

Strengthening Child Sexual Abuse Laws in NSW

Legal Aid NSW submission to the
Department of Justice

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and

short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

The Children's Legal Service advises and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Justice in relation to the discussion paper, *Strengthening child sexual abuse laws in NSW*.

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the Department of Justice's Discussion Paper *Strengthening child sexual abuse laws in NSW (the Discussion Paper)*. We support simplification of the current legislative framework concerning child sexual assault offences on the basis that current maximum penalties for offences are maintained. There are steps that could be taken to improve the prosecution of historic child sexual assault offences, including clarifying the procedure where the date of the offence is not precisely known, and amending section 66EA of the *Crimes Act 1900* (NSW) to make clear that an additional sanction is required where a person engaged in the persistent abuse of a child. We consider the introduction of a similar age defence in NSW to be well overdue, and we strongly support the decriminalisation of consensual sexting amongst children and young people.

However, Legal Aid NSW is concerned about the many proposals for statutory change with retrospective effect, including proposals to remove limitation periods and to apply contemporary sentencing standards to historic offences. We acknowledge that past justice procedures and sentencing practices were marked by an inadequate understanding of the impact of sexual abuse on children. Every effort should be made to ensure that our current and future laws and legal processes take full account of the harm done by child sexual abuse. However, a fundamental feature of both the rule of law in Australian society and under international human rights principles is that criminal laws should operate prospectively. We also note that NSW, as a jurisdiction that has adopted the Uniform Evidence Law, has undertaken significant procedural reforms in recent years to address contemporary understandings of the long term impact of child sexual abuse on its victims.

A number of recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse go beyond institutional offending and would, if implemented, have implications beyond the criminal law. Amendments to the *Evidence Act 1995* (NSW) concerning admissibility of evidence should be considered in this broader context by the Australian Law Reform Commission, whose 1987 Report 38 *Evidence* formed the basis of the Uniform Evidence Act. Such inquiry would be usefully informed by the extensive work of the Royal Commission.

With these considerations in mind, Legal Aid NSW responds to the Questions in the Discussion Paper as follows.

Chapter 2 Simplifying the legislative framework

1. Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?
2. Should the number of age categories be reduced? If yes, what age categories should be used?
3. Should any new offences be created?
4. Should any offences be repealed?

Legal Aid NSW supports simplifying the current legislative framework by moving the current child sexual abuse offences into a separate part of the *Crimes Act 1900* (NSW) (that is, Option 2 on page 18 of the Discussion Paper). We support the structure proposed by the NSW Sentencing Council in 2008, that is: Division 10: Sexual assault adult; Division 10A: Sexual assault; Division 10B: Sexual servitude.

However, we support retention of the current age categories of offences involving victims under 10, 10-13, 14-15 and 16-17. Offences defined by age categories provide direction to a sentencing Court as to the relative objective seriousness of the offence. While all children mature at different rates, and age categories will always have an element of arbitrariness, the current categories approximate developmental stages of a child and are consistent with age categories applicable to defendants. Thus, 10 is the minimum age for criminal responsibility, while at 14, a child defendant no longer has the benefit of the presumption of *doli incapax* and is presumed to have a level of sufficient maturity to discern the difference between right and wrong. At 16, a young person reaches the age of consent, and offences committed by a person over 18 cannot be dealt with by the Children's Court. Retention of current age categories would also enable reliance on existing case law and sentencing statistics and facilitate appropriate plea negotiations under the pending mandatory criminal case conferencing reforms.

We are also concerned that if there were a reduced number of age categories, many offenders would be exposed to higher maximum penalties. There has already been a significant increase in penalties for sexual assault offences in NSW in recent years, including through the introduction of standard non parole periods. We consider that further increases are not warranted. Simplification of the structure of offences in the *Crimes Act 1900* (NSW) should not be used to justify penalty increases in respect of individual offences. Any proposal to increase current maximum penalties should be separately considered by the NSW Sentencing Council on the basis of a detailed analysis of sentencing statistics and trends, and with full consideration given to the potential risks in increasing penalties (including the impact on rates and timing of guilty pleas, the criminalisation of young people and incarceration rates).

Definition of child

Legal Aid NSW consider that offences applying to victims under 18 are appropriate where the person is ‘under special care’, as in section 73 of the *Crimes Act 1900* (NSW). However, in all other offences except section 66EA, persistent sexual abuse of a child, a child is defined as under 16. Legal Aid NSW considers that there should be a consistent definition of a child as under 16 for all offences, including section 66EA.

Chapter 3 Clarifying offences of sexual assault / sexual intercourse with child

5. 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?

Legal Aid NSW considers the separate offences and respective maximum penalties in section 61J(2)(d) and section 66C should remain (Option 1 on page 23 of the Discussion Paper).

We agree with the Discussion Paper that the penalties ‘reflect the differences in criminality between sexual intercourse with a child under 16 with their agreement, albeit still unlawful, and sexual intercourse which is without the consent of the child.’¹ There is sound logic in the apparent difference between maximum penalties for the two offences where the victim is aged 14 or 15: the offence of aggravated sexual assault of a child under 16 years (section 61J) requires the prosecution to prove that the defendant knew that the victim was not consenting. The maximum penalty of 20 years imprisonment acknowledges both the seriousness of this offence and the role of consent in respect of sexual offending.

The offence of sexual intercourse with child between 10 and 16 (section 66C) does not require proof of lack of consent. The maximum penalties of 10 or 12 years imprisonment where the child is between 14 and 16 acknowledges that this is a serious offence, but not as serious as non-consensual sexual intercourse with a child. That said, courts have increasingly departed from their earlier approach which presumed no harm is caused by premature sexual activity.²

We acknowledge that questions about consent can be distressing to a young complainant. We consider such concerns are preferably addressed by improving support of a young

¹ Department of Justice *Strengthening child sexual abuse laws in NSW* (2017), 22

² See, for example, *R v Nelson* [2016] NSW CCA 130; [16] ff

person when giving evidence more generally and beyond questioning around consent, such as those currently being piloted in the Sydney and Newcastle District Courts.

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

Legal Aid NSW does not support this proposal. For the reasons outlined above, we do not consider that the number of age categories for child sex offences should be reduced. We also consider that the current maximum penalty of 16 years imprisonment for sexual intercourse with a child aged 10 or 11 (or 20 years for the aggravated offence) is already sufficient to acknowledge the gravity of this offence. A maximum penalty of life imprisonment should be reserved for the most heinous of offences. Parliament has progressively increased the maximum penalty for section 66A since it was first introduced in 1985. Most recently, the aggravated version of the offence and the simple offence were consolidated, with a maximum penalty of life imprisonment now applying to both forms of offending. We do not support further expansion of the offence to victims under 12, including on the basis that it may reduce the rate of guilty pleas, thereby exposing more children to the potential re-traumatisation of a criminal trial.

Chapter 4 Clarifying indecent assault/act of indecency

7. 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?
8. Should the term 'indecent' and the common law definition remain?

Legal Aid NSW supports the retention of separate offences for acts involving "indecent" touching and conduct which is "indecent" but does not involve touching. We would oppose any merger of the two offences (Option 1 on page 27 of the Discussion Paper).

We would not oppose amending the definition of indecent assault to include any sexual touching between the victim and the offender on the basis that appropriate safeguards for age appropriate consensual touching were introduced, to acknowledge the reality of sexual experimentation amongst young people. We would also not oppose introduction of a statutory definition of the term "indecency" based on the NSW Sentencing Council's recommended definition:

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.

While this definition is a useful starting point, it could be simplified by removing the words ‘unbecoming’ and ‘propriety’. We suggest that the Victorian definition, which simply refers to conduct that is contrary to “community standards of acceptable conduct”³ is a better model.

Chapter 5 Simplifying aggravating factors

9. Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?
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Legal Aid NSW considers that uniform aggravating factors should be available in respect of all child sexual abuse offences (Option 2 on page 29 of the Discussion Paper) on the basis that separate offences for the basic offence and the aggravated versions of each offence are retained. As the Discussion Paper notes, this creates scope for charge negotiations. We do not support Option 3 on page 29: eliminating the aggravated form and increasing the maximum penalty for the basic offence to that currently applicable to the aggravated offence.

Chapter 6 Addressing difficulties arising from historic child sexual offending

Where date of offence is refined during evidence

10. 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?
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In Legal Aid NSW’s experience, is not uncommon for an indictment to allege that an offence was committed between two dates, during which time the age of the complainant has changed. Legal Aid NSW would support the provision proposed in question 10, so that if it was unclear, for example, whether the defendant had committed an offence under

³ *Crimes Act 1958* (Vic), section 49F

section 66A (sexual intercourse with child under 10 years) or section 66C(1) (sexual intercourse with a child aged between 10 and 14), the defendant could be convicted of the offence with the lesser maximum.

However, the provision should be clearly limited to uncertainty about the age of the victim as an element of two otherwise identical offences. It should not extend to those cases where there is uncertainty about other elements of the offence, as appears to be suggested in [6.9] of the Discussion Paper. A provision to such effect would give rise to great deal of complexity for a jury and a court which may be required to direct the jury about the elements of two different offences. There is a real risk that the jury would not understand the complexity of the task, leading to compromise or unsafe verdicts.

Sentencing historic child sexual abuse matters

<p>11. 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?</p>

For the reasons outlined in our submission to the Royal Commission in 2016, Legal Aid NSW does not support this proposal.

Applying current sentencing standards to historical offences undermines fundamental notions of fairness and the principle against retrospectivity of criminal penalty. The High Court in *Radenkovic* said⁴:

*considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him than the law as it existed at the hearing of the appeal.*⁵

Section 19(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that:

If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.

In *R v MJR*, Spigelman CJ held that it would be:

'out of keeping' with the provisions of s19 of the Crimes (Sentencing Procedure) Act 1999 for this Court to refuse to take into account the

⁴ In the context of a resentencing a person who had successfully appealed against sentence

⁵ *Radenkovic v R* (1990) 170 CLR 623, 632, Mason CJ and McHugh J

*sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender.*⁶

Legal Aid NSW considers that the approach of the courts in *Radenkovic v R* and *R v MJR* is correct. It is consistent with the general presumption against the retrospective operation of the criminal law.⁷ This presumption applies to sentencing standards as well as maximum tariffs. In *The Rule of Law*, Lord Bingham wrote:

*Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.*⁸

The presumption is also consistent with Australia's obligations under article 15 of the *International Covenant on Civil and Political Rights*, which provides that

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

An offender should be sentenced in a way that reflects the community's understanding of the seriousness of the offending at the time, and the offender's own understanding of the moral culpability of his or her conduct at the time. While that understanding was based on mistaken beliefs about the prevalence and impact of child sexual assault, it is not appropriate to impute contemporary understanding to historic child sex offenders.

We note that the Discussion Paper's reference to the 'daunting task' faced by courts in applying historical sentencing standards⁹ does not reflect the more recent experience of practitioners appearing in historical sentencing cases. The Court of Criminal Appeal has provided guidance on relevant standards in a series of recent cases which has considerably helped with this task,¹⁰ as has publicly available material such as the Public Defenders' historic sentencing tables.¹¹

The introduction of a requirement that courts must sentence offenders convicted of historic child sex offences according to current sentencing principles would create inconsistency in two ways. First, a person who committed an offence in 1985 and was sentenced in 1987 would be sentenced differently to a person who committed the same offence at the same

⁶ *R v MJR* (2002) 54 NSWLR 368, 31

⁷ *Maxwell v Murphy* (1957) 96 CLR 261

⁸ Tom Bingham, *The Rule of Law* (Penguin UK, 2011).

⁹ Discussion Paper at [6.15]

¹⁰ See, for example, *Magnuson v R* [2013] NSW CCA 50

¹¹ The Public Defenders *Sex offences – sexual intercourse with child under 10 pre-1.2.2003* http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Sentencing%20Tables/public_defenders_sexoffencessexintchild10.aspx

time but was sentenced in respect of the same facts in 2020. Second, child sex offences would be treated differently from other forms of offending, where the usual approach of sentencing according to the standards at the time of the offence would apply. As the High Court has emphasised, ‘consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently’.¹²

Limitation periods

12. 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?

Legal Aid NSW agrees that, both now and in the future, there should be no limitation period attached to child sex offences. We also support the policy objective behind the repeal of the limitation period in 1992 for certain child sexual assault offences committed against females aged 14 and 15 years. However, we oppose the repeal of the section 78 limitation period being made retrospective. We have set out our arguments against the retrospective operation of criminal laws in response to Question 11. These arguments have even more force when it comes to retrospective changes that expose individuals to criminal prosecution when they are not currently exposed to prosecution. As we reported to the Royal Commission, it is not uncommon that prosecutions are brought for offences that are subject to the section 78 limitation period, and are then withdrawn. It would be unfair to those individuals, in particular, if the limitation period was retrospectively removed. An important feature of legal systems characterised by the rule of law is that laws are certain and predictable. The retrospective criminalisation of conduct by this proposal is contrary to both.

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

Legal Aid NSW does not support making the repeal of this presumption retrospective. Our concerns about legislation with retrospective effect are again relevant, but even more so where a person alleged to have committed an offence would be exposed to prosecution when he was not so exposed at any time in the past.

This proposed change would expose adult males to prosecution for offences allegedly committed more than 25 years ago when they were aged 13 years or younger. There is a presumption that a child under 14 lacks the capacity to be criminally responsible for his or her acts (*doli incapax*). Practical difficulties will arise for both parties in terms of their access to relevant expert evidence to assist the court to make a finding about *doli incapax*. In *RP v The Queen*, offences were alleged to have been committed by an 11 year old

¹² *Wong* (2001) 207 CLR 584 [6], [65]; *Hili* (2010) 242 CLR 520 [49]

child between 2004 and 2007. The trial was held in 2014 and the High Court concluded (in 2016) that the Crown had not established that the accused had the capacity to be criminally responsible. Gageler J referred to reports submitted by the prosecution regarding the accused's capacity when aged 18, and commented:

*The information in those reports exposes the existence, and highlights the significance, of a gap in the evidence as to the state of RP's cognitive development some seven years before. Whether he then had the capacity to understand that the conduct to which he subjected his brother was seriously wrong by normal adult standards is a real and unanswered question.*¹³

These practical difficulties would be amplified if this proposal were implemented.

Chapter 7 Improving the offence of persistent child sexual abuse

Replace section 66EA with model provision?

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

Section 66EA strikes the right balance

Legal Aid NSW does not consider the model provision recommended by the Royal Commission should be adopted in NSW.

Legal Aid NSW acknowledges the challenge for the criminal justice system posed by the prosecution of people accused of the persistent abuse of a child many years prior. As the Royal Commission found, the complainant typically is unable to give details of particular instances, and it is not unusual for these witnesses to give inconsistent evidence and to become confused under cross-examination.¹⁴ However, we consider that section 66EA of the *Crimes Act 1900* (NSW) strikes the right balance between accommodating the evidentiary difficulties and the right of a defendant to know and respond to the case against them. This lies at the heart of the right to a fair trial.

Section 66EA requires proof of a sexual offence occurring on three separate occasions. It is not necessary 'to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred'.¹⁵ It is only necessary

¹³ *RP v The Queen* [2016] HCA 53 [43]

¹⁴ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 14

¹⁵ *Crimes Act 1900* (NSW) s 66EA(4)

to specify the period during which the offence occurred, and to describe the nature of the separate offences.¹⁶ The jury must be satisfied that there were three separate offences, and must be satisfied about the material facts of those offences.¹⁷

We do not consider that the requirement to provide material facts regarding three occasions of conduct constituting a sexual offence is an unreasonable or unrealistic one. The Tasmanian Director of Public Prosecutions, Mr Daryl Coates SC, gave evidence to the Royal Commission that 'it has only been on rare occasions that they have not been able to particularise three separate occasions of abuse'.¹⁸ Mr Coates also expressed concern about the impact that removing any requirement to identify individual assaults might have on interviewing complainants and in the jury's assessment of the complainant's evidence. The Royal Commission also reports his concern that a reduction in particulars through provisions where no individual assaults have to be identified could lead to credibility problems with the complainant, in that their evidence may appear vague and non-specific:

*Where specific incidents are led it provides the jury with the capacity to judge the witness's credit and reliability and for the accused to test the charges. If evidence were only to be required of general sexual abuse, given the onus of proof, I think this would lead to a rise in acquittals.*¹⁹

While indicating support for the Queensland approach to reform of section 66EA the NSW Director of Public Prosecutions also submitted that 'in order to adequately prove the offence of persistent sexual abuse, there is a need for some particularity for two or three offences. In our experience it is usually possible for a victim to provide details of the first and last abuse event. This would strike the appropriate balance ...'.²⁰

Legal Aid NSW considers that child complainants and other vulnerable witnesses should be supported to provide evidence through special measures such as pre-recording of their evidence, the use of remote witness facilities and support persons and the use of witness intermediaries. However, the right to a fair trial means that there must be some specifics provided as to the time, place and manner of the offence(s). As Kirby J noted in *KRM*:

The normal rule is that a person, accused of a criminal offence, is entitled to be informed not only of the "legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge". ... In harmony with this fundamental postulate, the rule established for criminal trials in Australia is ordinarily one which requires a high degree of specificity in the accusations,

¹⁶ *Crimes Act 1900* (NSW) s 66EA(5)

¹⁷ *Crimes Act 1900* (NSW) s 66EA(6)

¹⁸ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 55

¹⁹ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 55

²⁰ *Ibid*, 51

charges and evidence proffered by the prosecution. Because these are principles of the common law, they may, subject to the requirements of Ch III of the Constitution, be modified by legislation. However, any derogation from such fundamental rules has to be very clearly expressed. Otherwise, it will be presumed that no departure from them is included in the legislation concerned. (footnotes omitted) ²¹

Model provision does not protect procedural fairness

Legal Aid NSW does not support the adoption of the model provision recommended by the Royal Commission. The proposal is for a new offence of ‘maintaining an unlawful sexual relationship with a child’, which is a relationship where an adult engaged in two or more unlawful sexual acts with or towards a child over any period. However the prosecution is not required to allege the particulars of any unlawful sexual act, and the jury is not required to be satisfied of the particulars of any unlawful sexual act, but need only be satisfied ‘as to the general nature or character of those acts’.

As the Discussion Paper notes, principles of procedural fairness require that an accused person knows the case alleged against them and be given an opportunity to respond. If the new offence proposed by the Royal Commission were enacted, it would be possible for charges to be laid on the basis of limited information about the offences alleged. The defendant would be exposed to prosecution and potential 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.’²² It would fall to the courts to consider whether a fair trial could be conducted where the prosecution has not been required to provide the dates, places or manner of the offence, other than ‘the general nature or character’ of the offences. This places a significant burden on courts, and if the charge is relied upon frequently, there is likely to be a significant number of appeals.

We are also concerned that experience in other jurisdictions demonstrates a disproportionate impact on young offenders of an offence based on the Royal Commission’s recommended approach: the Royal Commission noted evidence that 35 per cent of convictions under the Tasmanian offence of maintaining a sexual relationship with young person had been for offences where the court characterised the offender and complainant as being in a consensual relationship.²³

In our experience, section 66EA is rarely prosecuted, most commonly because of the late involvement of Crown Prosecutors in reviewing the indictment. This may be remedied by the early appropriate guilty pleas reforms now proceeding in New South Wales.

²¹ *KRM* [2001] HCA 11

²² *KBT v R* [1997] HCA 54

²³ Royal Commission, footnote 20 above, 188

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

No. The model provision includes a maximum penalty of 25 years, and giving the offence retrospective effect would expose people to penalties much higher than those that were available at the time of the offence. This retrospective and very substantial increase in penalty would be contrary to the common law presumptions, rule of law principles and international obligations outlined in response to question 11, above. We make the same comment should this question be intended to apply to the current section 66EA offence, which has operated prospectively since its commencement in 1999.

Should section 66EA be reformed, we prefer the sentencing approach taken under the Victorian course of conduct provision. This provision 'allows for a more just and appropriate sentencing exercise', as it requires a court to impose a sentence that reflects the totality of the offending, but does not permit a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence.²⁴

16. 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?

Legal Aid NSW considers that a higher penalty should be imposed for persistent sexual abuse of a child, to reflect the ongoing nature of the abuse. The courts' interpretation of section 66EA as procedural rather than a substantive offence does not appear to accord with the intention of Parliament when it introduced section 66EA.²⁵ To clarify, we would support amendment of section 66EA as per Recommendation 4 of the NSW Sentencing Council in 2008:

*Providing a note to, or amending 66EA Crimes Act 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.*²⁶

²⁴ Law Council of Australia, *Criminal Justice* Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, 17 October 2016, 9

²⁵ Department of Justice *Strengthening child sexual abuse laws in NSW* (2017), [7.10]-[7.11]

²⁶ Sentencing Council, *Penalties relating to sexual assault offences in New South Wales* Vol 1

Course of conduct charge

17. Should a course of conduct charge, as introduced in Victoria, be enacted?
18. Should a course of conduct charge be available for historic offences?

Should our primary position regarding reform of section 66EA in accordance with the views of the NSW Sentencing Council not be supported, Legal Aid NSW considers a course of conduct provision, as introduced in Victoria, is a preferable reform than adoption of the Royal Commission model provision.²⁷

However, as noted by the Royal Commission, ‘the course of conduct charge is largely untested, and it is unclear how it will operate in practice’.²⁸ To date, there have been at least nine reported decisions concerning sentencing for course of conduct charges, nearly all following pleas of guilty,²⁹ and one concerning the retrospective nature of the provision.³⁰ Legal Aid NSW considers that the Victorian provision should be monitored and evaluated, including its impact on the rights of accused to a fair trial, prior to further consideration being given to its introduction in NSW.

Chapter 8 Improving the offence of grooming

19. 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?
20. 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?

Legal Aid NSW considers that grooming offences should be targeted to behaviour that is otherwise inappropriate, such as exposing a child to pornography or alcohol. We do not support extending grooming offences to activities that could be harmless, such as friendly

²⁷ *Criminal Procedure Act 2009* (Vic) Schedule 1, Clause 4A

²⁸ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 67.

²⁹ *Poursanidis v The Queen* [2016] VSCA 164; *DPP v Ellis* [2016] VCC 1246; *Harmon v R* [2017] VSCA 169; *DPP v Crawford* [2017] VCC 105; *DPP v Thornton* [2016] VCC 946; *DPP v Ingle* [2016] VCC 1430; *DPP v Davis* [2016] VCC 998; *DPP v Girton* [2016] VCC 1535; *DPP v Frank* [2016] VCC 1905

³⁰ *R v RS* [2016] VCC 1464. See also *R v Garcia* [2015] VSCA 275 regarding a stay of proceedings for a course of conduct charge on the ground of unfairness. The unfairness concerned the laying of a course of conduct charge after the commencement of a hearing for other charges of child sexual assault.

communication or giving gifts. As the Discussion Paper notes, ‘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’. When actual sexual offending has occurred, the attention of the criminal justice system should focus on sexual offending, rather than the prior grooming behaviour.³¹

Institutions should address grooming behaviour through supervision and codes of conduct.

We do not support offences targeting the grooming of persons other than the child, such as a parent. Again, proving that this behaviour had an unlawful purpose would be extremely difficult until after a further sexual offence has occurred.

Chapter 9 Strengthening offences against young people under care

20. Should other specific relationships be included in the definition of ‘special care’?
21. Should ‘special care’ offences apply to all forms of sexual offences including indecent conduct?

Legal Aid NSW concurs with the Royal Commission finding that there are no gaps in the NSW provisions regarding ‘special care’ relationships. We can see no justification for the limitation of the section 73 offence to sexual intercourse, and we support its extension to non-penetrative sexual acts, including indecent assaults and acts of indecency.

Chapter 10 Offences of failing to protect/report

Failure to report

22. Should the Royal Commission’s model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?
23. Should protection be afforded to people who make disclosures of child sexual abuse?

Legal Aid NSW does not support the Royal Commission’s model for a targeted failure to report offence.

On the one hand, it is too limited, as it is confined to institutions that operate facilities or provide services for children, where a child is under the care, supervision or control of the institution. At the same time, it is too broad, as it would criminalise a person who ‘should

³¹ Discussion Paper at [8.1]

have suspected (to a standard of negligence) that an adult was abusing a child. This low standard of proof may operate to inappropriately criminalise any adult person, including volunteers, associated with an institution. It could deter people from volunteering or otherwise participating in the work of institutions providing facilities or services for children.

For the reasons outlined in our submission to the Royal Commission in October 2016, Legal Aid NSW supports the repeal of section 316 of the *Crimes Act 1900* (NSW) (conceal serious indictable offence) and its replacement with an offence specifically targeted to the disclosure of child sexual assault based on the Victorian offence of failure to disclose a child sexual assault offence.³² We share the concerns of the New South Wales Law Reform Commission (**the LRC**) that section 316 can operate unfairly, including to prosecute victims of family and domestic violence as well as victims of sexual assault offending.³³ The LRC unanimously recommended that section 316(1) be repealed.

The targeted Victorian offence applies to all adults who have a reasonable belief that a sexual offence has been committed against a child under the age of 16 by another person over the age of 18. We agree with the submission to the Royal Commission of the Law Council of Australia that the requisite level of knowledge of the commission of a sexual offence should be one of 'reasonable suspicion' rather than 'reasonable belief'. We note that section 328 of the *Crimes Act 1958* (Vic) also provides that it is a reasonable excuse to fail to comply with the section if a person fears on reasonable grounds for the safety of a person were the person to disclose, and the failure to disclose is a reasonable response in the circumstances. We consider this provision appropriately balances the fears that may be held by victims of domestic and family violence who are aware of child sex offending, with the need to ensure these offences are disclosed wherever it is safe to do so.

We agree that protections should be available for whistle blowers, as long as the disclosure is made in good faith. The protections in section 328 of the *Crimes Act 1958* (Vic) appear to be a suitable model.

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

For reasons outlined above, Legal Aid NSW does not support the introduction of offences with retrospective application.

³² *Crimes Act 1958* (Vic) section 327(2)

³³ See page 226 of the Consultation Paper.

Failure to protect

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

Legal Aid NSW does not support the introduction of a failure to protect offence. Such an offence requires people to determine whether there is a 'substantial risk' that a child will be victimised. This calculation is difficult even for experts to make, and is more appropriately a basis for civil rather than criminal liability. As noted by the Truth Justice and Healing Council submission to the Royal Commission, there is a danger that institutions may 'adopt risk-averse behaviours that are so onerous they restrict the capacity of the institutions to provide services to children'.³⁴

The risk that people in authority will fail to protect children is preferably addressed by the Working with Children Check regime and mandatory reporting provisions. These measures can also be enhanced by:

- introducing extended civil liability (a non-delegable duty) for institutions that fail to take steps to protect children (as recommended by the Royal Commission, and broadly supported by Legal Aid NSW)³⁵
- efforts to ensure that schools and other institutions have appropriate standards in place to ensure child protection
- the failure to report offence based on the Victorian provision.

Chapter 11 statutory defences

Honest and reasonable mistake as to age

26. 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?

Legal Aid NSW supports retention of the common law defence of honest and reasonable mistake of fact (Option 1 on page 72 of the Discussion Paper). The Discussion Paper suggests that the defence may lead to 'unjust results' (at [11.17]). However, if the defendant's belief that a child was 16 or older is both honest and reasonable in the context

³⁴ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 242

³⁵ See further Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report* Chapter 15

of the particular facts of a case, we do not consider that an acquittal is necessarily an unjust outcome: as noted by the High Court in *CTM v The Queen* “the greater the gap between the child’s true age and the age of 16 years, the less likely it may be, in practice, that such a belief was reasonable”.³⁶ The reasonableness of the belief is best judged by the trier of fact, and the common law provides appropriate flexibility in this context.

Similar age

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

Legal Aid NSW strongly supports the introduction of a similar age defence, to acknowledge the reality that children under 16 engage in consensual sex and should not be criminalised for doing so. We support a similar age defence which is available when there is no more than three years between the two people and the younger person is aged between 12 and 16.

As the Discussion Paper notes, such a defence was recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, which recommended a defence where there is a two year age gap. Four Australian jurisdictions currently have a similar age defence.³⁷

We do not consider that reliance on police discretion or NSW Police Force guidelines regarding consensual underage sexual activity is a satisfactory approach. These guidelines are not publicly available, and the exercise of the discretion is not subject to oversight or review. In the experience of our criminal lawyers, police charging decisions in respect of consensual underage sex are not consistent, and may be affected by pressure of family members of complainants.

Reform should also address the injustice of past convictions and sex offender registration in historic similar age cases. Concerns about the inappropriate and unfair consequences of child protection legislation with regard to consensual underage sex have been longstanding and have been raised in many forums: see, for example, the recommendations of the *Standing Committee for Law and Justice’s Report Spent Convictions for Juvenile Offenders*.³⁸ While in some cases this behaviour is dealt with in accordance with s 33(1)(a) of the *Children (Criminal Proceedings) Act 1999* (NSW), thus

³⁶ *CTM v The Queen* [2008] HCA 25 (at [27])

³⁷ Discussion Paper, 73

³⁸ Available at

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5916/100706%20Spent%20convictions%20for%20juvenile%20offenders%20Re.pdf>

exempting the offender from registration obligations, this is not always the case. This is demonstrated by the following case:³⁹

Case study: Graham

Graham pleaded guilty to two offences contrary to section 66(C)(1) and one offence contrary to section 66C(3) of the *Crimes Act 1900*.

Graham and his girlfriend were in a relationship and engaged in consensual sexual intercourse. The first and second offence occurred when Graham was 16 and his girlfriend was 13, and then 13 years and 6 months. The third offence occurred when Graham was 17 years and 3 months and his girlfriend was 14 years 9 months.

The Magistrate sentenced Graham to probation orders and directed that no convictions be recorded. The Magistrate accepted the information in Juvenile Justice and psychologist reports that there was no suggestion of paedophilia. Notwithstanding, Graham is a registrable person subject to a reporting period of 7.5 years.

The Children's Legal Service has seen many cases like Graham's, the injustice of which should be remedied through mechanisms for removal from the sex offender register (such as through application to the Local Court) and/or retrospective exemptions from the Working with Children check.

³⁹ For a more recent reported example, see *Director of Public Prosecutions (NSW) v McKellar* [2015] NSWLC 23

Chapter 12 Decriminalising consensual sexting

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

Legal Aid NSW strongly supports legislative reform to decriminalise age appropriate sexting. We agree with the observation in the Discussion Paper (at page 81) that the practice of age appropriate sexting is distinct from child pornography offences, which the legislation was originally introduced to target. However, we consider that an appropriate law reform response to this issue is one which decriminalises age appropriate behaviour at the start of the process: the legislation should clearly distinguish between consensual sexting and conduct that exploits or abuses children.

We suggest this could best be achieved by:

- amending the definition of child abuse material,
- introducing statutory exceptions to child pornography offences, and
- introducing a statutory defence.

A legislative response involving both exceptions and defences would be consistent with the approach taken in Victoria, which is the only jurisdiction which has to date dealt with consensual sexting by young people. This approach would also be consistent with the approach taken to the recently introduced distribution of intimate images offence⁴⁰ and the NSW Government’s previous approach to decriminalising other forms of appropriate behaviour, such as that protected by the “artistic merit” defence in Division 15A of the *Crimes Act 1900* (NSW). On advice of the Child Pornography Working Party, the Government amended the offence in 2010 to move what had previously been defences relating to the literary, artistic, educational or journalistic merit of the material into the definition section of the offence so that:

*by requiring that the literary, artistic or educational merit of the material is determined **prior to the work being defined as child pornography**, it ensures that works with genuine artistic merit are not confused with child pornography. It also ensures that a defence is not available for the creators of material without any artistic merit, but produced under the guise of an artistic purpose⁴¹ [our emphasis]*

⁴⁰ Section 91T of the *Crimes Act 1900* (NSW) contains exceptions, rather than defences

⁴¹ Hon. Michael Veitch (Parliamentary Secretary) Second Reading Speech to the Crimes Amendment (Child Pornography and Abuse Material Bill) 2010 (20 April 2010), 1

Leaving this issue to be dealt with only via a defence will mean that young people involved in age appropriate sexting still face being prosecuted, and being required to give evidence, before the defence can be raised. It would create inconsistency where hypothetically, a 15 year old who sends an image of herself posing naked to her 17 year old boyfriend would be required to raise a defence to a charge of possession of child abuse material - whereas the prosecution would be required to establish that the same image displayed by a 50 year old artist is not exempted from the definition of child abuse material in section 91FB of the *Crimes Act 1900*.

While we support the introduction of a similar age defence to other forms of sexual offences, we consider the issue of sexting requires **both** exceptions and defences, to prevent unnecessary prosecutions of age appropriate sexting. We suggest that reform in NSW be modelled on sections 51M-51P of the *Crimes Act 1958* (Vic) (**the Victorian Act**), adapted to take into account some differences between Victorian child abuse material offences and the NSW offences and apparent gaps in the Victorian legislation.

We note that our proposed approach addresses the production, possession and dissemination of child abuse material (**CAM**) where the *act* depicted in the CAM is consensual. It does not deal with the issue as to whether the *making, possession or dissemination* of the CAM is consensual. If the production or dissemination of the CAM is non-consensual, then this is addressed by intimate image offences in Division 15C of the *Crimes Act 1900*. Though related, the two pieces of legislation deal with different forms of conduct.

Legal Aid NSW suggests that amendments decriminalising sexting should incorporate the following elements:

Definition of Child Abuse Material

There are a number of potential ways to carve out sexting from the definition of CAM in section 91FB of the *Crimes Act 1900*, noting that the current definition contains a “reasonable persons” test which does not expressly refer to conduct of consenting young persons:

- A further subsection could be added to the current list of matters in section 91FB(2) to be taken into account in deciding whether reasonable persons would regard particular material as being offensive in all the circumstances that refers to the *relative age of the parties involved, the nature of the relationship between them at the time of the production of the material*;
- Additionally, a further matter could be prescribed in section 91FB(2) to the effect of *whether the material depicts/describes a child being abused/harmed and whether a child was abused/harmed in the production of the material*.

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- The phrase “the standards of morality, decency and propriety generally accepted by reasonable adults” in section 91FB(2)(a) could be replaced with “*the standards of morality, decency and propriety generally accepted by reasonable persons*”.

Further, and noting the Victorian exceptions and defences only apply to CAM which are images, we suggest that NSW exceptions and defences should apply to all types of CAM (that is, to include written and audio, real and depicted images).

Finally, and in any event, we suggest that the definition of CAM in Division 15A be amended to reflect the definition of “private parts” in Divisions 15B and 15C, where “private parts” includes those of transgender and intersex individuals.

Age of child

Consistent with the age of consent in NSW (and unlike the Victorian model) the definition should continue to refer to images of a child under 16 years.

Exceptions

We note the Victorian exceptions to in section 51M(1) and (2) address the situation where:

- if “A” is a child and the image depicts A alone then it is not an offence for A to possess and send the image. If A is now an adult and possesses the same image of A alone then it is no longer an exception, but a defence under section 51O. There is no exception or defence in respect of where A, as an adult, later sends the image of him/herself.
- if “A” is a child and is the victim of an offence which is depicted by the image (eg where A is being sexually assaulted without consent) then it is not an offence for A to possess and send the image (section 51M(2) of the Victorian Act). This is intended to address the scenario where A films the assault against her for protective/evidentiary purposes. However, if A is now an adult but was a child victim depicted in the image there is no exception or defence for A possessing or sending the image.

We suggest the NSW exceptions should apply to:

- If A is a child (under 18) and the material is of A alone: there is an exception for the making, possession and sending of the material (ie reflecting section 51M(1) of the Victorian Act);
- If A is an adult and the CAM is of A alone there is an exception to the making and possession of the CAM, but not to the sending of the material. Non-consensual

distribution of the image by an adult would be dealt with under Divisions 15A or 15C of the *Crimes Act 1900* (the intimate images offence provisions);

- Whether an adult or a child now – if A were the victim of an offence which is depicted in the CAM there is an exception to the making, possession and sending of the material (that is, reflecting section 51M(2) of the Victorian Act, but extended to where A turns 18). This would address the situation where A, as an adult, seeks to send a recording of a sexual assault against A to the police, for evidentiary purposes.

Defences

The Victorian Act contains two relevant defences:⁴²

- **Section 51N** applies where A is a child who takes, possesses or sends an image which does not depict an act which is a criminal offence (eg a 15 year old taking nude selfies) or where the image depicts an act which is a criminal offence but A reasonably believes that it does not and A was not more than 2 years older than the youngest child depicted in the image; or A reasonably believed they were not more than 2 years older than youngest child depicted in the image; and
- **Section 51O** applies to any person who has an image of themselves as a child that does not depict that person committing a criminal offence. The defence does not apply to distribution.

We suggest that section 51N of the Victorian Act should be extended in NSW to:

- Apply to conduct of 18 and 19 year olds who, in our experience, are also at risk of criminalisation through age appropriate sexting;
- Situations where A reasonably believes that the parties to that act consented to the act. This would cover the scenario where A actually knows that the two 15 year olds who had sex in the image were committing a crime of underage sex, but A has an honest and reasonable belief that the sex was consensual;
- A similar age gap of 3, rather than 2 years. We refer to our submissions above concerning the similar age defence;

⁴² Section 51P of the Victorian Act provides a further defence where the accused is no more than 2 years older than a 16 or 17 year old child. This is not relevant to NSW, where the age of a child for the purposes of Division 15A of the *Crimes Act 1900* (NSW) is defined as under 16 years.

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- The provision should also clarify that the relevant age for comparison is the age of the youngest child as depicted/described in the CAM. For example, B and C have consensual sex where B is 13. They film the act. Two years later A (who is 17) comes into possession of the video. B is now 15. A is only 2 years older than B, but is more than 2 years older than the age of B at the time of the filming. The relevant age for B should be the age that is depicted/described in the CAM.

Burden of proof

We consider that the evidentiary onus should be on the accused to raise and establish the defence on the balance of probabilities with the ultimate burden of proof on the prosecution rebutting the defence to the usual criminal standard.

[Legal Aid NSW proposed sexting amendments to Division 15A, *Crimes Act 1900*](#)

In light of the above, we provide in **Annexure 1** a suggested starting point for further consideration of addressing sexting in Division 15A of the *Crimes Act 1900* (NSW). We also submit that such amendments should operate “retrospectively”, that is, to enable review of sex offender registration and working with children requirements which have been imposed as a result of age appropriate sexting. For the reasons outlined above in respect of the close in age defence, provision should be made for review and removal of people from the Child Protection Register whose entry on the Register has resulted from sexting.⁴³

We note that similar amendments should also be sought to the *Commonwealth Criminal Code* to prevent the prosecution of children otherwise protected by any NSW reforms.

If the above proposals are not adopted, in the alternative, and consistent with the approach taken with the intimate image offences in Division 15C of the *Crimes Act 1900* (NSW), the approval of the NSW Director of Public Prosecution should be required before the prosecution of offences under Division 15A of the *Crimes Act 1900* (NSW), where the alleged perpetrator is under 18 years old.

⁴³ Note the Royal Commission observed that: some jurisdictions have provided for judicial discretion in relation to whether a juvenile offender will be required to register on a child sex offender registry and that the WALRC has expressed support for this approach. State and territory governments may wish to keep under consideration from time to time the adequacy and appropriateness of the coverage of their child sex offender registration schemes in relation to juveniles. If evidence emerges to show that treatment programs for juvenile child sex offenders remove the risk of further sexual offending against children, state and territory governments could also reconsider the application of their sex offender registration and WWCC clearance requirements to those juveniles who successfully complete treatment: Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 473)

Chapter 13 giving evidence on multiple occasions

30: 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?

At the outset, we note the Discussion Paper (at [13.6]) refers to the power of the Children's Court to hear and determine committal proceedings where an adult co-accused is joined pursuant to section 29(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**). We note that, until recently, such power could only be exercised where the adult was less than 3 years older than their younger juvenile co-accused. Legal Aid NSW did not oppose that change.

We also note that the statement in [13.6] that "however, the complainant will still be called to give evidence in the Children's Court in relation to the young person" is not accurate: section 91(8) of the *Criminal Procedure Act 1986* (NSW) applies to both adult and juvenile committal proceedings.

Legal Aid NSW supports measures to reduce re-traumatisation of vulnerable complainants in criminal proceedings. However, the experience of Legal Aid NSW's Children's Legal Service is that the scenario sought to be addressed by the Royal Commission's recommendation arises only very rarely in NSW, and even more rarely in child sexual assault offences. We are not aware of any cases that have been identified by the NSW Director of Public Prosecutions in support of reform of section 31 of the CCPA.

In respect of the potential reform options identified in [13.8] and [13.9] of the Discussion Paper, we submit as follows:

Limiting cross examination in respect of the complainant's evidence

We do not support this option. It is inconsistent with the accused's right a fair trial, including the ability to test the key evidence against them. It would undermine the fundamental rationale of section 31 of the CCPA (as discussed further below).

Allowing juveniles to be dealt with in adult courts where there are adult co-accused

We do not support this option. We agree with the Discussion Paper that it would be a significant departure from the current approach where a young person is dealt with as a

juvenile. It would be at odds with the purpose of a separate jurisdiction for juvenile offenders and contrary to international human rights principles.

Pre-recording of complainant's evidence in the Children's Court

We support this option, subject to adequate resourcing of all affected agencies, including Legal Aid NSW. We have recently indicated our support for the expansion of the Child Sexual Assault Evidence Pilot to the NSW Children's Court, including both special measures of witness intermediaries and pre-recording of evidence. While the Children's Court does not share the same challenges of trial delay experienced in the District Court, there is clear benefit to a child complainant in having their evidence taken as early as possible in the proceedings, once full disclosure of the prosecution case has been made. As there may be significant delay reaching the trial date in the District Court in the rare case of referrals following a section 31 hearing, additional trial preparation would be required for both solicitors and counsel appearing at trial.

Committal process for juveniles solely on tendered documents

We do not support this option. It represents a significant erosion on the rights of juvenile defendants. Section 31 of the CCPA provides a mechanism for the Children's Court to refer to the District Court, in appropriate cases, non-Serious Children's Indictable Offences ("SCIOs") to be dealt with according to law. This well-established referral power works on the basis of a presumption in favour of non-SCIOs (being the majority of juvenile offences) remaining in the summary jurisdiction of the Children's Court. The power can only be exercised following consideration of all of the prosecution evidence. In contrast, the committal provisions of the *Criminal Procedure Act 1986* (NSW) which apply to adult accused do not contain such a presumption, and apply only to strictly indictable offences and Table offences dealt with on indictment. There is no Table offences scheme in the CCPA. These distinctions reflect the fundamentally different legal principles operating in the criminal justice process in respect of juvenile and adult accused. Changing section 31 to effectively introduce a formal committal would have significant cost implications for Legal Aid NSW and the Children's Court. Many more matters would likely be dealt with in the District Court, resulting in increased costs and delays in that jurisdiction.

Prosecution power to elect where a young person is charged with a sexual assault offence

We do not support this option. We repeat our comments about the rationale for the current approach to non-SCIOs in the Children's Court. As noted above, while there is no Table offence scheme in the Children's Court, sexual assault offences categorised as a SCIO are presumptively dealt with at law. We consider that the current SCIO scheme adequately

delineates between sexual offences which are can be appropriately dealt with in the Children’s Court and those which are too serious and must be dealt with at law.

Expansion of category of SCIOs

We do not support this option, noting that the Royal Commission found no evidence to suggest that juveniles charged with child sexual abuse offences are being dealt with in a lower court when they should be dealt with in a higher court.⁴⁴

Chapter 14 Tendency and coincidence

31. 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?

Legal Aid NSW considers that the proposed reforms to the tendency and coincidence provisions of the *Evidence Act 1995* (NSW) have significant implications for the criminal and civil justice system in NSW and in particular for the rights of accused persons in all criminal proceedings. It is very difficult to isolate or differentiate rules of evidence applying in child sexual assault proceedings from rules of evidence applying in other types of matters.

We therefore maintain our position as submitted to the Royal Commission that this issue should be the subject of comprehensive inquiry and consultation undertaken by the Australian Law Reform Commission.

Chapter 15 Jury directions

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

Legal Aid NSW does not consider further codification of jury directions in NSW is required. We note that the Royal Commission did not recommend that jury directions be partially codified. Recommendation 64 is that “*State and territory governments should consider or*

⁴⁴ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 451

reconsider the desirability of partial codification of judicial directions now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.”

The NSW Law Reform Commission (**LRC**) considered the Victorian precedent in its consideration of jury directions in 2012.⁴⁵ The NSW LRC’s approach has been criticised by the Royal Commission for omitting “scrutiny of the content of directions being applied from outside the legal profession and a clear path for transmission of up to date knowledge from social science research”.⁴⁶ However, it is noted that the LRC consulted with a number of social scientists, including the National Child Sexual Assault Reform Committee, whose suggested mandatory judicial directions form the basis of the Royal Commission’s recommendation concerning children’s responses to sexual abuse.⁴⁷ Having consulted extensively with legal and non-legal stakeholders, the LRC concluded that the Victorian approach to codification of jury directions should not be followed in NSW.

We agree with that conclusion, and the observations of the LRC that:

The principal advantage of the existing common law framework is its flexibility to meet the demands of the individual case and to respond to new, unforeseen issues that may arise in future cases. The use of a system of suggested directions that can be updated promptly, without the need for legislation, can assist judges to keep pace with appellate decisions and legislative changes in the criminal laws. In turn this provides a means of ensuring greater consistency and accuracy in the provision and content of directions without detracting from the flexibility that is needed for adjusting the directions to the individual case.⁴⁸

We also agree with the LRC’s observation that:

On a more fundamental level, there is an inherent potential for inflexibility in the introduction of a statutory scheme or codification that seeks to anticipate the issues on which a jury will need instruction. It is our view that the adoption of such a scheme could pose a risk to the fairness of the trial process if it detracts in any way from the ability of the trial judge to assess the needs of the particular case and to tailor the directions to the jury to accommodate those needs. A trial judge is in the best position to understand the dynamics of any particular trial and to devise directions that meet the demands of that trial.

Similarly, we do not see any real advantage in implementing a system of formally authorised or mandated model directions. In theory, such a system could increase consistency and accuracy, and consequently reduce the risk of appealable error. However, in reality, there remains a risk that judges would err when making the threshold determination of whether or not to provide a direction. Judges might also err on the side of caution by providing more directions than are necessary. Additionally, as with codification, a system of mandatory or authorised model directions has an inherent degree of inflexibility that could potentially compromise

⁴⁵ Law Reform Commission NSW Report 136 *Jury Directions in Criminal Trials*: <http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-136.pdf>

⁴⁶ *Ibid*, 190

⁴⁷ See Recommendation 70

⁴⁸ At [2.25]

*the fairness of the trial process.*⁴⁹

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

No. As acknowledged in the Discussion Paper (at [15.14]), the court may give warnings and directions to the jury contemporaneously with the jury hearing the evidence, to assist the jury to give appropriate weight to the evidence. The common law provides appropriate flexibility in this regard, and section 165 of the *Evidence Act 1995* (NSW) does not prescribe or limit judicial discretion as to the timing of jury directions or warnings.

As noted by Odgers,⁵⁰ it is common practice for a warning to be given (if requested by a party) when the evidence in question is admitted in the trial, as well as in the summing up to the jury at the end of the proceedings. In a different context, a NSW Supreme Court judge has observed:

*For my part, I believe it is highly preferable that a trial judge gives such information and warnings as are required in respect of a particular part of the evidence that is to be given in a trial before a jury either immediately before or immediately after the giving of that evidence rather than to wait to fulfil that obligation during the course of the summing up. Generally speaking, it would be expected that any information or warning that a jury is required to consider in their assessment of a particular piece of evidence would have considerably more impact upon the jury if given at a time proximate to the evidence. This does not mean that it would not be advisable, or even necessary in some cases, to convey that information or warning again during the course of the summing up. But whether such a course is necessary in order to ensure a fair trial and one according to law will depend upon all the circumstances of the particular case and the nature of the information or warning that must be given.*⁵¹

This flexible approach is reflected in the suggestion in the NSW Criminal Trials Benchbook that

directions and warnings about particular types of evidence or witnesses be given at the time the evidence is called before the jury. If the evidence is very prominent in the trial it may be appropriate to give the direction or warning immediately after the opening addresses, for example where the Crown case is solely or substantially based upon visual identification. Directions and warnings should also be repeated in the summing up. It may be appropriate to give a direction or warning in writing at the time it is given orally to the jury, or for it to be included in the written directions

⁴⁹ At [2.36]

⁵⁰ Uniform Evidence Law, page 1355

⁵¹ Ibid, citing *R v DBG* (2002) 133 A Crim R 227; [2002] NSWCCA 328 at [23] per Howie J.

*in the summing up depending upon the significance of the evidence to the Crown case.*⁵²

A trial judge's general powers and obligations under the common law to give appropriate warnings and directions to a jury has been described as a specific manifestation of "the overriding duty of the trial judge ... to ensure that the accused secures a fair trial".⁵³

In our view, prescribing the timing of jury directions unnecessarily fetters this overriding duty. Such prescription is not necessary and is undesirable.

34. Should the requirement to give a <i>Markuleski</i> direction be abolished?
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Legal Aid NSW maintains its position as submitted to the Royal Commission that the 'Markuleski' direction should not be abolished. The direction, and its rationale, is not limited to child sexual assault proceedings. As acknowledged by the Royal Commission, the direction is not required in all cases;⁵⁴ where tendency or coincidence evidence is not adduced, directions to the jury against the use of propensity reasoning will not normally be required, unless there is a feature of the evidence creating a risk that the jury would misuse the evidence.⁵⁵ Whether the direction is given in the particular circumstances of the case should remain a matter for the discretion of the court, noting the observations of Spigelman CJ in *R v Markuleski* that:

On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.

*Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.*⁵⁶

As noted by the Law Council of Australia,⁵⁷ the purpose of such a direction is to ensure that a jury is not misled by a direction that they should consider each count separately and that different verdicts may be reached on different counts. A judicial direction may be necessary to prevent the risk that a juror, having doubts about a complainant's account in respect of one count, will believe that those doubts should be disregarded when considering the complainant's account in respect of another count.

⁵² At [1.015]

⁵³ Ibid, citing *Crofts v The Queen* (1996) 186 CLR 427; 88

⁵⁴ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 131

⁵⁵ *R v Matthews* [2004] NSWCCA 259 at [43]–[51] applying *KRM v The Queen*.

⁵⁶ At [189]–[191]

⁵⁷ In its submission to the Royal Commission Criminal Justice Consultation Paper, page 25

35. 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?

Legal Aid NSW does not support this recommendation. A number of concerns identified by the Royal Commission about the use and exploitation by defence counsel of misconceptions and uncertainty to undermine a child witness's credibility are being addressed by current trial measures in NSW, through the use of witness intermediates and pre-recording of children's evidence as part of the Child Sexual Assault Evidence Pilot. Legal Aid NSW supports these measures, and their expansion to other vulnerable witnesses.

We further note that legislative amendments in NSW and Victoria have, in contrast to other jurisdictions, arrived at a position in relation to corroboration, delay and reliability that is consistent with the social science research considered by the Royal Commission.⁵⁸ The *Evidence Act 1995* (NSW) also provides for the use of expert evidence with respect to the impact of child sexual abuse on children and their development and behaviour during and following the abuse (in sections 79(2) and 108C).

The Judicial Commission's Sexual Assault Trials Handbook also contains comprehensive reference material drawn from legal and non-legal experts concerning the impact of sexual abuse on complainants, including on their memory and ability to give evidence. This includes reference to the social science research published by the Royal Commission itself.

Legal Aid NSW considers that it is preferable that particular issues regarding a complainant's evidence continue to be dealt with, where appropriate, by expert evidence and directions tailored to or responding to the particular circumstances of the case. A one size fits all direction may not be appropriate to the particular witness, and risks a misdirection resulting in a miscarriage of justice.

Chapter 16 standard non-parole periods

36. 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?

Legal Aid NSW does not oppose the Sentencing Council's recommendation.

⁵⁸ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* Parts III-VI, 140

Annexure 1: Legal Aid NSW suggested amendments to Division 15A of the *Crimes Act 1900* (NSW) to decriminalise sexting

"child abuse material" means⁵⁹ material that depicts or describes, in a way that reasonable persons would regard as being, in all the 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
 - (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 deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive, include:
- (a) the standards of morality, decency and propriety generally accepted by reasonable persons, 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,
 - (d) the relative age of the parties involved, the nature of the relationship between them at the time of the production of the material
 - (e) whether the material depicts/describes a child being abused/harmed and whether a child was abused/harmed in production the material
 - (f) 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 includes 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)).

⁵⁹ Suggested additions to the definition of child abuse material are underlined

(4) The "**private parts**" of a person are:

- (a) a person's genital area or anal area, or
- (b) the breasts of a female person or transgender or intersex person identifying as female.

Exceptions applying to children

A does not commit an offence against sections 91G and 91H if -

- (a) A is a child (under 18) and the child abuse material depicts A alone,
- (b) A is an adult and the child abuse material CAM depicts A alone, there is an exception to the making and possession
- (c) A is a child and A is the victim of a criminal offence punishable by imprisonment and the child abuse material depicts that offence,
- (d) A is an adult and A is the victim of a criminal offence punishable by imprisonment and the child abuse material depicts that offence, there is an exception to the making and possession by A of the CAM,

Defence applying to children

It is a defence to a charge for an offence against sections 91G and 91H if -

- (a) the child abuse material depicts one or more persons (whether or not it depicts A), and
 - (b) the child abuse material -
 - (i) does not depict or describe an act that is a criminal offence punishable by imprisonment, or
 - (ii) depicts or describes an act that is a criminal offence punishable by imprisonment but A honestly and reasonably believes that it does not, or
 - (iii) depicts or describes an act that is a criminal offence punishable by imprisonment but A honestly and reasonably believes that the all parties to the act consented to the act,
- and

(c) at the time of the conduct constituting the offence under ss 91G or 91H –

- (i) A was not more than 3 years older than the age of the youngest child as depicted in the child abuse material, or
- (ii) A reasonably believed that they were not more than 3 years older than the age of the youngest child as depicted in the child abuse material.

Examples

1. The image depicts A taking part in an act of sexual penetration with another child who is not more than 3 years younger. Both are consenting to the act. A is not guilty of an offence against section 91G and 91H 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 3 years older than the youngest child depicted in the image. A is not guilty of an offence against section 91G and 91H in respect of the image.