is implied to be, a child.
- (2) The matters to be taken into account in decision whether reasonable persons would regards particular material as being, in all circumstances, offensive, include:
- (a) the standards of morality, decency and propriety generally accepted by reasonable adults, and
 - (b) the literary, artistic or educational merit (if any) of the material, and
 - (c) the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and
 - (d) the general character of the material (including whether it is of a medical, legal or scientific character).
- (3) Material that depicts a person or the private parts of a person include material that depicts a representation of a person or the private parts of a person (including material that has been altered or manipulated to make a person appear to be a child or to otherwise create a depiction referred to in subsection (1)).
- (4) The private parts of a person are:
- (a) the person's genital area or anal area, or
 - (b) the breasts of a female person.
- 12.5 The legislation provides for offences relating to the production, dissemination and possession of such child abuse material.³¹⁹
- 12.6 For the purposes of these provisions, a child is defined as a person under the age of 16 years.³²⁰
- 12.7 There are two defences that could apply to the practice of 'sexting'. The first is if the accused could not have reasonably be expected to have known that they had produced, disseminated or possessed child abuse material, for example, because they believed that the child was 16 years or older.³²¹ The second defence is if the material came into the accused's possession unsolicited and reasonable steps were taken to get rid of it.³²²

'Sexting' may involve the commission of other offences

- 12.8 'Commonwealth law provides for offences that would apply to 'sexting' behaviour by young people. In particular it is an offence to possess, control, produce, supply or obtain child pornography material or child abuse material by using a carriage or postal service.³²³ A child is defined as a person under 18 years. This would mean that it is lawful for two people aged 16 years to have consensual sexual intercourse, yet they would both be committing an offence if one sent the other a sexual image of themselves.

319. *Crimes Act 1900* (NSW) sections 91G-91H.

320. *Crimes Act 1900* (NSW) section 91FA.

321. *Crimes Act 1900* (NSW) section 91HA(1).

322. *Crimes Act 1900* (NSW) section 91HA(2).

323. *Criminal Code Act 1996* (Cth) sections 471.17-471.22, 474.19-474.24C.

- 12.9 'Sexting' may also constitute the offence of committing an act of indecency with or towards another person, or inciting someone else to engage in an indecent act.³²⁴ This offence applies where the victim is an adult or a child. There is a higher maximum penalty where the victim is below the age of 16 years. Sending a sexual explicit image may also constitute an offence of *grooming*.³²⁵ 'Sexting' behaviour was prosecuted under section 61N (*incite act of indecency*) of the *Crimes Act 1900* in the case of *DPP v Eades*.³²⁶ The matter involved a 13 year old complainant sending an image of her standing naked to the offender, who was aged 18 years at the time and had requested such an image.

Child Protection Register

- 12.10 Consensual 'sexting' by minors may result not only in a conviction for producing, disseminating or possessing child abuse material but also the possibility of registration on the Child Protection Register.³²⁷ However, if the accused is under 18 years, they will not be registered if they only committed a single offence under section 91H of *produce, disseminate or possess child abuse material* as a result of 'sexting' behaviour.³²⁸ The Parliamentary Committee on Children and Young People recently recommended the introduction of legislation to make appropriate exceptions to registration.³²⁹

'Sexting' practices of young people and potential consequences

Prevalence of 'sexting' practices

- 12.11 Research indicates that 'sexting' is a common behaviour amongst young people. It is mostly done voluntarily and consensually.
- 12.12 The Australian Institute of Criminology conducted a study into the prevalence of 'sexting' amongst young people.³³⁰ For the purposes of the survey, 'sexting' was defined as the sending and receiving of sexual images. The study found that 38% of respondents aged 13-15 years and 50% of respondents aged 16-18 years reporting having sent a sexual picture or video of themselves to another person. 62% of respondents aged 13-15 years and 70% of respondents aged 16-18 years had received a sexual image. The participants were asked about their motivations for sending an image of themselves. The most common answers were "to be fun/flirty", "because I received one", "as a sexy present" and "to keep them interested". The least common answers were "to fit in" and "pressure from friends". The data also indicated that 'sexting' was generally done with few 'sexting' partners and within a relationship.
- 12.13 A recent study examined the 'sexting' practices of students in years 10, 11 and 12.³³¹ The study found that 54% of students had received, and 43% of students had sent, a sexually explicit text message. A sexually explicit image had been received by 42% of students and sent by 26% of students. 9% of students had sent a sexually explicit image of someone else and 22% had used social media for sexual reasons. Year 11 and 12 students were significantly more likely to engage in 'sexting' than year 10 students. The study also found

324. *Crimes Act 1900* (NSW) section 61N.

325. *Crimes Act 1900* (NSW) section 66EB.

326. [2009] NSWSC 1352.

327. *Child Protection (Offenders Registration) Act 2000* (NSW) sections 3, 3A, 3D, 3E.

328. *Child Protection (Offenders Registration) Act 2000* (NSW) sections 3A(2)(c).

329. Committee on Children and Young People, *Sexualisation of Children and Young People*, Report 2/56, November 2016, recommendation 5.

330. Australian Institute of Criminology, *Sexting amount young people: Perceptions and practices*, Lee M, Crofts T, McGovern A, Milivojevic S, November 2015.

331. Patrick K, Heywood W, Pitts M, Mitchell A. Demographic and behavioural correlates of six sexting behaviours among Australian secondary school students. *Sexual Health* 2015; 12: 480-487.

that 'sexting' was significantly associated with sexual behaviour and recreational substance use among both male and female students.

Harmful consequences of 'sexting'

- 12.14 While the majority of 'sexting' behaviour is voluntary and not detrimental to the parties involved, there can be instances that result in harm.
- 12.15 An image may be distributed beyond the initial intended recipient without consent of the person depicted in the image. This can lead to significant and ongoing harm including embarrassment, harassment and bullying. Young women are more likely than young men to suffer negative social consequences from redistribution of sexual images.³³² It can also be used to propagate gender stereotypes and can amount to violence against women.
- 12.16 A young person may later regret sharing a sexually explicit image of themselves, even when this was initially done consensually. Unlike physical photographs, it is almost impossible to retrieve or destroy a digital image that has been shared. Such an image can be duplicated without any limitations and its onward distribution cannot be stopped. It can sexualise children and place undue pressure on them to engage in 'sexting'.³³³
- 12.17 Furthermore, images can be used or manipulated for the purposes of producing child pornography. In 2015 the Internet Watch Foundation conducted a study into the trends of online sexual content.³³⁴ The study examined 3,803 images and videos of nude or semi-nude young people aged 20 years or younger. It found that 89.9% of the images and videos assessed had been harvested from the original upload location and were redistributed by third party websites. All of the content assessed as depicting children aged 15 years or younger had apparently been harvested from its original upload location and collected on third party websites. In the majority of images young people took no steps to conceal their identity or location.
- 12.18 'Sexting' behaviour may involve the commission of a criminal offence. Although police discretion is generally being exercised in matters involving consensual 'sexting', there is a real risk of being prosecuted. A child under 16 years who takes an image or a video of themselves would have committed the offence of producing child abuse material. Sending that image would involve dissemination of child abuse material and the saving of the image by the recipient would be possession of child abuse material. These offences carry a maximum penalty of 10 years imprisonment.³³⁵ A conviction for such an offence may have long term consequences. It may involve a child being placed on the Child Protection Register, as discussed above. It can also deter children from reporting non-consensual dissemination of images that they voluntarily provided for fear of being prosecuted themselves.

'Revenge porn'

- 12.19 The Government has introduced legislation to criminalise the non-consensual distribution of intimate images, commonly known as 'revenge porn' or image based abuse. The Crimes Amendment (Intimate Images) Act 2017 will make it an offence to intentionally record or distribute an intimate image of another person without their consent. It will also make it an offence to threaten to record an intimate image without consent. These offences will be punishable by maximum penalties of imprisonment for three years, or a fine of 100 penalty units, or both.

332. Law Reform Committee of Victoria 2013, *Inquiry into sexting*, Parliament of Victoria.

333. Law Reform Committee of Victoria 2013, *Inquiry into sexting*, Parliament of Victoria.

334. Internet Watch Foundation, *Emerging Patterns and Trends Report #1: Online-Produced Sexual Content*, 10 March 2015.

335. *Crimes Act 1900* (NSW) section 91H(2).

- 12.20 The legislation specifies that a child under 16 years cannot consent to the recording or distribution of an intimate image. This approach was taken for consistency with the current law in NSW for other child sexual offences.
- 12.21 The offences will not apply to a child under 16 years who takes and sends an intimate image of themselves to another person. However, the offences will apply to a person who records an intimate of a child under 16 years, or who distributes an image they have been sent by a child under 16 years. To prevent the new offences over-criminalising activity between children, the Director of Public Prosecutions will be required to approve any prosecution of a child under 16 years for one of these offences. The new offences apply in addition to existing State offences and Commonwealth telecommunications offences.

Other jurisdictions

- 12.22 All Australian jurisdictions have laws criminalising the production, dissemination and possession of child pornography material. The definition of a child in relation to child pornography material varies across jurisdictions. In NSW, Queensland and Western Australia the material must relate to a child who is, or who appears to be, under 16 years. In South Australia the material must relate to a child who is, or appears to be, under 17 years. In the Commonwealth, ACT, Northern Territory, Tasmania and Victoria the material must relate to a child who is, or appears to be, under 18 years.
- 12.23 All jurisdictions have defences available for child pornography offences if the conduct was of public benefit and was necessary for purposes such as law enforcement or scientific research.
- 12.24 Only Victoria has introduced specific defences to child pornography offences with the intention of decriminalising certain 'sexting' activities. Tasmania has a defence for child pornography that was not introduced with 'sexting' in mind, but could nevertheless have the effect of decriminalising certain 'sexting' behaviour.

Victoria

- 12.25 In Victoria, under sections 51C-51H of the *Crimes Act 1958* (Vic) it is a crime to produce, distribute possess or access child abuse material or encourage or administer a website that deals with child abuse material. It is also an offence to involve a child in the production of child abuse material.³³⁶ A child under the legislation is defined as a person under 18 years.³³⁷
- 12.26 In 2014 Victoria introduced the specific exceptions to child pornography offences, as they were then called, for 'sexting' by young people under 18 years. These were previously contained in section 70AAA of the *Crimes Act 1958* (Vic). An amended version of the defences were introduced in sections 51M-51P and commenced on 1 July 2017.³³⁸ It covers a selection of circumstances involving consensual 'sexting'. It also covers situations where the child is the victim of child pornography offences.
- 12.27 Child pornography offences do not apply to an accused person in the following circumstances:
- the person is a child and the image is of themselves alone or the image depicts a criminal offence where they are the victim;

336. *Crimes Act 1958* (Vic) section 51B.

337. *Crimes Act 1958* (Vic) section 51A(1).

338. See Appendix D for the full version of the sections.

- the image does not depict a crime and the accused is less than two years older than the youngest minor depicted in the image;
- the image is of themselves as a child, it does not depict a criminal offence and they did not distribute the image to any other person; or
- the image is of a child aged 16 or 17 years who is not under their care, supervision or authority where the age difference is less than two years, it does not depict a criminal offence and the image was not distributed to any person other than the accused.

Tasmania

- 12.28 In Tasmania, it is an offence to produce, distribute, possess or access child exploitation material or involve a child under 18 years in the production of child exploitation material.³³⁹
- 12.29 A defence to child pornography offences is available where child pornography material depicts sexual activity between the accused and a child under 18 years that is not an unlawful sexual act.³⁴⁰ While this defence was not introduced with 'sexting' in mind, it may nevertheless apply to certain 'sexting' behaviour.
- 12.30 Under the *Criminal Code Act 1924* (Tas), there are a number of age-based defences to crimes of unlawful sexual intercourse and indecent act with someone under 17 years. Consent is a defence to these charges where the complainant is 15 years or over and the perpetrator is no more than 5 years older or where the complainant is 12 years or over and the perpetrator is no more than 3 years older.³⁴¹ Accordingly, a person who is charged with a child pornography offence for a photo that depicts consensual sexual activity within these parameters can raise the defence that the depicted act is not unlawful. However, this defence would only apply to depictions of sexual intercourse and thus may not apply to images depicting 'naked selfies', which is a common form of 'sexting' material.

Options for reform

- 12.31 There is evidence to suggest that the majority of young people who engage in 'sexting' activities do so voluntarily, consensually and with few 'sexting' partners.³⁴² These findings suggest that the majority of 'sexting' occurs without negative consequences and within existing relationships. However, such behaviour is not without its risks. Children could be subjected to ridicule or peer pressure and the images may be used by unintended recipients to produce child abuse material.
- 12.32 Young people may be prosecuted for engaging in consensual 'sexting' activities. While police may use their discretion not to prosecute in most instances, there is nevertheless a conflict between the law and current practices of young people. There remains the real possibility that a child may be charged and convicted of child abuse material offences or the new intimate images offences, with long lasting consequences. Children and young people may need education about the practice of 'sexting' and the law concerning child abuse material, intimate image offences and indecent acts.³⁴³
- 12.33 The law in relation to child abuse material is designed to protect children from sexual exploitation. To prosecute children for creating or sharing consensual sexually explicit

339. *Criminal Code Act 1924* (Tas) sections 130-130D.

340. *Criminal Code Act 1924* (Tas) section 130E(2).

341. *Criminal Code Act 1924* (Tas) sections 124(3), 125B(3).

342. Australian Institute of Criminology, *Sexting amount young people: Perceptions and practices*, Lee M, Crofts T, McGovern A, Milivojevic S, November 2015.

343. National Children's and Youth Law Centre, *New Voices/New Laws*, November 2012.

images, videos and texts of themselves to prevent such material from being used for child pornography purposes may be akin to victim blaming. It does not protect children but rather makes children who may become victims of child pornography vulnerable to prosecution. The Parliamentary Committee on Children and Young People “considers that education provides the best means to prevent such non-consensual sharing of images”.³⁴⁴

- 12.34 There is no doubt that prosecutions and the law should continue to target non-peers and those who create, possess or distribute images of children without their consent. However, there exists a strong argument in favour of the introduction of defences or exceptions to child abuse material offences and potentially the new intimate image offences in the context of ‘sexting’. This would acknowledge that the practice of age appropriate ‘sexting’ is distinct from child pornography offences, which the legislation was originally introduced to target.³⁴⁵

Question

Q29. Should NSW introduce a defence to decriminalise consensual ‘sexting’ involving persons under 16 years? If yes, how should the defence work?

344. Committee on Children and Young People, *Sexualisation of Children and Young People*, Report 2/56, November 2016 at p 54.

345. National Children’s and Youth Law Centre, *New Voices/New Laws*, November 2012.

13. Limiting circumstances where complainants give evidence on multiple occasions

In brief

In some circumstances, a complainant may be required to give evidence on multiple occasions where the accused is a young person. This can lead to duplication, delay and increased difficulties for complainants.

- 13.1 Generally in NSW, a complainant in a child sexual abuse matter is only required to give evidence once. Although proceedings that are to be dealt with on indictment begin in the Local Court before being committed for trial in a higher court, there are restrictions on calling complainants to give evidence in Local Court committal proceedings for a prescribed sexual offence and a prohibition on calling child sexual assault complainants who are under 18 years.³⁴⁶ This means most sexual assault complainants (and all child sexual assault complainants) give evidence once only, during the trial in the higher court.

Some complainants give evidence more than once where accused is a young person

- 13.2 Young people charged with a 'serious children's indictable offence' are dealt with in a similar way to adults, except their proceedings begin in the Children's Court instead of the Local Court. Complainants cannot generally be called to give evidence in the Children's Court committal proceedings for these offences and instead give evidence only once, at the trial in the higher court. The most serious child sexual abuse offences fall under the definition of 'serious children's indictable offence', including *sexual intercourse with a child under 10 years* and *aggravated sexual assault* (unless the only circumstance of aggravation is that the victim was under 16 years old).³⁴⁷
- 13.3 However, a different procedure applies to other child sexual abuse offences that are not serious children's indictable offences. For these other indictable offences, the Children's Court may deal with the matter to finality, or may commit a young person for trial in the District or Supreme Court. The Children's Court will commit a young person for trial in a higher court where:
- all the evidence for the prosecution has been taken and the court is of the opinion that the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence, and the matter cannot be properly dealt with summarily, or
 - a young person elects to be dealt with as an adult at any time during or at the end of the prosecution's case (except where the charge is one that may be dealt with summarily without the consent of the accused).³⁴⁸
- 13.4 Before determining which jurisdiction should deal with a young person charged with an indictable offence, the Children's Court must first conduct a hearing where prosecution and

346. *Criminal Procedure Act 1986* (NSW) sections 91(8) and 93.

347. *Children (Criminal Proceedings) Act 1987* (NSW) section 3.

348. *Children (Criminal Proceedings) Act 1987* (NSW) sections 31(2) and 31(3).

defence evidence is tendered, any witnesses are called and submissions are made by both parties. It is only at the conclusion of the prosecution case that the Children's Court can decide that the young person must be tried according to law in a higher court. If the young person is committed for trial in a higher court, all of the evidence is repeated at the trial in the District or Supreme Court.

- 13.5 This means that in any prosecution for an indictable child sexual abuse offence where the accused is a young person, the complainant may be required to give evidence twice – once before the Children's Court, and again before a higher court, if the Children's Court determines that the matter should be finalised in a higher court.
- 13.6 The same problem arises where there is also a co-accused who is an adult. When an indictable offence is charged jointly against a young person and an adult, the Children's Court can hear and determine committal proceedings in respect of both accused if it is of the opinion that this is in the interests of justice.³⁴⁹ In such a case, the Children's Court exercises the jurisdiction of a Local Court Magistrate in relation to the adult and the child sexual assault complainant cannot be required to give evidence in the proceedings in relation to the adult. However, the complainant will still be called to give evidence in the Children's Court in relation to the young person. If this occurs and at least one of the co-accused is committed for trial, the complainant will then be required to give evidence a second time at trial in the higher court.

Options for reform

- 13.7 Requiring complainants to give evidence more than once can lead to duplication and delay. It can also compound the difficulties faced by complainants, who are often vulnerable and can be re-traumatised in the process of giving evidence and being cross-examined.
- 13.8 The Royal Commission has recommended that governments should review their legislation – and if necessary introduce amending legislation – to ensure that complainants in child sexual abuse prosecutions do not have to give evidence on multiple occasions where the accused or a co-accused is a juvenile.³⁵⁰ The Royal Commission suggested there may be a number of ways of implementing this recommendation, including:
- The Children's Court could continue to have a full hearing of the matter (where the offence is an indictable offence other than a serious children's indictable offence), but the legislation could prevent the court hearing evidence from the complainant other than a pre-recorded police interview. However, such recordings are generally not available in historic child sexual abuse matters where the complainant is now an adult.
 - Where there is an adult co-accused, the legislation could allow juveniles charged with child sexual abuse offences to be dealt with in the adult courts along with the adult co-accused. However, this would only assist where there is an adult co-accused, and would be a significant departure from the current approach where a young person is dealt with as a juvenile.
 - Complainants could be permitted to prerecord evidence on one occasion, which can then be used for the purposes of any proceedings in both the higher courts and the Children's Court. The Child Sexual Offence Evidence Pilot allows child complainants to pre-record their evidence but this occurs in the higher court after committal, once the matter is further advanced. It may be difficult to pre-record complainants'

349. *Children (Criminal Proceedings) Act 1987* (NSW) section 29(2).

350. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 84.

evidence at such an early stage, and this would also have significant resource implications.

13.9 As well as the options suggested by the Royal Commission, additional reform options could include:

- The Children's Court could determine to commit a young person for trial or sentence in a higher court solely on tendered documents, without a hearing at which the complainant would be called to give evidence. This would reflect the current Local Court process for adults.
- The prosecution could be given the option to elect that a matter is to be dealt with on indictment in a superior court. This is similar to the current power afforded to the prosecution when an adult accused is charged with an indictable offence. The power to elect could be limited to circumstances where the young person is charged with a sexual assault offence.
- More indictable offences, and particularly serious sexual offences, could be made 'serious children's indictable offences', so the Local Court process would apply.

13.10 The Government announced reforms to criminal procedure in May 2017 to encourage more appropriate early guilty pleas. These reforms will change criminal procedure in the Local Court, but will not affect criminal procedure in the Children's Court. Once implemented, this reform will include the introduction of charge certification by senior prosecutors to perform the function of screening out cases, replacing committal decisions by the Local Court. However, restrictions on calling complainants to give evidence in the Local Court prior to trial in the higher court will remain, as will the disparity for complainants where the accused is a young person rather than an adult.

Questions

Q30. Should the Royal Commission's recommendation to ensure that child sexual abuse complainants are not required to give evidence on multiple occasions be adopted? If yes, what is the best option to achieve this reform?

14. Tendency and coincidence evidence

In brief

In NSW, tendency evidence and coincidence evidence is only admissible in a criminal proceeding if its probative value substantially outweighs the risk of prejudice to the accused. The Royal Commission concluded that this approach unjustly favours the accused in child sexual offence proceedings, and recommended that all jurisdictions amend their legislation to facilitate greater admissibility of tendency and coincidence evidence and more joint trials in such proceedings.

- 14.1 The admissibility of evidence in proceedings in NSW courts is governed by the *Evidence Act 1995*, which enacts the Uniform Evidence Law adopted in most Australian jurisdictions.³⁵¹ Part 3.6 of the Act governs the admissibility of tendency and coincidence evidence. This chapter focuses on the admissibility of tendency and coincidence evidence in criminal proceedings where the defendant is charged with a child sexual offence, as this was a key issue the Royal Commission examined in its Criminal Justice Report.

Admissibility of tendency and coincidence evidence in NSW

- 14.2 Tendency evidence is “evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, [adduced] to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind”.³⁵² For example, where a person who is charged with child sexual offence has a history of such offences, evidence may be adduced to demonstrate that the accused has a sexual interest in children and a tendency to act on that interest (to show that the accused had that state of mind or acted in that way in the manner alleged). This is known as ‘propensity’ evidence and reasoning at common law.
- 14.3 Coincidence evidence is defined as “evidence that 2 or more events occurred [adduced] to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally”.³⁵³ For example, if multiple children allege that a person sexually assaulted them in similar circumstances, the prosecution may adduce evidence to demonstrate the improbability of the coincidence of multiple similar, but false, allegations being made (to show that the accused committed the charged offence). This is known as ‘similar fact’ evidence and reasoning at common law.

Admissibility of tendency and coincidence evidence

- 14.4 Section 97 of the *Evidence Act 1995* establishes the tendency rule, which provides that tendency evidence is not admissible unless reasonable notice is given and “the court thinks

351. The Commonwealth, NSW, Victoria, Tasmania, ACT and NT are Uniform Evidence Act jurisdictions, and have parallel legislation based on the Model Uniform Evidence Bill endorsed by the then Standing Committee of Attorneys-General in 2007.

352. *Evidence Act 1995* (NSW) section 97(1) and Dictionary.

353. *Evidence Act 1995* (NSW) section 98(1) and Dictionary.

that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value”.

- 14.5 Importantly, tendency evidence adduced by the prosecution in criminal proceedings is further restricted. Section 101 provides that tendency evidence about a defendant cannot be used against the defendant “unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant”.
- 14.6 The coincidence rule under s 98 of the *Evidence Act* provides that coincidence evidence is not admissible unless reasonable notice is given and “the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value”.
- 14.7 The asymmetrical balancing required under s 101 also applies to coincidence evidence, such that its probative value must substantially outweigh the risk of prejudice for it to be admissible.
- 14.8 Under the *Evidence Act 1995*, the assessment of the admissibility of tendency and coincidence evidence takes the probative value of evidence at its highest. That is, the probative value of the evidence is assessed assuming the evidence will be accepted as true, and any questions as to reliability or credibility relating to the evidence do not factor into the assessment. Instead, they become a matter for the trier of fact to resolve if the evidence is adduced. This abrogates the position at common law, where the judge is required to consider reliability and credibility in assessing the probative value of evidence to determine whether it should be admitted.
- 14.9 However, some case law has suggested that in certain circumstances a judge may be required to consider the reliability and credibility of the evidence when assessing its probative value. For example, if the possibility of collusion, concoction or contamination is so significant that it undermines the capacity of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding, the judge might consider this possibility in determining admissibility of the evidence, rather than leaving it to the jury to determine.³⁵⁴

Tendency and coincidence evidence in child sexual assault proceedings

- 14.10 Tendency and coincidence evidence is said to have ‘particular prominence’ in proceedings relating to sexual offences, including child sexual offences.³⁵⁵ This prominence arises from the common nature of such offences.
- 14.11 As noted by the Royal Commission, child sexual offences are “generally committed in private and with no eyewitnesses [and] no medical or scientific evidence capable of confirming the abuse”.³⁵⁶ In trials for these offences, the fact at issue is often whether the offence occurred (rather than the identity of the perpetrator of the offence).³⁵⁷
- 14.12 In these circumstances, the only direct evidence of the alleged offence often comes from the complainant, so the trier of fact is effectively considering the word of the complainant against that of the accused. The complainant’s account, and their reliability or credibility, may be supported by evidence from other complainants who allege that the accused sexually abused them (where evidence is ‘cross-admissible’) or by the evidence of witnesses who say that the accused also sexually abused them. In ‘word against word’ cases, this evidence can be

354. *GM* [2016] NSWCCA 78.

355. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 457.

356. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 411.

357. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 414.

critical in satisfying the trier of fact beyond a reasonable doubt that an alleged offence occurred.³⁵⁸

- 14.13 The Royal Commission also noted that, in proceedings for child sexual offences, a single offender has often offended against multiple victims.³⁵⁹ This is consistent with studies that suggest that the 'propensity' of such offenders is particularly high.³⁶⁰ Notably, evidence also demonstrates that a single perpetrator often commits child sexual offences in vastly different circumstances.³⁶¹

Tendency and coincidence rules can impact joint trials

- 14.14 There is no legislative presumption in favour of joint trials in child sexual offence matters in NSW, but the prosecution can present an indictment seeking to try an accused in relation to two or more victims in the same trial. However, the application of the tendency and coincidence rules may affect whether a joint trial to determine charges against an accused by multiple complainants is held,³⁶² because a joint trial is less likely to proceed where tendency and coincidence evidence is not cross-admissible (and the jury would not be allowed to use tendency or coincidence reasoning with respect to the charges).³⁶³
- 14.15 Where similar allegations are made by multiple complainants against a single accused, the prosecution usually seeks to hold a joint trial of all the charges before one jury so that there are fewer restrictions on the evidence that can be adduced and the full picture of the accused's alleged criminality is presented to the jury. Joint trials can also facilitate a sense of unity and mutual support for the complainants in the proceedings.³⁶⁴ The Royal Commission also advocated more joint trials in child sexual offence proceedings for these reasons.³⁶⁵

Other jurisdictions

- 14.16 As noted above, the majority of other jurisdictions in Australia have also enacted the Uniform Evidence Law. As such, the legislation in those jurisdictions mirrors that in NSW.

Victoria

- 14.17 Although Victoria has enacted the Uniform Evidence Law, case law in the jurisdiction has developed in a different direction to NSW. The key differences are:
- In Victoria, common or similar features or an underlying unity or pattern in the sexual offending is required (rather than merely beneficial) to establish significant probative value.

358. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 334 and 628.

359. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 411.

360. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 638.

361. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 597.

362. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 411.

363. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 416.

364. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 445.

365. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 591.

- The circumstances that would be considered similar features are narrower in Victoria than in NSW.
- Historically, Victoria also maintained the common law position that the reliability of and weight a jury might give to evidence affects the probative value of the evidence, but this was overruled in *IMM* in 2016.³⁶⁶

14.18 These discrepancies may be reduced by the recent High Court decision in *Hughes*, which held that Victoria had an “unduly restrictive approach to the admission of tendency evidence” and accepted the NSW approach.³⁶⁷

14.19 Victoria also has a legislative presumption in favour of joint trials, which is not rebutted merely because the evidence on one charge is inadmissible on another charge.³⁶⁸ However, the Victorian Government told the Royal Commission that in practice charges are still often severed into separate trials where evidence is not cross-admissible between complainants due to the perceived risk of unfair prejudice to the accused.³⁶⁹

Queensland

14.20 In Queensland, a modified version of the common law test outlined by the High Court in *Pfennig* in 1995 applies. Under that test, propensity and similar fact evidence may be admitted if it possesses “a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged”.³⁷⁰ This sets a much higher bar for admissibility than the *Evidence Act 1995* in NSW as, for the evidence to be admissible, there must be no rational interpretation of the evidence available that is consistent with the accused being innocent of the offence charged.

South Australia

14.21 In South Australia, s 34P of the *Evidence Act 1929* (SA) prescribes that evidence of a defendant’s discreditable conduct may be admitted if reasonable notice is given and its probative value substantially outweighs any prejudicial effect it may have on the defendant. If the evidence is used for propensity reasoning, it also must have a ‘strong probative value’ having regard to the particular issues arising at trial. This test is similar to the tests for admissibility of tendency and coincidence evidence in NSW.

14.22 The *Evidence Act 1929* (SA) also overrides the common law such that the probative value of the evidence is assessed at its highest and any possibility of collusion, concoction or contamination is left to the jury to consider.

Western Australia

14.23 Section 31A of the *Evidence Act 1906* (WA) provides that propensity evidence is admissible if the court considers that it would have significant probative value and “that the probative value of the evidence compared with the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial”.

366. *IMM v The Queen* [2016] HCA 14.

367. *Hughes v The Queen* [2017] HCA 20 [12].

368. *Criminal Procedure Act 2009* (Vic) section 194.

369. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 525.

370. *Pfennig v The Queen* [1995] HCA 7 [58], [61] (Mason CJ, Deane and Dawson JJ); (1995) 182 CLR 461, 481, 483.

- 14.24 Like in the NSW *Evidence Act 1995*, it “is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion” when considering the probative value of the evidence.³⁷¹
- 14.25 The Royal Commission formed the view that the Western Australian legislation provided for “probably the most liberal test for admitting tendency and coincidence evidence in Australia, particularly taking into account how it is applied by the Western Australian courts”.³⁷²

England and Wales

- 14.26 Since the introduction of the *Criminal Justice Act 2003* (UK), “evidence of bad character” is admissible in proceedings in England and Wales if it satisfies one of seven prescribed conditions. The conditions are fairly broad, and include being “relevant to an important matter in issue between the defendant and the prosecution”.³⁷³
- 14.27 This legislation was enacted to allow more tendency and coincidence evidence to be adduced than the English common law had allowed. It was described by the Royal Commission as ‘the most liberal’ approach that it examined in its consideration of tendency and coincidence evidence.³⁷⁴

Canada

- 14.28 Canadian common law governs the admissibility of ‘propensity’ and ‘coincidence’ evidence, although it does not clearly distinguish between them. Such evidence is to be admitted if the prosecution demonstrates that its probative value outweighs any prejudicial risk. It appears that this requires a degree of specificity in the propensity.³⁷⁵

New Zealand

- 14.29 In New Zealand, the admissibility of propensity and coincidence evidence is governed by Subpart 5 of Part 2 of the *Evidence Act 2006* (NZ). These types of evidence are not distinguished, and can only be admitted if the probative value of the evidence outweighs its prejudicial risk.

United States of America

- 14.30 Tendency and coincidence evidence is broadly excluded in the United States by Federal Rule of Evidence 404(b)(1), although laws vary across jurisdictions. However, notably, “the tendency to admit other-misconduct evidence appears to be stronger in sexual abuse cases”.³⁷⁶ Under Federal Rules of Evidence 413 and 414, evidence of other sexual assaults or any child molestation can “considered on any matter to which it is relevant” in relation to charges of sexual assault or child molestation, respectively.

371. *Evidence Act 1906* (WA) section 31A(3).

372. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 430.

373. *Criminal Justice Act 2003* (UK) section 101(1).

374. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 487.

375. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 493.

376. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 499.

Probative value versus prejudicial risk

- 14.31 Provisions governing admissibility of tendency and coincidence evidence seek to balance the probative value of the evidence against the risk of prejudice to the accused.
- 14.32 Views differ on whether the law governing the admissibility of tendency and coincidence evidence in NSW strikes the proper balance between allowing probative evidence to be adduced and protecting the accused from unfair prejudice, particularly in child sexual offence proceedings. This debate is reflected in Part VI of the Royal Commission's Criminal Justice Report.

The probative value of tendency and coincidence evidence

- 14.33 The tendency and coincidence rules recognise that circumstantial evidence of an accused's previous conduct may be logically probative of guilt.³⁷⁷ However, such evidence can only be considered in the assessment of the probability of the existence of a fact in issue through permissible tendency or coincidence reasoning.
- 14.34 Tendency evidence may be probative because it can inform the assessment of the probability of the accused having, or having had, a tendency to act in a particular way or to have or have had a particular state of mind, and whether they acted in a particular way or had the state of mind alleged on an occasion in issue in the proceeding. This reasoning involves considering the tendency and how precisely it correlates to the act or state of mind the accused is alleged to have had on the occasion in issue.
- 14.35 The law has traditionally taken the view that tendency evidence has a greater probative value if it possesses a more distinctive common feature with the conduct the charge in issue, as it makes it increasingly rational to reason that it is likely the accused acted in that manner in relation to the charge. However, the High Court recently held that, under the *Evidence Act 1995*, evidence that an adult man had a sexual interest in female children aged under 16 years "and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection", had significant probative value in a trial for a sexual offence involving an underage girl, despite the evidence not displaying specific features similar to the facts in issue.³⁷⁸
- 14.36 Coincidence evidence, such as evidence of previous similar complaints against an accused, may be adduced to demonstrate that it is improbable that the similar allegations are a coincidence or that all complainants are mistaken or lying. Again, if it is established that the accused committed another offence in a similar manner or circumstances, the law has held that a jury can reason that it is more probable that the accused committed the charged offence.
- 14.37 The Royal Commission considered that it was unclear why, when two important similarities in criminal behaviour are present – *sexual* offending against a *child*³⁷⁹ – any further level of similarity between incidents of proven or alleged child sexual abuse, or distinctiveness in the offending, would be required for tendency or coincidence evidence to have significant probative value.³⁸⁰

377. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 414.

378. *Hughes v The Queen* [2017] HCA 20 [2].

379. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 595.

380. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 594.

The prejudicial risk of tendency and coincidence reasoning

- 14.38 NSW courts have a long history of preventing tendency or coincidence evidence being adduced due to the risk of prejudice to the accused.³⁸¹ This reflects, at least in part, concern about impermissible jury reasoning. In fact, the Royal Commission suggested that it is this concern, rather than any perceived lack of probative value, that plays the largest role in limiting the admissibility of tendency and coincidence evidence.³⁸²
- 14.39 The Royal Commission identified three ways in which this prejudice is anticipated to manifest:³⁸³
- *Inter-case conflation prejudice*: Juries will confuse or conflate the evidence led to support different charges in a joint trial, so that they will wrongly use evidence relating to one charge in considering another charge.
 - *Accumulation prejudice*: Juries will assume the accused is guilty due to the number of charges against him or the number of prosecution witnesses, regardless of the strength of the evidence.
 - *Character prejudice*: Juries will use evidence about the accused's other criminal misconduct and find guilt by reasoning that an accused who has behaved in a certain way once will do so again.
- 14.40 The exclusion of tendency and coincidence evidence to prevent such prejudice is seen as the 'duty of a trial judge'.³⁸⁴ The common law has long considered this duty particularly important in sexual offences, including child sexual offences, which are said to require special care to ensure that the accused is not unfairly prejudiced.³⁸⁵
- 14.41 The Royal Commission expressed doubt about the actual likelihood or incidence of this impermissible reasoning (and resultant unfair prejudice). Research was commissioned that used mock juries to acquire evidence on the actual reasoning process undertaken by juries.³⁸⁶ The research found that, contrary to assumptions made in the common law, it is "unlikely that a defendant will be unfairly prejudiced in the form of impermissible reasoning as a consequence of joinder of counts or the admission of tendency evidence".³⁸⁷ Instead, "jury verdicts were logically related to the probative value of the evidence".³⁸⁸
- 14.42 The Royal Commission noted that a number of the submissions it received perceived limitations in the methodology and findings of the research. These included concerns that the research did not account for the breadth of the concepts of impermissible reasoning and unfair prejudice, doubts that the matters presented to the mock jury covered all the ways in

381. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 455.

382. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, see, for example, pages 417 and 455.

383. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 458.

384. *IMM v The Queen* [2016] HCA 14, [158]–[161] (Nettle and Gordon JJ); (2016) 257 CLR 300, 345-6.

385. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 457.

386. Consideration of this research is beyond the scope of this paper, however we invite comments on its findings, particularly because the research was conducted by reference to the law as it applies in NSW: *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* <http://childabuseroyalcommission.gov.au/policy-and-research/events/jury-reasoning-launch>

387. J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pages 36-37.

388. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 463.

which unfair prejudice may manifest, and disbelief that a mock jury could ever have the negative responses to a fictional accused that may be expected in a real trial.³⁸⁹

- 14.43 Despite these concerns, the Royal Commission was satisfied that the research methodology was strong “in terms of the size, selection and composition of its mock juries, and the presentation of its mock trials”, and that the findings had substantial “validity in terms of informing a consideration of issues in relation to the admissibility of tendency and coincidence”.³⁹⁰

Options for reform

- 14.44 The Royal Commission concluded that “the current law needs to change to facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual abuse matters” as a matter of urgency as its operation is resulting in injustice to complainants and the community.³⁹¹ It expressed the view that “there have been unjust outcomes in the form of unwarranted acquittals” as a consequence of excluding relevant evidence in the form of tendency and coincidence evidence in child sexual offence proceedings.³⁹²
- 14.45 That conclusion was underpinned by the view that tendency and coincidence evidence in child sexual offence proceedings was generally more relevant, and less prejudicial, than the law assumes.³⁹³ That is, the law currently *understates* the probative value of tendency and coincidence evidence and *overstates* the risk that such evidence will unfairly prejudice the accused,³⁹⁴ and is therefore “unfairly protective of the accused”.³⁹⁵
- 14.46 The Royal Commission recommended that all jurisdictions should reform their legislation to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence, and greater use of joint trials, in child sexual abuse matters.³⁹⁶
- 14.47 Specifically, the Royal Commission recommended that, in child sexual offence proceedings, tendency or coincidence evidence adduced against the defendant should generally be admissible if the court thinks that the evidence, either by itself or having regard to the other evidence, would be relevant to an important evidentiary issue in the proceeding. This test of relevance would be satisfied if it is “evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding” or “evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole”.³⁹⁷ In assessing admissibility, the court would be

389. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 468-477.

390. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 617.

391. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 591.

392. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 629.

393. J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.

394. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 603.

395. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 591.

396. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 44.

397. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 650.

explicitly required to assume that the evidence is accepted, which will leave consideration of any issues of possible collusion, concoction and contamination to the trier of fact.

- 14.48 The Royal Commission recommended that relevant evidence should be excluded where, on the application of a defendant to refuse to admit tendency or coincidence evidence, the court determines that “admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant” and “if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk”.³⁹⁸ If evidence is not excluded under this provision, it could not be excluded under the general exclusionary provisions in the *Evidence Act 1995*.³⁹⁹
- 14.49 The Royal Commission recommended that all Australian governments should introduce legislation to enact these reforms.⁴⁰⁰ These recommendations are limited to tendency and coincidence evidence in child sexual abuse offence proceedings, given the scope of the Terms of Reference of the Royal Commission.⁴⁰¹ At the request of the Royal Commission, the NSW Parliamentary Counsel’s Office has drafted model provisions to reflect these recommendations. The draft legislation is at Appendix E.
- 14.50 The limitation of the model provisions to child sexual offence proceedings would, in effect, create a separate evidentiary regime for such proceedings. The Royal Commission acknowledged that this would pose difficulties, particularly where two separate evidentiary regimes had to operate in a proceeding (for example, because a child sexual offence was charged on the same indictment as another offence, or tendency or coincidence evidence was sought to be adduced against the complainant or other witnesses). Issues would also arise where an accused is charged with an offence other than a child sexual offence that is alleged to have been committed with a sexual motivation.⁴⁰² Despite these difficulties, and the opposition to this approach expressed to the Royal Commission, it was “satisfied that the current injustices are such that reform must proceed now in relation to child sexual abuse offences, even if it creates some difficulties”.⁴⁰³
- 14.51 The Royal Commission also considered whether all jurisdictions should introduce a specific presumption in favour of joint trials in child sexual offence proceedings. Ultimately it did not recommend this, as it determined that the desired increase in the joinder of trials would be “better achieved through increasing the cross-admissibility of evidence from multiple complainants”.⁴⁰⁴ It expects that the proposed reforms would result in more joint trials in child sexual offence proceedings. The Royal Commission also considered but rejected the option of removing the distinction between tendency and coincidence evidence, and the option of providing for evidence of prior acquittals to be admissible.
- 14.52 Although the Royal Commission has made specific recommendations that its model provisions should be adopted in relation to child sexual abuse proceedings, other options are also available in relation to the admissibility of tendency and coincidence evidence:
1. Maintain the provisions in their current form.

398. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 650.

399. Section 135 of that Act allows evidence to be excluded where, for example, it is unfairly prejudicial to the accused and section 137 establishes that the court must refuse to admit evidence adduced by the prosecutor in a criminal proceeding if its probative value is outweighed by the danger of unfair prejudice to the defendant.

400. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 50.

401. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 636.

402. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 639.

403. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 638.

404. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 649.

2. Adopt the Royal Commission's recommendations in relation to proceedings for adult sexual offences as well as child sexual offences.
3. Amend the legislation governing the admissibility of tendency and coincidence evidence in all proceedings (not just child sexual abuse proceedings), either in NSW or in all Uniform Evidence Law jurisdictions, to facilitate greater admissibility.
4. Amend the legislation governing the admissibility of tendency and coincidence evidence in child sexual abuse proceedings, either in NSW or in all Uniform Evidence Law jurisdictions, to facilitate greater admissibility, but in a different way to that recommended by the Royal Commission.
5. Enact reform that was considered, but not recommended, by the Royal Commission, including:
 - a. a presumption in favour of joint trials, independent of the cross-admissibility of evidence.
 - b. a provision for the admissibility of evidence of prior charges of which the accused was acquitted.
 - c. removing the distinction between tendency evidence and coincidence evidence in the legislation.

Question

Q31. Should the approach to tendency and coincidence evidence proposed in the draft legislation at Appendix E be adopted? If not, should aspects of that approach or any other option for reform be pursued in NSW?

15. Improving and codifying jury directions

In brief

The role of a trial judge is to ensure a fair trial and this includes directing the jury about the appropriate law and relevant facts. It may require warning the jury how not to reason and where particular care should be taken. Misdirection can result in a miscarriage of justice. Jury directions can be particularly complex and lengthy in child sexual abuse trials. The Royal Commission has recommended amendments to jury directions and that jurisdictions should consider partial codification of directions.

- 15.1 After the evidence and closing addresses of the prosecution and defence, a trial judge is required to sum up the case to the jury and provide relevant directions about the elements of the offence and the evidence presented. This chapter does not discuss the general directions given in most trials. Instead, it focuses on the directions that are most relevant to child sexual abuse trials. This was a key issue examined by the Royal Commission.

Jury directions as they currently operate in NSW

- 15.2 Generally jury directions are not codified in NSW. This provides judges with flexibility about the warnings and instructions they give a jury in relation to the particular issues and evidence in a trial. However, legislative provisions have been introduced to prohibit certain directions where the common law requires a jury direction to be given that is inconsistent with current understanding about children and common delay in the disclosure of child sexual abuse. In particular, judges are precluded from inaccurately warning jurors about the unreliability of children and the dangers of delay and uncorroborated evidence. Certain directions about child witnesses and delay may only be given where it is required in the unique circumstances of the case to ensure an accused receives a fair trial. This reform of jury directions concerning delay, corroboration and the evidence of children is consistent with the Royal Commission's recommendations.⁴⁰⁵

Directions on unreliability of children and credibility of complainants

- 15.3 The *Evidence Act 1995* contains provisions relating to warnings a judge may give the jury about unreliable evidence. Section 165A provides that where a child gives evidence a judge must not:
- Warn or suggest that children are unreliable witnesses.
 - Warn or suggest that the evidence of children is inherently less credible or reliable or requires more scrutiny than the evidence of an adult.
 - Give a warning or suggestion about the unreliability of the particular child's evidence solely on the basis of their age.
 - Warn of the danger of convicting on the uncorroborated evidence of a witness who is a child.

405. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 65.

- 15.4 A judge is not prevented from informing the jury that the evidence of a particular child may be unreliable and why that is so, and warning about the need for caution in determining whether to accept the evidence and the weight to be given to it.⁴⁰⁶ Such a warning can only be given if a party has satisfied the court that there are circumstances particular to the child that affect their reliability, other than solely their age, and that a warning is warranted.
- 15.5 The legislation has also removed the requirement that evidence on which a party relies be corroborated.⁴⁰⁷
- 15.6 Section 294AA of the *Criminal Procedure Act 1986* provides that a judge in prescribed sexual assault proceedings must not warn or suggest to the jury that complainants as a class are unreliable witnesses or warn about the dangers of convicting on uncorroborated evidence of any complainant. This provision also prohibits the judge from giving a *Murray*⁴⁰⁸ direction that where the prosecution case relies on one witness, their evidence must be scrutinised with great care before a verdict of guilty can be brought.

Delay or absence of complaint and forensic disadvantage

- 15.7 Previously the common law required a judge to give the jury the *Longman*⁴⁰⁹ direction where there was a delay in the complainant reporting abuse. The judge was required to warn the jury that the complainant's evidence could not be adequately tested because of the passage of time and that, as a result, it would be unsafe or dangerous to convict on uncorroborated evidence of the complainant alone unless satisfied of its truth and accuracy after scrutinising it with great care.
- 15.8 Section 165B of the *Evidence Act 1995* now regulates the limited circumstances when a warning about delay can be given to a jury. It provides circumstances where a judge may give a warning to the jury about any significant forensic disadvantage suffered by the defendant as a consequence of delay, including delay in reporting the alleged offence. The mere existence of delay is not sufficient to establish a significant forensic disadvantage. Where such a warning is given, the judge must not suggest that it would be dangerous to convict the defendant solely because of the delay or the forensic disadvantage arising from the delay.⁴¹⁰
- 15.9 In a prescribed sexual offence trial, section 294 of the *Criminal Procedure Act 1986* provides that if evidence is given or a question is asked that suggests an absence of complaint or delay in making a complaint, the judge must:
- warn the jury that the absence of complaint or delay in complaint does not necessarily indicate that the allegation is false; and
 - inform the jury that there may be good reasons why a victim of sexual assault may hesitate or refrain from making a complaint; and
 - not warn the jury that delay in complaint is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.

Directions where jury to consider multiple counts

- 15.10 Where a jury is required to consider multiple counts, the judge must give *KRM*⁴¹¹ and *Markuleski*⁴¹² directions to ensure that verdicts are logically consistent and the jury does not

406. *Evidence Act 1995* (NSW) section 165A(2).

407. *Evidence Act 1995* (NSW) section 164(1).

408. *R v Murray* (1987) 11 NSWLR 12.

409. *Longman v The Queen* (1989) 168 CLR 79.

410. *Evidence Act 1995* (NSW) section 165B(4).

411. *KRM v The Queen* (2001) 206 CLR 221.

412. *R v Markuleski* (2001) 52 NSWLR 82.

compromise. This requires the judge to instruct the jury that they must consider each count separately and consider it only by reference to the evidence that applies to it. The judge must also explain that the jury is entitled to bring in verdict of guilty on some counts and not guilty on other counts if there is a logical reason for doing so. A jury is also instructed that were they find the accused not guilty on any counts, particularly if that is because they had doubts about the complainant's credibility, they have to consider how that conclusion impacts on their deliberation of the remaining counts.

- 15.11 These directions are intended to address the concern that where there are multiple charges of sexual assault, there may be a joinder effect and a risk of unfair prejudice. This is based on the assumption that a jury is more likely to convict when they have heard about multiple criminal offending by the defendant. Such instructions should be given in any case where the credibility of the complainant's evidence is a substantial issue at trial and even in cases that are not word-on-word.

Expert evidence to inform juries about child sexual abuse

- 15.12 Judges are currently prohibited from providing juries with information about children, including the impacts of child sexual abuse and the abilities of children to give evidence. This is because such a direction would be in the nature of expert evidence.
- 15.13 Sections 79 and 108C of the *Evidence Act 1995* permit the prosecution to call expert evidence about the behaviour and development of children generally and of children who have been victims of sexual abuse. These provisions are rarely used for a number of reasons, including the difficulty of finding an expert with the necessary knowledge and experience, the evidence is too general in nature to assist the jury and the evidence will be countered by a defence expert.⁴¹³ While the Royal Commission acknowledged the limited use of these provisions, it supported their introduction.⁴¹⁴

Directions at the time the evidence is given

- 15.14 The majority of warnings and instructions are provided to the jury at the end of the trial. However, there are instances where warning and directions about the use of the evidence is given contemporaneously with the jury hearing the evidence. This is generally done in instances where this practice will assist the jury to give appropriate weight to the evidence.⁴¹⁵ Examples of circumstances where such directions are given include evidence given by informants, identification evidence and where evidence is given using closed-circuit television or alternative arrangements.
- 15.15 Ensuring a fair trial will generally require any directions given in the course of the trial to be repeated during summing up. For example, where tendency evidence is admitted, a direction should be given when the evidence is given and again in the course of summing up.⁴¹⁶ In limited circumstances a judge may decline to summarise the evidence in the case, however, they will still be obliged to put the defence case accurately and fairly and instruct the jury about how the law applies to the case.⁴¹⁷

413. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 154.

414. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 69.

415. NSW Law Reform Commission, *Jury Directions*, Report 136, November 2012 [6.87].

416. *Quattieri v R* (2006) 171 A Crim R 463.

417. *Criminal Procedure Act 1986* (NSW) section 161; *Condon v R* (1995) 83 A Crim R 335 [347-348]; *Wong v R* [2009] NSWCCA 101 [141].

Options for reform

- 15.16 The Royal Commission noted that jury directions in NSW relating to corroboration, delay and reliability are consistent with social science research.⁴¹⁸ They continue to ensure that an accused person receives a fair trial by enabling necessary directions to be given where required by the particular circumstances of the case.
- 15.17 However, the Royal Commission made a number of recommendations for reform to other aspects of jury directions in child sexual abuse proceedings.

Partially codifying relevant jury directions

- 15.18 In 2015, Victoria passed the *Jury Directions Act 2015* (Vic), which introduced major legislative reform of jury directions. This included abolishing some common law directions and codifying jury directions on delay and credibility. It also requires a trial judge to address jury on common misconceptions about sexual assault complainants. The partial codification and simplification of jury directions has received support from the judiciary in Victoria.⁴¹⁹
- 15.19 The Victorian approach of codifying many jury directions and abolishing some common law directions could be adopted in NSW. However, this issue was considered in 2012 by the NSW Law Reform Commission (NSWLRC) in Report 136: *Jury Directions*, which concluded that jury directions should not be codified. The NSWLRC was concerned that such an approach would not be any simpler, would unsettle judges' familiarity with current directions and require courts to interpret new legislation.⁴²⁰ It further noted that codified directions may be inflexible and pose a risk to the fairness of a trial by removing the judge's ability to assess and accommodate the needs of the particular case.⁴²¹ The NSWLRC concluded that the best course was to retain the existing approach as it preserved the judge's discretion to tailor jury directions to the real issues of each trial.⁴²²
- 15.20 The Royal Commission recommends that governments consider the desirability of partial codification of judicial directions now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.⁴²³ The Royal Commission notes that any codification of jury directions would require significant contributions from the judiciary and be kept under review to ensure the accuracy, adequacy and fairness of the directions.⁴²⁴
- 15.21 In advance of more general codification of jury directions, the Royal Commission recommends governments work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial and introduce any necessary legislation.⁴²⁵ Such an approach would be a departure from the current practice of judges giving jury directions at the conclusion of the trial.

418. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 140.

419. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 188.

420. NSW Law Reform Commission, *Jury Directions*, Report 136, November 2012 [2.34].

421. NSW Law Reform Commission, *Jury Directions*, Report 136, November 2012 [2.35].

422. NSW Law Reform Commission, *Jury Directions*, Report 136, November 2012 [2.39].

423. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 64.

424. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, pages 188-189.

425. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 71.

Royal Commission recommends abolishing the Markuleski direction

- 15.22 The Royal Commission has recommended that legislation be introduced to abolish any requirement for a *Markuleski* direction.⁴²⁶ The direction may undermine the separate consideration direction and favour propensity reasoning, that is, rather than considering the evidence against each charge it may encourage the jury to reason that because the accused is guilty or not guilty of one offence they are more likely to be guilty or not guilty of another offence. Victoria is considering abolishing the requirement for such a direction.

Royal Commission recommends judges provide educative information

- 15.23 Juries are often asked by counsel and judges to bring their life experience and common sense into their deliberation of a matter. This can be problematic in a child sexual abuse trial, where the research indicates that children's behaviour and reactions to abuse do not accord with juror expectations.⁴²⁷ Research has found that jury fallacies are substantially reduced by both expert evidence and jury directions.⁴²⁸ As noted above, the prosecution can call expert evidence to inform the jury about children and the impact of child sexual abuse, however, this is rarely done. Another avenue to address this issue may be for judges to provide such information to juries in the course of their closing directions or earlier in the course of the trial.
- 15.24 The Royal Commission has recommended that governments should consult in relation to judicial directions containing educative information about children, including the impacts of child sexual offences, children's responses to sexual abuse and their abilities as witnesses, with a view to settling standard directions and introducing legislation as soon as possible to permit and require such directions to be given.⁴²⁹
- 15.25 The National Child Sexual Assault Reform Committee (NCSARC) was established in 1999. One of its aims is to identify the barriers to successful prosecution of child sex offences posed by the current adversarial system and to propose alternatives. The NCSARC recommended that three mandatory judicial directions, summarising the research and information that would be given by expert witnesses, should be introduced in all Australian jurisdictions.
- 15.26 The Royal Commission recommends that NCSARC's proposed directions, and the Victorian proposed direction on inconsistencies in the complainant's account, should be used as a starting point in developing educative directions. The Royal Commission also suggested that the NCSARC's third direction should be altered so that it can apply regardless of the complainant's age at trial. The Victorian proposed direction and NCSARC's recommended directions are attached at Appendix F. The Royal Commission was of the view that developing standard educative directions would work better than developing educative material to assist juries.⁴³⁰

426. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 66.

427. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 133.

428. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 154.

429. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 70.

430. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts VII-X, page 202.

Question

Q32. Should jury directions be partially codified as recommended by the Royal Commission?

Q33. Are legislative amendments required to permit judges to give directions to juries earlier in the trial?

Q34. Should the requirement to give a *Markuleski* direction be abolished?

Q35. Should the Royal Commission recommendation to permit and require judges to inform the jury about children and the impact of child sexual abuse be adopted? If yes, what judicial directions should be given?

16. Standard non-parole periods for indecent assault offences

In brief

A standard non-parole period is prescribed for many child sexual abuse offences. While the majority of these standard non-parole periods represent about half of the maximum penalty, the offence of *indecent assault of child under 16 years* departs from this ratio and has received much criticism.

- 16.1 This chapter outlines the maximum penalties and applicable standard non-parole periods (SNPP) available for child sexual assault offences, with particular emphasis on the SNPP for *indecent assault of child under 16 years*. The chapter focuses on the SNPP for this offence as it has been the subject of extensive criticism. The information on SNPPs for other offences is included for the purposes of completeness. Examination of these SNPPs and sentencing options for child sexual abuse more generally is beyond the scope of this discussion paper.

Standard non-parole periods for child sexual assault offences

- 16.2 The legislation requires a court to set a non-parole period when imposing a sentence of imprisonment greater than six months.⁴³¹ The non-parole period represents the minimum period of time the offender must be kept in custody in relation to the offence.⁴³² The balance of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court find special circumstances.⁴³³ This is commonly referred to as the 'statutory ratio' and effectively requires that the non-parole period represent 75% of the total term of imprisonment unless there is a finding of special circumstances.
- 16.3 A SNPP is taken to represent the non-parole period for an offence in the mid-range of objective seriousness.⁴³⁴ Together with the maximum penalty, it operates as a relevant guidepost or benchmark.⁴³⁵ It does not apply to offenders being sentenced for offences they committed when they were under the age of 18 years.⁴³⁶ The court may depart from the SNPP if it is appropriate.
- 16.4 The following table lists the maximum penalty and applicable SNPP for child sexual abuse offences. It also includes the ratio of the SNPP to the maximum penalty.

431. *Crimes (Sentencing Procedure) Act 1999* (NSW) sections 44, 46.

432. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 44(1).

433. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 44(2).

434. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 54A.

435. *Muldock v The Queen* [2011] HCA 39 at [26]-[29]; *McDonald v R* [2015] NSWCCA 80 at [39]-[46].

436. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 54D(3).

Table 7.1: Maximum penalties and standard non-parole periods (SNPP)

Section	Offence	Maximum Penalty	SNPP	Ratio
61J(2)(d)	Sexual intercourse without consent with child under 16	20 years	10 years	50%
61M(2)	Indecent assault of child under 16	10 years	8 years	80%
66A	Sexual intercourse with child under 10	Life	15 years	15 years / life
66B	Attempt, or assault with intent, to have sexual intercourse with child under 10	25 years	10 years	40%
66C(1)	Sexual intercourse with child aged 10-13	16 years	7 years	44%
66C(2)	Sexual intercourse with child aged 10-13 in circumstances of aggravation	20 years	9 years	45%
66C(4)	Sexual intercourse with child aged 14-15 in circumstances of aggravation	12 years	5 years	42%
66EB(2)(a)	Procuring a child under 14 for unlawful sexual activity	15 years	6 years	40%
66EB(2)(b)	Procuring a child aged 14-15 for unlawful sexual activity	12 years	5 years	42%
66EB(2A)(a)	Meet or travel to meet a child under 14 who has been groomed with the intention to procuring the child for unlawful sexual activity	15 years	6 years	40%
66EB(2A)(b)	Meet or travel to meet a child aged 14-15 who has been groomed with the intention to procuring the child for unlawful sexual activity	12 years	5 years	42%
66EB(3)(a)	Expose child under 14 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	12 years	5 years	42%
66EB(3)(b)	Expose child aged 14-15 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	10 years	4 years	40%
91D	Cause, or participate as a client with, a child under 14 in an act of child prostitution	14 years	6 years	43%
91E	Obtain benefit from an act of child prostitution where child under 14	14 years	6 years	43%
91G(1)	Use, cause or allow child under 14 to produce child abuse material	14 years	6 years	43%

Problems with standard non-parole period for indecent assault of child under 16 years

16.5 It can be seen from the above table that the ratio of SNPP to maximum penalty for the majority of child sexual abuse offences is between 40% and 50%. Only the offence of *indecent assault of child under 16 years* stands out in stark contrast to this, with a ratio of 80%. This offence has a maximum penalty of imprisonment of 10 years, which is reserved for the worst category.

- 16.6 Consider a hypothetical situation where a sentencing court finds that an offence falls within the worst category and imposes a total term of 10 years imprisonment. The starting point for the non-parole period is 7 years and 6 months, which can be reduced if there is a finding of special circumstances.⁴³⁷ The court can impose a longer non-parole period, however, this would be unusual. Even for an offence failing in the highest range of objective seriousness, it is difficult for a court to impose a non-parole period of 8 years.
- 16.7 For the court to impose the standard non-parole period of 8 years, the total term would be 10 years and 8 months imprisonment, unless there was a variation to the statutory ratio. Where an offence falls within the mid-range of objective seriousness it is difficult to envisage how a court could impose a non-parole period of 8 years imprisonment.
- 16.8 In the three year period from April 2013 to March 2016, the average prison sentence for the offence of *indecent assault of child under 16 years* has ranged 12.5 months to 17.6 months.⁴³⁸ During the same period no sentence above 7 years imprisonment was imposed and only one person was sentenced to imprisonment for 6-7 years for the offence.⁴³⁹
- 16.9 It should be noted that the offence of *indecent assault* of a child under 16 years carries a higher SNPP than the objectively more serious offences of *sexual intercourse with child between 10 and 13 years* (section 66C(1)) and *aggravated sexual intercourse with child between 14 and 15 years* (section 66C(4)).
- 16.10 The judiciary has been critical of standard non-parole periods that approach the maximum penalty.⁴⁴⁰
- 16.11 In 2008, the NSW Sentencing Council recommended that the SNPPs for sexual offences be consistently set within a narrow range of 40-60% of the maximum penalty.⁴⁴¹ More recently in 2013, the NSW Sentencing Council recommended that SNPPs 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%.⁴⁴² 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 SNPP reduced to 5 years (50% ratio).⁴⁴³

Question

Q36. Should the recommendation of the NSW Sentencing Council be adopted to increase the maximum penalty to 12 years and reduce the standard non-parole period to 6 years for the offence of *indecent assault of child under 16 years*? If not, is there another way to re-structure the maximum penalty and standard non-parole period for the offence?

437. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 44.

438. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

439. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

440. For example, *R v Dagwell* [2006] NSWCCA 98; *Corby v R* [2010] NSWCCA 146; *R v Stoupe* [2015] NSWCCA 175.

441. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

442. NSW Sentencing Council, *Standard Non-Parole Periods*, December 2013, Recommendation 4.1.

443. NSW Sentencing Council, *Standard Non-Parole Periods*, December 2013, Recommendation 4.2.

Appendix A: Table of child sexual offences

Table 1: Child sexual offences under the *Crimes Act 1900 (NSW)*⁴⁴⁴

(The age ranges below are inclusive)

Section	Offence	Maximum Penalty
61J(2)(d)	Sexual intercourse without consent with child under 16	20 years
61M(2)	Indecent assault of child under 16	10 years
61N(1)	Commit or incite act of indecency with child under 16	2 years
61O(1)	Commit or incite act of indecency with child under 16 in circumstances of aggravation	5 years
61O(2)	Commit or incite act of indecency with child under 10	7 years
61O(2A)	Commit or incite act of indecency with child under 16 while knowingly being filmed for the purpose of production of child abuse material	10 years
61P	Attempt to commit an offence under section 61J, 61M, 61N or 61O	Same as substantive offence
66A	Sexual intercourse with child under 10	Life
66B	Attempt, or assault with intent, to have sexual intercourse with child under 10	25 years
66C(1)	Sexual intercourse with child aged 10-13	16 years
66C(2)	Sexual intercourse with child aged 10-13 in circumstances of aggravation	20 years
66C(3)	Sexual intercourse with child aged 14-15	10 years
66C(4)	Sexual intercourse with child aged 14-15 in circumstances of aggravation	12 years
66D	Attempt, or assault with intent, to commit an offence under 66C	Same as substantive offence
66EA	Persistent sexual abuse of child under 18	25 years
66EB(2)(a)	Procuring a child under 14 for unlawful sexual activity	15 years
66EB(2)(b)	Procuring a child aged 14-15 for unlawful sexual activity	12 years
66EB(2A)(a)	Meet or travel to meet a child under 14 who has been groomed with the intention to procuring the child for unlawful sexual activity	15 years
66EB(2A)(b)	Meet or travel to meet a child aged 14-15 who has been groomed with the intention to procuring the child for unlawful sexual activity	12 years
66EB(3)(a)	Expose child under 14 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	12 years
66EB(3)(b)	Expose child aged 14-15 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	10 years

444. The *Crimes Act 1900 (NSW)* can be found on the NSW Government legislation website: <http://www.legislation.nsw.gov.au/#/view/act/1900/40>.

73(1)	Sexual intercourse with child aged 16 who is under care	8 years
73(2)	Sexual intercourse with child aged 17 who is under care	4 years
73(4)	Attempt to commit an offence under 73	Same as substantive offence
78A	Sexual intercourse with close family member aged 16 or above	8 years
78B	Attempt to commit an offence under 78A	2 years
80A(2A)	Compel child under 16 to engage in self-manipulation by threat	20 years
80D(2)	Cause sexual servitude of a child under 18	20 years
80E(2)	Conduct business involving sexual servitude of child under 18	19 years
80G	Incite a person to commit a sexual assault offence	Same as substantive offence
91D	Cause, or participate as a client with, a child under 14 in an act of child prostitution	14 years
91D	Cause, or participate as a client with, a child aged 14-17 in an act of child prostitution	10 years
91E	Obtain benefit from an act of child prostitution where child under 14	14 years
91E	Obtain benefit from an act of child prostitution where child aged 14-17	10 years
91F	Premises used for child prostitution	7 years
91G(1)	Use, cause or allow child under 14 to produce child abuse material	14 years
91G(2)	Use, cause or allow child aged 14-15 to produce child abuse material	10 years
91H	Produce, disseminate or possess child abuse material	10 years
91J(4)(a)	For sexual arousal or gratification observes child under 16 in private act without their consent	5 years
91J(6)	Attempt to commit an offence under 91J(4)(a)	5 years
91K(4)(a)	For sexual arousal or gratification films child under 16 in private act without their consent	5 years
91K(6)	Attempt to commit an offence under 91K(4)(a)	5 years
91L(4)(a)	For sexual arousal or gratification films private parts of child under 16 without their consent	5 years
91L(6)	Attempt to commit an offence under 91L(4)(a)	5 years

Appendix B: Royal Commission's persistent child sexual abuse model provision

Persistent Sexual Abuse of Children Model Provisions

1 Name of the Model Provisions

These Model Provision are the *Persistent Sexual Abuse of Children Model Provision*.

2 Definitions

(1) In these Model Provisions:

adult means a person over the age of 18 years.

child means:

- (a) a person who is under the age of 16 years, or
- (b) a person under the age of 18 years, if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the person is under the special care of the adult in the relationship.

predecessor offence means the offence of persistent sexual abuse of a child.

sexual offence means:

- (a) an offence that involves having sexual intercourse with another person, or
- (b) an offence that involves an act of indecency on or in the presence of another person, or
- (c) an offence that involves procuring a person for unlawful sexual activity, or
- (d) an offence that involves compelling another person to engage in any sexual self-manipulation, or
- (e) an offence involving the sexual servitude of another person, or
- (f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraph (a), (b), (c), (d) or (e), or
- (g) an offence that involves an attempt to commit an offence of a kind referred to in paragraph (a), (b), (c), (d), (e) or (f).

unlawful sexual relationship offence means an offence against section 3 (1).

(2) For the purposes of these Model Provisions, a person under the age of 18 years (*the child*) is under the *special care* of an adult if:

- (a) the adult is the parent, step-parent, guardian or foster parent of the child or the de facto partner of a parent, step-parent, guardian or foster parent of the child, or
- (b) the adult is a school teacher and the child is a pupil of the school teacher, or
- (c) the adult has an established personal relationship with the child in connection with the provision of religious, sporting, musical or other instruction to the child, or
- (d) the adult is a custodial officer of an institution of which the child is an inmate, or
- (e) the adult is a health professional and the child is a patient of the health professional, or

- (f) the adult is responsible for the care of the child and the child has a cognitive impairment.

Jurisdictional note.

The definition of sexual offence is a general description of the types of offences that should be covered by the offence. Each jurisdiction should insert a specific definition of the individual sexual offences that constitute the unlawful sexual relationship offence.

Jurisdictional note.

For the purposes of the offence, a child is a person under the age of 16 years. However, subsection (2) extends the definition of child to a person who is over 16 but under the age of 18 years, to cover sexual offences against younger persons committed by adults who are in a special relationship of trust or authority with the child. Each jurisdiction should tailor the wording of subsection (2) to suit the wording of the relevant offences in that jurisdiction.

Jurisdictional note.

A reference to the predecessor offence is only required in those jurisdictions that currently have an offence of persistent sexual abuse of a child. That offence should be repealed by the new offence. The definition of predecessor offence should refer to the section number of the offence that is repealed.

3 Offence of maintaining unlawful sexual relationship with child

- (1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

- (2) An unlawful sexual relationship is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.
- (3) An unlawful sexual act is any act that constitutes, or would constitute (if particulars of the time and place at which the act took place were sufficiently particularised), a sexual offence.
- (4) For an adult to be convicted of an unlawful sexual relationship offence, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed.
- (5) However:
- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence, and
 - (b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence, but must be satisfied as to the general nature or character of those acts, and
 - (c) if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.
- (6) The prosecution is required to allege the particulars of the period of time over which the unlawful sexual relationship existed.
- (7) This section extends to a relationship that existed wholly or partly before the commencement of this section and to unlawful sexual acts that occurred before the commencement of this section.
- (8) A court that imposes a sentence for an unlawful sexual relationship offence constituted by an unlawful sexual relationship that is alleged to have existed wholly or partly before the commencement of this section must, when imposing sentence, take into account:
- (a) the maximum penalty for the predecessor offence, if the predecessor offence was in force during any part of the alleged period of the unlawful sexual relationship, and

- (b) the maximum penalty for the unlawful sexual acts that the unlawful sexual relationship is alleged to have involved, during the period of the unlawful sexual relationship, if the unlawful sexual relationship is alleged to have existed wholly or partly before the commencement of the predecessor offence.

Jurisdictional note.

For jurisdictions that require a fault element to be specified for each physical element of the offence, the intention is that the fault element for the offence is the fault element for each constituent unlawful sexual act.

4 Charging both unlawful sexual relationship offence and sexual offences

- (1) A person may be charged on a single indictment with, and convicted of and punished for, both:
 - (a) an offence of maintaining an unlawful sexual relationship with a child, and
 - (b) one or more sexual offences committed by the person against the same child during the alleged period of the unlawful sexual relationship.
- (2) Except as provided by subsection (1), a person who has been convicted or acquitted of a sexual offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the sexual offence of which the person has been convicted or acquitted is one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship.
- (3) Except as provided by subsection (1), a person who has been convicted or acquitted of an unlawful sexual relationship offence in relation to a child cannot be convicted of a sexual offence in relation to the same child if the occasion on which the sexual offence is alleged to have occurred is during the period over which the person was alleged to have committed the unlawful sexual relationship offence.
- (4) A person who has been convicted or acquitted of a predecessor offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the period of the alleged unlawful sexual relationship includes any part of the period during which the person was alleged to have committed the predecessor offence.
- (5) For the purposes of this section, a person ceases to be regarded as having been convicted for an offence if the conviction is quashed or set aside.

Appendix C: Victorian offence of failing to report child sexual abuse

Crimes Act 1958 (Vic)

Section 327: Failure to disclose sexual offence committed against child under the age of 16 years

(1) In this section—

"interests" includes reputation, legal liability and financial status;

"organisation" includes a body corporate or an unincorporated body or association, whether the body or association—

- (a) is based in or outside Australia; or
- (b) is part of a larger organisation;

"sexual offence "means—

- (a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I or under any corresponding previous enactment; or
- (b) an attempt to commit an offence referred to in paragraph (a); or
- (c) an assault with intent to commit an offence referred to in paragraph (a).

(2) Subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a police officer as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.

Penalty: 3 years imprisonment.

(3) For the purposes of subsection (2) and without limiting that subsection, a person has a reasonable excuse for failing to comply with that subsection if—

- (a) the person fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or
- (b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the first mentioned person has no further information.

Example

A person may believe on reasonable grounds that the information has already been disclosed to police by another person if the person has made a report disclosing all of the information in his or her possession in compliance with mandatory reporting obligations under the *Children, Youth and Families Act 2005*.

- (4) For the purposes of subsection (2) and without limiting that subsection, a person does not have a reasonable excuse for failing to comply with that subsection only because the person is concerned for the perceived interests of—
- (a) the person reasonably believed to have committed, or to have been involved in, the sexual offence; or
 - (b) any organisation.
- (5) A person does not contravene subsection (2) if—
- (a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and
 - (b) the victim was of or over the age of 16 years at the time of providing that information to any person; and
 - (c) the victim requested that the information not be disclosed.
- (6) Subsection (5) does not apply if—
- (a) at the time of providing the information, the victim of the alleged sexual offence—
 - (i) has an intellectual disability (within the meaning of the *Disability Act 2006*); and
 - (ii) does not have the capacity to make an informed decision about whether or not the information should be disclosed; and
 - (b) the person to whom the information is provided is aware, or ought reasonably to have been aware, of those facts.
- (7) A person does not contravene subsection (2) if—
- (a) the person comes into possession of the information referred to in subsection (2) when a child; or
 - (b) the information referred to in subsection (2) would be privileged under Part 3.10 of Chapter 3 of the *Evidence Act 2008*; or
 - (c) the information referred to in subsection (2) is a confidential communication within the meaning of section 32B of the *Evidence (Miscellaneous Provisions) Act 1958*; or
 - (d) the person comes into possession of the information referred to in subsection (2) solely through the public domain or forms the belief referred to in subsection (2) solely from information in the public domain; or
 - (e) the person is a police officer acting in the course of his or her duty in respect of the victim of the alleged sexual offence; or
 - (f) the victim of the alleged sexual offence has attained the age of 16 years before the commencement of section 4 of the *Crimes Amendment (Protection of Children) Act 2014*.

Appendix D: Victorian exceptions to ‘sexting’

Crimes Act 1958 (Vic)

Section 51M: Exceptions applying to children

- (1) A does not commit an offence against section 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if—
- (a) A is a child; and
 - (b) the child abuse material is an image; and
 - (c) the image depicts A alone.

Example

A is 15 years old and takes a photograph of themselves. A stores the photograph on their mobile phone. The offences in 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) do not apply to A in respect of the image.

Note

Section 51O may apply if A is an adult.

- (2) A does not commit an offence against section 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if—
- (a) A is a child; and
 - (b) the child abuse material is an image; and
 - (c) A is the victim of a criminal offence punishable by imprisonment and the image depicts that offence.

Example

The image depicts the child (A) being raped by another person. The offences in sections 51B(1), 51C(1), 51D(1), 51G(1) and 51H(1) do not apply to A in respect of the image.

- (3) In subsections (1) and (2), a reference to an image, in relation to an offence against section 51B(1), is a reference to the image that A involves the child in producing.

Note

References to A in this section are references to the same A referred to in sections 51B, 51C, 51D, 51G and 51H.

Section 51N: Defences applying to children

- (1) It is a defence to a charge for an offence against section 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if—
- (a) A is a child; and
 - (b) the child abuse material is an image; and
 - (c) the image depicts one or more persons (whether or not it depicts A); and

- (d) the image—
 - (i) does not depict an act that is a criminal offence punishable by imprisonment; or
 - (ii) depicts an act that is a criminal offence punishable by imprisonment but A reasonably believes that it does not; and
- (e) at the time of the conduct constituting the offence—
 - (i) A was not more than 2 years older than the youngest child depicted in the image; or
 - (ii) A reasonably believed that they were not more than 2 years older than the youngest child depicted in the image.

Examples

1. The image depicts A taking part in an act of sexual penetration with another child who is not more than 2 years younger. Both are consenting to the act. A is not guilty of an offence against section 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) in respect of the image.
 2. The image depicts a child being sexually penetrated. A is a child and A reasonably believes that the image depicts a consensual sexual relationship between two 16 year olds and is therefore not a criminal offence. A also reasonably believes that A is not more than 2 years older than the youngest child depicted in the image. A is not guilty of an offence against section 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) in respect of the image.
- (2) In subsection (1), a reference to an image, in relation to an offence against section 51B(1), is a reference to the image that A involves the child in producing.
- (3) A bears the burden of proving (on the balance of probabilities) the matters referred to in subsection (1)(d)(ii) and (e)(ii).

Notes

1. References to A in this section are references to the same A referred to in sections 51B, 51C, 51D, 51G and 51H.
2. An evidential burden applies to the matters referred to in subsection (1)(a), (b), (c), (d)(i) and (e)(i).

Section 51O: Defence – image of oneself

- (1) It is a defence to a charge for an offence against section 51B(1), 51C(1), 51G(1) or 51H(1) if—
- (a) the child abuse material is an image; and
 - (b) the image depicts A as a child; and
 - (c) the image does not depict A committing a criminal offence punishable by imprisonment; and
 - (d) A does not distribute the image to any other person.
- (2) In subsection (1) a reference to an image, in relation to an offence against section 51B(1), is a reference to the image that A involves the child in producing.
- (3) A bears the burden of proving (on the balance of probabilities) the matters referred to in subsection (1)(b).

Notes

1. References to A in this section are references to the same A referred to in sections 51B, 51C, 51G and 51H.
2. An evidential burden applies to the matters referred to in subsection (1)(a), (c) and (d).
3. Sections 51M(1) or (2) or 51N may apply if A is a child.

Section 51P: Defence – accused not more than 2 years older than 16 or 17 year old child and act with child’s consent

- (1) It is a defence to a charge for an offence against section 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if—
 - (a) the child abuse material is an image; and
 - (b) at the time at which the image was first made, the child (B) whose depiction in the image makes it child abuse material—
 - (i) was aged 16 or 17 years; and
 - (ii) was not, or had not been, under A’s care, supervision or authority; and
 - (c) the image does not depict an act that is a criminal offence punishable by imprisonment; and
 - (d) A did not distribute the image to any person other than B; and
 - (e) A is not more than 2 years older than B; and
 - (f) at the time of the conduct constituting the offence, A reasonably believed that B consented to that conduct.
- (2) In subsection (1) a reference to an image, in relation to an offence against section 51B(1), is a reference to the image that A involves B in producing.
- (3) For the purposes of subsection (1)(b), the reference to the time at which the image was first made does not include reference to any later time at which a copy, reproduction or alteration of the image was made.
- (4) A bears the burden of proving (on the balance of probabilities) the matters referred to in subsection (1)(e) and (f).

Notes

1. References to A and B in this section are references to the same A and B referred to in sections 51B, 51C, 51D, 51G and 51H.
2. An evidential burden applies to the matters referred to in subsection (1)(a), (b), (c) and (d).

Appendix E: Draft tendency and coincidence legislation

Royal Commission into Institutional Responses to Child Sexual Abuse Evidence (Tendency and Coincidence) Model Provisions

1 Name of model provisions

These model provisions are the *Evidence (Tendency and Coincidence) Model Provisions*.

2 Purpose of model provisions

- (1) The purpose of these provisions is to set out model amendments to the Uniform Evidence Law to permit tendency evidence or coincidence evidence to be admitted in a criminal proceeding for a child sexual offence or the murder or manslaughter of a child if it is relevant to an important evidentiary issue in the proceeding.
- (2) In these provisions, the *Uniform Evidence Law* is the set of provisions that forms the basis for the Uniform Evidence Acts enacted by the Commonwealth and certain other Australian jurisdictions.

Note. As at May 2017, each of the following Acts is based on the *Uniform Evidence Law*:

- (a) the *Evidence Act 2011* of the Australian Capital Territory,
- (b) the *Evidence Act 1995* of the Commonwealth,
- (c) the *Evidence Act 1995* of New South Wales,
- (d) the *Evidence (National Uniform Legislation) Act* of the Northern Territory,
- (e) the *Evidence Act 2001* of Tasmania,
- (f) the *Evidence Act 2008* of Victoria.

These Acts have uniform numbering. Accordingly, amendments set out in these provisions are by reference to that numbering.

- (3) It is also intended that the model amendments to the Uniform Evidence Law be used as the basis for new laws in those jurisdictions that do not apply the Law.

Note. As at May 2017, Queensland, South Australia and Western Australia have not applied the Uniform Evidence Law.

3 Model amendments to Uniform Evidence Law

Schedule 1 sets out the model amendments to the Uniform Evidence Law.

Schedule 1 Model amendments to Uniform Evidence Law

[1] Section 92 Exceptions

Insert after section 92 (2):

- (2A) In a child sexual offence proceeding (and without limiting subsection (2)), section 91(1) does not prevent the admission or use of a defendant's conviction for an offence as tendency evidence or coincidence evidence.

[2] Section 96A

Insert after section 96:

96A Special provisions for defendants in child sexual offence proceedings

- (i) For the purposes of this Part, each of the following kinds of evidence is *relevant to an important evidentiary issue* in a child sexual offence proceeding:
 - (a) evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding,
 - (b) evidence that is relevant to any matter in issue in the proceeding if the matter:
 - (i) concerns an act or state of mind of the defendant, and
 - (ii) is important in the context of the proceeding as a whole.
- (ii) In applying section 97(1A)(a), 98(1A)(a) or 100A(1)(a) to evidence about a defendant in a child sexual offence proceeding, the court is to determine whether the test referred to in the provision is satisfied assuming the evidence were to be accepted as credible and reliable.
- (iii) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence in a proceeding on the basis of its inherent unfairness or unreliability is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding.
- (iv) Without limiting subsection (3), evidence is not inadmissible as tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding only because it is about:
 - (a) the conviction before or by an Australian court or a foreign court of a party charged with an offence, or
 - (b) an act for which a party has been charged with an offence in Australia or a foreign country, but not convicted (except if it was because of an acquittal before or by an Australian court or a foreign court).

Note. Paragraph (b) includes situations where charges are withdrawn or an offence has been proven and no conviction entered by the court.
- (v) Any fact that is relied on as tendency or coincidence evidence about a defendant in a child sexual offence proceeding does not have to be proved beyond a reasonable doubt.

[3] Section 97 The tendency rule

Omit section 97(1)(b). Insert instead:

- (b) the tendency evidence admissibility test for the evidence is satisfied.

[4] Section 97(1A)

Insert after section 97(1):

- (1A) The *tendency evidence admissibility test* for the purposes of subsection (1)(b) is:
 - (a) for evidence about the defendant in a child sexual offence proceeding— that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding, or

- (b) for evidence about any other person—that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[5] Section 98 The coincidence rule

Omit section 98(1)(b). Insert instead:

- (b) the coincidence evidence admissibility test for the evidence is satisfied.

[6] Section 98(1A)

Insert after section 98(1):

(1A) The *coincidence evidence admissibility test* for the purposes of subsection (1)(b) is:

- (a) for evidence about the defendant in a child sexual offence proceeding— that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding, or
- (b) for evidence about any other person—that the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[7] Section 100A

Insert after section 100:

100A Exclusion of tendency evidence and coincidence evidence in child sexual offence proceeding

- (1) Despite sections 97 and 98, the court in a child sexual offence proceeding may, on the application of a defendant, refuse to admit tendency evidence or coincidence evidence about the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that:
 - (a) admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant, and
 - (b) if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.
- (2) The admission of evidence is not unfair to a defendant in a child sexual offence proceeding merely because it is tendency evidence or coincidence evidence.

Note. See also section 96A(3) and (4).
- (3) If directions about the relevance and use of tendency evidence or coincidence evidence will remove the risk of unfairness of the kind referred to subsection (1) (b), the court must give those directions rather than refuse to admit the evidence.
- (4) Tendency evidence or coincidence evidence about a party that is admissible under this Part in a child sexual offence proceeding cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party

[8] Section 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution non-child sexual offence proceeding

Insert “(other than a child sexual offence proceeding)” after “criminal proceeding” in section 101(1).

[9] Dictionary

Insert in alphabetical order:

child sexual offence means any of the following offences (however described) regardless of when it occurred:

- (a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual assault of, a person under 18 years if that person’s age at the time of the offence is an element of the offence,
- (b) an offence against, or arising under, a law of this State involving indecent conduct with, or directed towards, a person under 18 years if that person’s age at the time of the offence is an element of the offence,
- (c) an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b),

but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

Jurisdictional note. Paragraphs (a) and (b) of this definition are suggested as an alternative to listing specific offences. If they prefer, jurisdictions may choose instead to list specific offences (including historical ones).

child sexual offence proceeding means:

- (a) a criminal proceeding for a child sexual offence, or
- (b) a criminal proceeding for the murder or manslaughter of a person under 18 years of age if the commission of a child sexual offence by the defendant (whether in relation to that child or another child) is a fact in issue.

Appendix F: Recommended mandatory jury directions

National Child Sexual Assault Reform Committee's recommended mandatory judicial directions

Children's abilities as witnesses:

If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 16 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

- (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would;
- (b) this does not mean that a child witness is any more or less reliable than an adult witness;
- (c) one difference is that very young children typically say very little without some help to focus on the events in question;
- (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults;
- (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths..

Very young children's abilities as witnesses:

If the complainant is under the age of five years, the judge must give the jury the following instructions:

- (a) although children under the age of 5 years typically report less detail than older children or adults, the information they recall can be just as accurate;
- (b) depending on how they are questioned, children under the age of 5 years can be more open to suggestion than older children, although research has shown they have difficulty remembering the suggestions put to them after a short period of time;
- (c) the reliability of the evidence of very young children depends on the way they are questioned. It is important, when deciding how much weight to give to a very young child's evidence, to distinguish between open-ended questions aimed at obtaining information, from leading questions that might put words into their mouths.

Children's responses to sexual abuse:

If the complainant is under the age of 16 years, the judge must give the jury the following directions:

- (a) there is no one set of symptoms or behaviours that all sexually abused children display. Depending upon the individual child and their circumstances, some children may exhibit a number of symptoms whereas some children may exhibit none at all;
- (b) sexual abuse may not result in physical symptoms and physical evidence that can be detected by a medical examination;
- (c) very often victims of sexual abuse do not cry out for help, resist or escape from the offender;

- (d) they often delay their complaint of abuse for months or years and there may be a number of reasons why a child will delay their complaint, such as threats to themselves or their loved ones, or fear they will not be believed or they will be blamed. They may feel ashamed, embarrassed or responsible for the abuse. They might want to protect the abuser if it is someone they love or trust and they may not know that the abuse is wrong. They may not have the language to describe what has happened to them, particularly if they are very young;
- (e) some children may exhibit particular behaviours as a result of being sexually abused that are counterintuitive and may not appear to make sense to the adult layperson;
- (f) the behaviours that have been reported in the scientific literature include: delay in complaint for months or years; disturbed sleep patterns and/or nightmares; bedwetting; disturbed behavioural patterns; learning difficulties, fearfulness and general emotional upset; retraction of the complaint; sexualized behaviour; and ongoing contact and/or affection for the alleged offender;
- (g) because a child exhibits some or all of these particular behaviours, that does not necessarily mean that sexual abuse has occurred.

Victorian proposed direction

- (a) it is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and
- (b) differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability; and
- (c) experience shows that –
 - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
 - (ii) trauma may affect different people differently, including by affecting how they recall events; and
 - (iii) it is common for there to be differences in accounts of a sexual offence; and

Example

People may describe a sexual offence differently at different times, to different people or in different contexts.

- (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and
- (d) it is up to the jury to decide –
 - (i) whether or not any differences in the complainant's account are important in assessing the complainant's credibility and reliability; and
 - (ii) whether the jury believes all, some or none of the complainant's evidence.