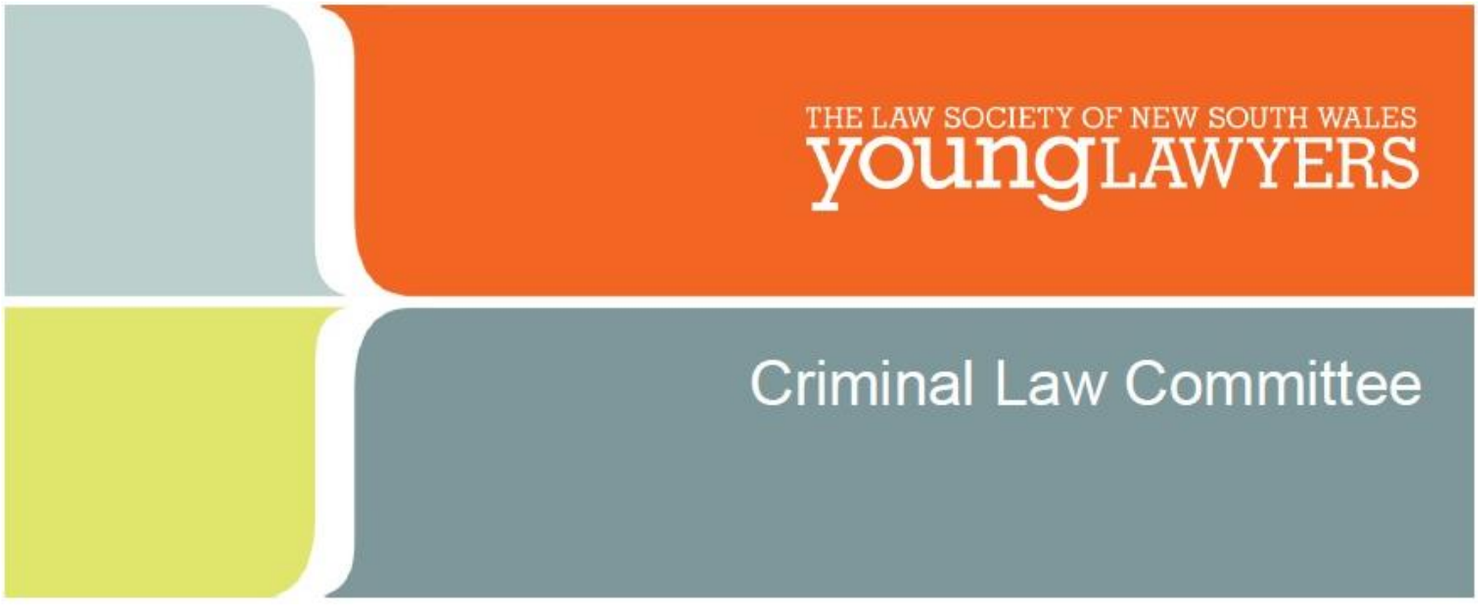

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice System Consultation Paper

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The Royal Commission into Institutional Responses to Child Sexual Abuse

GPO Box 5283
Sydney NSW 2001

Contact:

Renée Bianchi

President, NSW Young Lawyers

Liam Cavell

Chair, NSW Young Lawyers Criminal Law Committee

Authors: **Sam Hartridge (Submissions Coordinator), Vanessa Chan, Samudhya Jayasekera, Sharyn Jenkins, Samuel James Murray, Kartini Saddington, Michael Tangonan, and Reshma Zachariah.**

The NSW Young Lawyers Criminal Law Committee (**Committee**) makes the following submission to the Royal Commission into Institutional Responses to Child Sexual Abuse.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee is responsible for the development and support of Members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee draws its Members from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

The Committee welcomes the opportunity to address some of the issues raised in the Criminal Justice System Consultation Paper (**Consultation Paper**) released by the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**).

The Committee fully agrees with the Consultation Paper that it is necessary and appropriate to review the operation of the criminal justice system to ensure that offenders are appropriately punished. As an institution, the criminal justice system needs to be arranged to punish those responsible for child sexual abuse, thereby providing clear social condemnation of these abhorrent acts. Furthermore, the system needs to be responsive to the needs of victims and plays an important role in repairing the damage suffered. The Committee also agrees that the criminal justice system is a critical element in preventing the development of institutional environments that do not effectively respond to, or prevent, instances of child sexual abuse.

Punishment, retribution and rehabilitation are indispensable to addressing these concerns. However, the criminal trial is a blunt tool that cannot alone address this issue. Accordingly, the problems identified and reforms proposed in the course of this consultation by the Royal Commission, the Committee and other respondents in the process, will only be effective if they are accompanied by broader changes, including evidence-based policies addressing prevention, treatment, and rehabilitation. The Committee observes that such policies will need an ongoing political commitment in order to fully effect the social change envisaged by the terms of reference of the Royal Commission. Where changes to the criminal justice system are considered to improve institutional responses to child sexual abuse, the Committee emphasises the need to fully consider how these changes might affect the system more broadly.

In this submission, the Committee restricts itself to four topics of particular significance. These are reporting and investigation, including a proposal for a uniform national code of conduct; consideration of third party offences; tendency and coincidence evidence; and discussion of the Consultation Paper's sentencing proposals.

Reporting and investigation

The Committee submits that improving the reporting and investigation of child sexual abuse is a critical and straightforward means of improving the response by the criminal justice system. As noted in the Consultation Paper, survivors' initial contact with the criminal justice system informs their entire experience and satisfaction with the ultimate outcome. The Committee is encouraged by the long-term trend of improved police and other institutional practices that are facilitating the reporting and investigation of child sexual abuse. The Committee notes that unfortunately, even with the best processes and protocols, mistakes relating to reporting and investigation may still be made.

Accordingly, the Committee proposes that a uniform national standard for reporting and investigation be developed. This standard should include governing principles, processes, and safeguards. It should be easily accessible to all participants and kept up to date. The Committee submits that this should take the form of a code of conduct mechanism implementing the principles detailed in the Consultation Paper.

Code of conduct for professionals responding to reports of child sexual abuse

The Committee submits that consideration should be given to introducing a standardised national code of conduct for responding to reports of child sexual abuse, which includes

police officers and child protection workers. The promulgation of a uniform code of conduct would be a cost effective way of ensuring that best practice is as widely encouraged as possible. The drafting of such a code should include all relevant stakeholders, but in particular survivor advocacy and support groups. Such a code of conduct should be regularly updated to incorporate lessons learned by responders and the latest research concerning child sexual abuse.

Furthermore, the code of conduct could be adapted to specific audiences, including specialist and non-specialist police, (non-police) child protection workers, mandatory reporters, and importantly, different survivor groups. These adaptations could adjust levels of specificity, technicality, and be tailored to those from different cultural backgrounds. Making codes publically available creates a common, external standard for conduct and responses to be assessed. Furthermore, it enhances accessibility and transparency of the process, an issue noted in the Consultation Paper to be a significant concern for survivors.

Any code should include relevant guiding principles, such as those mentioned in chapter three of the Consultation Paper. In particular, it would be appropriate to emphasise the need for proper training of those responding to child sexual abuse claims to ensure that all claims are treated in a non-judgemental manner and that the focus is on the credibility of the complaint, rather than the complainant. Any code should highlight that matters based on the complaint alone, without other corroborating evidence, should not be automatically classified as weak and viewed with scepticism. It is common in child sexual abuse offences for there to be a distinct lack of corroboration due to the historic nature of the offences and often only the perpetrator and the victim are present during the alleged commission of the offence. Training in this area would help prevent the reoccurrence of past failures by law enforcement to pursue reports, based on doubts as to their veracity and incorrect assumptions concerning the false claims.

The code could also clarify that making a report does not bind a complainant to pursue the matter through the criminal justice system to completion. This is particularly important in light of the concerns expressed by many survivors that they are reluctant to engage with a process that they see as stressful and potentially re-traumatising. A feature of many Australian prosecutorial guidelines is that the wishes and views of the complainants are given significant weight and this could be reinforced in any code. The code could also specify procedures to be followed, for example in interviews, contacting survivors, and referral to support services. A publically promulgated version of the code should detail the

full range of reporting options, including any anonymous and non-police options that are available.

Such a code would be a relatively simple means for ensuring relevant stakeholders could have access to clear, reliable and uniform information to ensure that best practice responses are implemented. Further, the development and regular updating of the code would facilitate interaction between specialist police groups and other interested experts across states.

Compliance mechanism

A further step could be to establish a national compliance and monitoring mechanism to ensure that any code is effectively implemented. This is particularly important where, as the Consultation Paper notes, procedures have often not been followed in the past. Such a mechanism could centralise work on updating the code of conduct, and facilitate engagement between researchers, police and child protection professionals. Furthermore, it could coordinate training for responders – in particular non-specialist police. Finally, if deemed appropriate, such a mechanism could also be extended so as to have the power to deal with complaints, and have responsibility for ensuring the methods are concordant with the most current research and approaches. Any mechanism could be a stand-alone entity or incorporated into current oversight bodies, such as the Australian Human Rights Commission.

Third party offences

The Committee supports the introduction offences for failing to report and prevent child sexual abuse. The Committee also endorses criminal liability for institutions.

Failure to report

The Committee submits that the introduction of a failure to report offence is appropriate. Consequently, the Committee supports recommendations to introduce offences similar to the *Crimes Act 1958* (Vic) s 327, and adopting a “reasonable belief” standard. However, the Committee submits that “police” in s 327(2) should be replaced with “appropriate authority” to enable States to make their own jurisdictional arrangements; for example, where state police do not have a dedicated child abuse/sexual offences investigation team. Such an offence should have exclusions similar to those in the Victorian legislation to ensure that the interests of the victim are fully safeguarded.

The Committee endorses a failure to report offence specifically directed at institutional settings, with a lower standard of "reasonable suspicion". Such an offence should apply to professionals who work with children in institutional settings. Accordingly, the reporting authority should be external to the institution in which the reporter of the offence is employed. The Committee is also of the view that there must be an aggravated articulation of the offence in occasions where there are repeated failures to report relevant information.

The Committee submits that the nature of child sexual abuse is such that it warrants a specific offence for failing to report, and to this extent can be distinguished from a general reporting offence akin to *Crimes Act 1900* (NSW), s 316. This is primarily due to the uniquely vulnerable position of the victim. In this respect it must also be noted that quite often, child victims might not understand the wrongfulness of the act at the time. Furthermore, a lack of censure for failing to report abuse can reinforce feelings of isolation. It may also propagate the view that they are deserving of the abuse, in situations where an adult with a degree of responsibility over the victim is aware of the offending behaviour but fails to report it.

A specific legal duty to report abuse would combat the culture of denial that is characteristic of child sexual abuse in institutional settings. It would also reinforce community expectations regarding the conduct of responsible adults in their interactions with children.

***Crimes Act 1900* (NSW) s 316**

The Committee does not support the introduction of general failure to report offences along the lines of s 316 of the *Crimes Act 1900* (NSW). In this respect, the Committee agrees with the view of the NSW Police Integrity Commission[1] and the NSW Law Reform Commission[2] that this section is apposite for repeal. Matters within the ambit of such a broad provision as that contained within s 316 of the *Crimes Act* are commonly addressed elsewhere in state legislation. For example, in the case of New South Wales, the scope of s 316 is already covered by Part 7 (destruction of evidence and other public justice offences) and Part 9 (aiding, abetting, and accessorial liability) of the *Crimes Act*.[3]

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[1] NSW Police Integrity Commission, *Protea Report 2015*, 288.
[2] NSW Law Reform Commission, *Review of section 316 of the Crimes Act 1900(NSW)* Report No 93 (1999) 37-41.
[3] NSW Law Reform Commission*, Review of section 316 of the Crimes Act 1900 (NSW)* Report No 93 (1999) 21-22.

Failure to Protect and Offences by Institutions

The Committee endorses legal mechanisms that censure failures on the part of institutions to protect against child sexual abuse. Institutional structures and culture can create or facilitate impunity. Furthermore, as the Royal Commission's work has made clear, the decisions of senior management within organisations can have dramatic impacts on the commission, detection, and prevention of abuse.

The Committee is of the view that such senior people should have a duty to take positive steps to protect against a substantial risk of harm. In this respect, reporting would be a necessary but perhaps not sufficient condition. The adoption of a provision similar to *Crimes Act 1958* (Vic) s 49C would ensure appropriate sanction. A "failure to protect" offence should apply a criminal negligence standard to failures to take appropriate steps where there is a knowledge of a substantial risk.

Such an offence usefully directs attention to measures, beyond reporting, that go to institutional arrangements and managerial decisions. Adopting a provision along the lines of s 49C places an onus on senior personnel in an organisation to take active steps to protect the children in their care. The Committee submits that such a provision, appropriately circumscribed, is entirely appropriate. Further, the Committee submits that if this approach were adopted, a proposed 'failure to report' offence would still have work to do. The latter would apply to those who have a reasonable suspicion, who are not necessarily in a position to take action (beyond reporting). The Committee notes that the failure to protect offence could potentially encompass a wide range of behaviour, and so it may be appropriate to draft graduated offences reflecting increasingly serious criminality or, alternatively, leave a wide sentencing discretion to the Court.

A 'failure to prevent' offence also lends itself to application to the institution itself. A criminal negligence standard could be drafted so it could be applied to an organisation without difficulty. Furthermore, it would be particularly important in drafting offences applicable to institutions that consideration be given to formulating a definition that prevents entities from hiding behind an ephemeral legal existence to avoid liability. The Committee also submits that there should be an aggravated version of the offence where there are consistent failures to take action by institutions to protect children that has caused significant harm to a number of children.

As noted in the Consultation Paper, institutional structures and cultures can be criminogenic, and accordingly, it is appropriate that institutions direct their corporate minds

to arrangements that ensure the safety of children in their care. Accordingly, the Committee submits that courts be given the power to make orders relating to institutional change to ensure the non-repetition of abuse as outlined on p 249 of the Consultation Paper. Moreover, depending on the degree of culpability, the Committee submits that institutions found guilty of a failure to protect offence should be subjected to a harsh monetary sanction. In this respect, it is important that the applicable penalties are adequately punitive.

Tendency and coincidence evidence

Principal amongst the Committee's concerns is the continued complexity of the law regarding the use of tendency and coincidence evidence. Despite the introduction of the Uniform Evidence Acts, the varying practice between states leaves lawyers, complainants and defendants uncertain as to the applications of these important evidentiary concepts.

This is of particular concern in the conduct of institutional child sexual abuse matters. As the Royal Commission has discovered, it was the practice of many institutions to move offenders between branches, and often interstate, following complaints of offending. The differences between tendency and coincidence laws in different states can therefore result in situations in which offenders face completely different trials depending on the state in which the offending took place. As such, the Committee supports the conclusions contained within *Case Study 38: Opinion of Counsel Assisting the Commission Regarding Week 1 of the Hearing – Admissibility of Tendency and Coincidence Evidence*[4] that the approach to tendency and coincidence evidence taken by the Uniform Evidence Act should be adopted in each Australian jurisdiction.

Jury Reasoning Research

One of the assumptions underpinning our legal system is that jurors obey directions. It is apparent from the research conducted by Goodman, Delahunty, Cossins and Martschuk for the Royal Commission that courts and legislators have consistently underestimated the ability of jurors to separate counts and evaluate evidence. While the Committee recognises the special dangers attaching to tendency and coincidence evidence, this research suggests that these dangers have been perhaps overstated. However, the Committee

[4] *Case Study 38: Opinion of Counsel Assisting the Commission Regarding Week 1 of the Hearing – Admissibility of Tendency and Coincidence Evidence,* 22 August 2016, p 435-436; p 441-442.

submits that further research in this area, and in particular a thorough peer review of the study, is appropriate to ensure that any changes to the law in this respect have a sound empirical basis.

Of particular interest are the findings by the study on the insignificance of the 'joinder effect'. That the mock jurors' definition of 'beyond reasonable doubt' was a certainty of under 90% in separate trials and over 90% in joint trials[5] indicates that rather than lowering the threshold for conviction, joint trials increase the difficulty for the prosecution of securing a conviction. Of further note was the finding that jurors were more likely to engage in impermissible reasoning in separate trials without tendency evidence, than they were in separate or joint trials with tendency evidence.[6] In light of this, the Committee agrees with Counsel Assisting that there may be opportunities for reform in this area.[7] The Committee notes that this is a complex area of law and recommends that any proposals to amend the Evidence Act be referred to the Australian Law Reform Commission.

Any proposed amendments should continue to allow for judicial discretion over admissibility questions, but also recognise the abilities of a jury to reason as directed. This approach may better balance the interests of the defendant with the interests of the community.

Evidence of Institutional Setting

The Committee does not support the rigid approach taken by the Victorian Court of Appeal in *PNJ* (2010) 27 VR 146, in which the Court indicated that it was a mistake to treat as relevant features which were outside the accused's control and merely reflected the setting in which the offending occurred. The Committee supports the approach taken by the New South Wales Court of Criminal Appeal in *R v PWD* [2010] NSWCCA 209 which held that the institutional setting in which the abuse occurred was relevant to considering the admissibility of tendency evidence for the reasons set out in that judgment, particularly at paragraphs [77] – [90].

[5] Pg 422
[6] Pg. 419
[7] Pg 445. *Case Study 38: Opinion of Counsel Assisting the Commission Regarding Week 1 of the Hearing – Admissibility of Tendency and Coincidence Evidence,* 22 August 2016, 321.

Joint trials

The Committee submits that there should be no specific provision made in favour of joint trials. To institute any presumption in favour of joint trials would be to reduce judicial discretion to an untenable extent.

Sentencing

Excluding Good Character as a Mitigating Factor

The Committee is of the view that it is appropriate for all states and territories to introduce legislation similar to that applying in New South Wales and South Australia, where good character may not be taken into account as a mitigating factor where the court is satisfied that that factor was of assistance to the offender in commission of the offence.

In NSW, this takes the form of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW):

> (5A) Special rules for child sexual offences
>
> In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

In South Australia, this takes the form of s 10(3) of the *Criminal Law (Sentencing) Act 1988* (SA):

> (3) In determining the sentence for an offence, a court must not have regard to any of the following:
>
> …
>
> (ba) the good character or lack of previous convictions of the defendant if—
>
> (i) the offence is a class 1 or class 2 offence within the meaning of the *Child Sex Offenders Registration Act 2006*; and

(ii) the court is satisfied that the defendant's alleged good character or lack of previous convictions was of assistance to the defendant in the commission of the offence.

The Committee supports the adoption of such legislative amendments across all Australian states and territories, as such amendments take into account the unique role that an offender's apparent good character can play in enabling, not only the initial commission of child sexual abuse offences, but also in the concealment of those offences by increasing the difficulties for victims in reporting and prosecution, thereby enabling the commission of future offences. It would be anomalous for a court to reduce a sentence given to a child sexual abuse offender on the basis of their reputation, social standing and prior non-convictions, where those very same characteristics enabled them to be put into a position of trust that allowed the offending to take place.

The Committee is of the view that it is unnecessary to make good character an aggravating factor as it is in England and Wales, given the existence of other sentencing standards that already reflect condemnation of such circumstances, such as abuse of a position of trust and authority,[8] and vulnerability of the victim,[9] being considered aggravating factors.[10] At a more abstract level, such a position would be directly in opposition with how good character is currently treated and viewed by society as a sentencing factor: that someone who has fewer convictions could, by virtue of their non-offending, get a higher sentence than someone who has committed other crimes.

The Committee is also of the view that refusing to take good character into account as a factor at all in such circumstances, is an appropriate middle ground between recognising it as a mitigating factor or as an aggravating factor.

Sentencing standards in historical cases

The Committee submits that it is inappropriate in the specific case of child sexual abuse crimes to apply historical standards. Whilst courts have generally applied historical standards and processes of sentencing on the basis of the principle of presumption against

[8] See eg *Sentencing Act 1999* (NSW), s 21A(2)(k); s 21A(2)(k); *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(u). See also *DPP v Riddle* [2002] VSCA 153 at [35]
[9] See eg *Sentencing Act 1999* (NSW), s 21A(2)(l).
[10] See also *Criminal Law (Sentencing) Act 1988* (SA), s 10(2)(c). In jurisdictions without such aggravating factors, the Committee is of the view that serious consideration should be given to their inclusion.

retrospective application of law,[11] such practice warrants amendment for these kinds of crimes. The fact that many such crimes are only being detected, prosecuted and punished now after lengthy delay,[12] whether due to late complaint or backlogs in the courts, means that such delays present a particular problem for how courts will deal with old cases of child sexual abuse.

The Committee recognises that its position infringes on this foundational principle. However, the Committee submits that such infringement may be appropriate in this context. On balance, the Committee submits that in the context of historical child sexual abuse, concerns about fairness to the accused are outweighed by three other concerns. These are the manifest inadequacy of historical standards, the difficulty in ascertaining such standards and the obfuscatory nature of the offending and the institutional context in which it occurred.

Firstly, the harm caused by child sexual abuse is much better reflected in contemporary sentence practices. Quite apart from procedural difficulties (which the Committee believes are ultimately of negligible impact, but worth noting regardless), the reason to apply current rather than historical standards with respect to child sexual abuse crimes is that historical approaches were inadequate in sentencing offenders of child sexual abuses. This is predominately because of a mistaken understanding of the harm of such crimes and their impact on the victims of child sexual abuse.[13] Thus, applying historical standards does not accord with social expectations and diminishes the denunciatory effect of conviction. Given the gulf between current community standards regarding child sexual abuse offences, and historical community standards, this runs the risk of severely undermining public confidence in the administration of justice. Moreover, as succinctly put by Mason P in dissent in *MJR*[14] "[s]tated bluntly, it is wrong for a court to apply earlier patterns that have been repudiated as erroneous in the single eye of the law."

Secondly, contemporary standards should be applied as the institutional context in which the offending took place in many cases actively inhibited effective prosecutions. It would seem preposterous to allow offenders to benefit from the deceptive conduct of the institutions that not only gave them the opportunities to offend but sheltered them after the

[11] See eg *R v Major* (1998) 70 SASR 488; *R v MJR* (2002) 54 NSWLR 368 (Spigelman CJ, Grove J, Sully J and Newman AJ; Mason P strongly dissenting); *R v Wruck* [2014] QCA 39; (2014) 239 A Crim R 111; *Green v The Queen* [2006] NTCCA 22; (2006) 19 NTLR 1 at [46]–[47].
[12] Freiberg, above n 5, Ch 4; *R v MJR* (2002) 54 NSWLR 368 at [40] (Mason P dissenting).
[13] Freiberg, above n 5, 78; *R v MJR* (2002) 54 NSWLR 368 at [57] (Mason P dissenting).
[14] (2002) 54 NSWLR 368 at [45].

fact. This reality is compounded by the delays in reporting, detailed in the Consultation Paper, the particular vulnerability of complainants who were children at the time, the harm they have suffered, and the abuse of trust and authority inherent in the offending. The offending should be viewed in the institutional context and an offender should not be able to defer any responsibility for their offending due to the inaction or otherwise of the institution.

Thirdly, contemporary standards should be applied as it is difficult and on occasions impossible, for the Court to determine what the historical sentencing approach would have been. Material available to determine such standards is often difficult to obtain, and oftentimes such sources do not allow the Court to make an objective assessment of the practices and patterns of sentencing in prior times. Where there is purported reliance on judicial memory to determine historical standards, this can be inconsistent and untestable. Basten JA makes this point in dissent in *R v MPB*:

> "Attitudes towards offences and practices, as reflected in the application of general principles, can often be sought only in isolated reported authorities, statistics and the memory of the judge. All of these sources are suspect in different ways. Although in PLV Smart AJ (in dissent) accepted that reliance on memory, if available, was appropriate (at [107]-[108]), it would be anathema to the consistent application of legal principle if one offender were to obtain the benefit of a judge's experience and recollection that earlier sentences were more lenient, whereas another offender would not because another judge had no such experience or recollection."[15]

In light of these three considerations, the Committee submits that the traditional jurisprudential concern about retrospectivity is diminished.[16] Retrospective criminal legislation is most concerned with criminalising previously existing lawful behaviour, thus disturbing the capacity of people to meaningfully live their lives the way they see fit. While it is an element of the principle, applying contemporary standards in sentencing is not retrospective criminalisation *per se*, rather the retrospective application of different punishment. Accordingly, in this sense, those concerns do not carry as much weight as they might otherwise. When compared with the inability of historical standards to reflect the harm and implications that flow from the institutional context of the offending and noting the

[15] *R v MPB* [2013] NSWCCA 213 at 17
[16] See eg *Radenkovic v The Queen* [1990] HCA 54; (1990) 170 CLR 62 (Mason CJ and McHugh J).

difficulty in even ascertaining such standards, the Committee submits that the preferable position is the application of current sentencing practice to prosecutions of historical offences. The Committee commends the approach to fixing sentences in historical offences as outlined by Basten JA in dissent in *R v MPB*.[17]

The Committee is not submitting that something which was not an offence when committed – such as grooming behaviour – now be sentenced according to current sentencing standards, but rather that offences which were crimes at the time they were committed and are now being sentenced be sentenced in accordance with modern standards to reflect the community's abhorrence of these crimes, and developments in understanding of the effect of these crimes on victims.

Concluding Comments

The Committee welcomes the valuable work of the Royal Commission in considering reforms to the criminal justice system, and looks forward to the final recommendations in this regard. However, the Committee reiterates its earlier observations. Effectively responding to child sexual abuse goes far beyond the criminal courts. Fundamental societal and institutional change needs to occur, including an accurate understanding of the conditions that facilitate the kinds of abuse that the Royal Commission has been concerned with. This includes engaging with all stakeholders, including in particular researchers and survivor advocacy groups, to ensure considered, evidence-based approaches to effectively preventing and responding to abuse. Social and institutional change of this kind can only occur with long term, sustained political commitment.

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. Should you have any further queries, please do not hesitate to contact the undersigned.

[17] [2013] NSWCCA 213 at [34]

Contact:

Renée Bianchi

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Liam Cavell

Chair

NSW Young Lawyers Criminal Law Committee

Email: crimlaw.chair@younglawyers.com.au