# Consultation Paper: Criminal Justice

## Legal Aid NSW Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

*October 2016*

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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 private practitioners.

Legal Aid NSW administers funding through its Women's Domestic Violence Court Advocacy Program (**WDVCAP**) to 28 Women's Domestic Violence Court Advocacy Services (**WDVCASs**). WDVCASs work alongside the legal system to assist women and their children seek legal protection in obtaining Apprehended Domestic Violence Orders. WDVCASs also provide information and referrals to women for their ongoing legal, and social/welfare needs. WDVCASs have a presence in 115 local courts across NSW.

Legal Aid NSW also provides state-wide criminal law services through the in-house Criminal Law Practice and funding to private practitioners. The services of the Criminal Law Practice cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia. The Children's Legal Service advises and represents children and young people 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Court.

Legal Aid NSW also has a number of relevant specialist services:

- The Sexual Assault Communications Privilege Service provides services to victims of sexual assault who want to prevent or restrict the disclosure of sensitive sexual assault communications in court.
- The Domestic Violence Unit provides integrated social and legal services to victims of domestic violence.
- The Prisoners Legal Service provides advice, minor assistance and representation to prisoners including assistance in other areas such as family law and civil law (fines, debt, housing) to help them rehabilitate after release.

Legal Aid NSW draws on its experience delivering services to victims, defendants and offenders in the preparation of this submission to the Royal Commission's Consultation Paper *Criminal Justice*. The names of all clients in the case studies have been changed to protect their privacy.

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# Introduction

Legal Aid NSW welcomes the opportunity to respond to the issues raised in the Consultation Paper *Criminal Justice* (**Consultation Paper**) released by the Royal Commission into Institutional Responses to Child Sexual Abuse (September 2016).

Legal Aid NSW's response to the issues raised in the Consultation Paper has been primarily informed by the extensive experience of lawyers from our Criminal Law Division and the Children's Legal Service, as well as the views of those who advise complainants in sexual assault proceedings.

Given the limited time provided for the response to the issues canvassed in the Consultation Paper, our submissions focus on the following issues:

- The role and operation of the sexual assault communications privilege
- Barriers to reporting of child sexual abuse
- Sexual assault offences
- Juvenile offenders
- Sentencing
- Post sentencing.

Legal Aid NSW has otherwise had the benefit of considering the Law Council of Australia submission to the Royal Commission dated 17 October 2016. We agree with the views of the Law Council that:

- The retrospective persistent sexual exploitation of a child offence in South Australia and maintaining a sexual relationship with a young person offence in Tasmania are not appropriate
- The requirement for particulars of criminal offences should not be restricted any further than it already is
- The Royal Commission should call on the Commonwealth Government to refer to the Australian Law Reform Commission (**ALRC**) a review of the law relating to tendency and coincidence evidence
- Neither the approach in Western Australian nor the approach in England and Wales to tendency and coincidence evidence should be adopted
- There should be no statutory presumption in favour of cumulative sentences for child sexual abuse offences
- Offenders should be sentenced on the basis of the penalties applicable at the time of the commission of the offence
- If placement on the sex offenders' register gives rise to disqualification from the Working with Children Checks regime, then an exception should be carved out for persons under the age of 18 to bring the interaction between the Working with Children Checks regime and the sex offenders' register regime in line with the Royal Commission's recommended age exemption

- The Royal Commission should specifically consider the current risk assessment methodologies in relation to high-risk sex offenders with a view to assessing their validity, rigour and predictive power, and
- The age of criminal responsibility should be increased from 10 to 12 years of age but the current doli incapax doctrine should remain unchanged.

The following submissions respond to the questions posed in the Consultation Paper.

# Issues in Police responses

## Possible principles for initial police responses

### The role of the Sexual Assault Communications Privilege

Legal Aid NSW refers to and reiterates the points made in its June 2015 Submission to the Commission on Issues Paper 8, *Experience of Police and Prosecution Responses*. We submit that the Commission should give further consideration to the role and operation of the sexual assault communications privilege (**SACP**) in two particular aspects of its criminal justice work.

First, SACP, and the important principles that underpin it, should be referred to in the development of any proposed principles to inform police and prosecutors' responses to child sexual assault (**CSA**) offending. The principles are:

- Disclosure of therapeutic records can cause further harm if revealed to the accused or in court.
- Counselling and other types of treatment are therapeutic tools, not investigative ones.
- Counselling should be a safe place for open, honest and private communication and healing.
- Keeping records private helps encourage reporting and prosecution of sexual assaults.
- Ethical conflicts for counsellors and other practitioners should be minimised where possible.
- Therapeutic records can contain irrelevant or speculative material that should not be brought before a court.

Second, and in response to Chapter 8 of the Consultation Paper *Delays in Prosecutions*, Legal Aid NSW submits that improving procedures around the operation of the privilege should be considered among other possible options to reduce delay. This would serve both to minimise the risk of adjournments in CSA matters, as well as provide complainants with greater assurance that the privacy of confidential communication will be respected.

Significant uncertainty persists about the practical implications of the privilege.

Legal Aid NSW observes that there is widespread non-compliance with the notice requirements in the legislation. Section 299C of the *Criminal Procedure Act 1986* (NSW) prevents the production or adduction of protected confidences unless the party seeking to do so gives reasonable notice in writing to the parties and the complainant. Leave to serve a subpoena cannot be granted until 14 days after notice is given. The court has the power to waive these notice provisions, but the legislation requires that to occur in "exceptional circumstances."

Anecdotally, these provisions are rarely enforced. Notice is often waived in the absence of a finding of exceptional circumstances. In practice, non-compliance with the notice provisions:

> *... creates significant difficulties for complainants. Often [the SACP lawyer is]... asked to appear the day before the return date of the subpoena or the first day of the trial, when the ODPP receives information of the issue of subpoenas. When notice is given, it is often very late. When it is not, the complainant is left to hope that an objection will be raised by the party producing the document*.[1]

Should further time be required to resolve outstanding disputes between parties concerning the application of the privilege, it is likely to lead to delays in the proceedings, which, in itself, can have an adverse impact on the wellbeing of complainants. Consistency in the application of the notice provisions is clearly required for the benefit of all parties.

In addition, a significant proportion of subpoenas continue to be issued in contravention of sections 297(1) and 298(1) of the *Criminal Procedure Act 1986* (NSW). This failure to comply with the legislation has been identified by the NSW Court of Criminal Appeal. Both *KS v Veitch (No 2)*[2] and *NAR*[3] concerned cases where subpoenas were issued without the leave of the court. It is of concern that a significant proportion of subpoenas, including those clearly seeking privileged material, are in effect invalid. This is particularly apparent in sexual assault proceedings where a subpoena is issued for the records of a client of a sexual assault counsellor.

Legal Aid NSW would welcome procedural reform aimed at the diversion of subpoenas which are likely to catch protected confidences *before* they are given a return date and stamped by the court registry. We note in this respect that the District Court of Western Australia has issued a Circular to Practitioners which requires any witness summons that might require production of a protected communication to be referred to a legally qualified Registrar for review. The Registrar will decline to issue the summons if he or she forms the view that the records or objects required under the summons appear to include protected communications. The applicant will be notified of this decision by letter.

The applicant can then either: (a) resubmit the summons with an amended description of the records or objects sought, or (b) apply to the court for leave to require production of the protected communications. Alternatively, the applicant can expressly exclude protected communications from the scope of the documents sought pursuant to the witness summons.

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[1] Gleeson, C "The Sexual Assault Communications Privilege Pro Bono Scheme" (2010-2011) *Bar News* 73 at page 75. See also Ian Nash, Public Defender "Use of the sexual assault communications privilege in sexual assault trials*" Judicial Officers' Bulletin* April 2015, Vol 27, No 3.
[2] [2012] NSWCCA 266.
[3] [2013] NSWCCA 25.

Adoption of a similar screening process in NSW would encourage compliance with SACP, reduce pressure on complainants close to trial to consent to the production of protected confidences, and promote the principles and purposes of SACP.

## Encouraging reporting

### Reporting by current and former prisoners

Legal Aid NSW welcomes consideration of measures to support and encourage current and former prisoners to report allegations of child sexual abuse. In the experience of the Legal Aid NSW Prisoners Legal Service, prisoners are reluctant to engage with police to make a complaint: it is virtually impossible for prisoners to call police to come to prisons so that they can make a complaint. If a police visit takes place, it is very obvious to other prisoners and will lead to allegations that the prisoner is being a 'dog', putting their safety at risk.

We submit that channels should be developed to allow prisoners to report abuse safely and to receive necessary support. To operate effectively, such channels would include:

- Multiple potential reporting pathways, including alternatives to police.
- Facilities to enable prisoners to make phone calls to police on a private line (for example, in a welfare officer's office). Currently, any phone call by a prisoner (other than a legal call) must be made in an open area where there is no privacy and where the conversation may be overheard by other inmates and recorded.
- Untimed phone calls. Prisoner calls are presently timed unless organised through a welfare officer. Access to welfare officers by prisoners is increasingly restricted as a result of the rapid rise in the NSW prison population over recent years.
- An appropriate support person during the disclosure interview(s).
- Post disclosure support through a regular, accessible, confidential, in-person, specialist counselling support service. A major problem for current or former prisoners reporting abuse is the lack of follow up specialist counselling. Disclosure is invariably a huge psychological step and complex emotions are attached to disclosure, including misplaced shame. Inmates who disclose do not have access to specialist counselling support in prison.

Legal Aid NSW encourages implementation of ongoing measures for prisoners to report based on the strategy used by the Commission over recent years, which we understand involves:

- proactive engagement by Commission staff in prisons throughout NSW
- providing education and support materials
- a dedicated free phone service to enable prisoners to make initial contact with the Commission, and
- subsequent conferences with prisoners, either in person or by teleconference in a private space.

# Police Investigations

## Costs orders

In the experience of Legal Aid NSW, costs are rarely awarded against police or prosecutors in CSA proceedings. There is no apparent justification for further restricting the power to award costs to an accused in section 117 of the *Criminal Procedure Act 1986* (NSW). We oppose any such further restriction.

# Police communication and advice

## Police investigations

Legal Aid NSW is concerned about police providing information to third parties where there have been allegations of child-on-child sexual abuse. In the Consultation Paper, for instance, a Western Australian Detective refers to developing a "communication plan" that may involve the "broader school community" when investigating non-consensual child - on-child sexual offending.[4] We submit that such communications are inappropriate and do not respect the presumed innocence or privacy of the child who is the subject of the allegations.

In NSW, legislation prohibits the publication or broadcast of information that might lead to the identification of a child who has been charged.[5] Children who are being investigated but have not been charged deserve even greater protection.

The NSW Police Force has Standard Operating Procedures regarding employment related disclosures. However, they do not provide guidance on how to deal with juvenile offenders. We suggest that this gap should be addressed.

## Mandatory reporting

The Commission also seeks submissions on whether it should support the Australian Law Reform Commission and New South Wales Law Reform Commission's recommendations for reforms to the protections against disclosing the identity of mandatory reporters in the context of institutional child sexual abuse (at [3.7.4 of the Consultation Paper].

Legal Aid NSW would support implementations of these recommendations in the context proposed.

[4] Consultation Paper, page 554.
[5] *Children (Criminal Proceedings) Act 1987* (NSW), section 15A.

# Child Sexual Assault Offences

## Persistent sexual abuse of child offence: section 66EA of the *Crimes Act 1900* (NSW)

Legal Aid NSW does not support substantive reform to section 66EA of the Crimes Act 1900 (NSW) (**NSW Crimes Act**), including:

- the introduction of any element of retrospectivity to the index offences forming the basis of the charge, and
- any weakening of the current requirement for particulars.

The NSW offence reflects the model recommended by the Model Criminal Code Committee in 2009. The fact that section 66EA is rarely prosecuted does not, on its own, justify substantive amendment to the provision.

In our experience, the reasons why the offence is rarely prosecuted are often unrelated to particularisation of charges. They most commonly relate to the late involvement of Crown Prosecutors in reviewing the indictment. This issue may be remedied by procedural changes proposed by the NSW Law Reform Commission (**LRC**) aimed at increasing appropriate early guilty pleas, including earlier involvement of Crown Prosecutors and defence Counsel in indictable proceedings, charge certification and mandatory criminal case conferencing. This is discussed further below.

Legal Aid NSW would be concerned about the adoption of a test focusing on the unlawful relationship between the parties in the absence of a "similar age" or "young love" defence. If the Queensland offence of maintaining an unlawful sexual relationship with a child were adopted in NSW, it would criminalise an unequivocally consensual relationship between an 18 year old and a 15 year old, including sexting.

We strongly oppose any amendment to the provision to make section 66EA retrospective, as has occurred in South Australia and Tasmania. The offence carries a maximum penalty of 25 years' imprisonment, and is intended to attract a higher penalty on sentence than the offences which comprise the individual acts.[6] In that context, we do not accept the assertion that "*in giving persistent child sexual abuse offences retrospective operation, the offences would apply to conduct that was unlawful at the time it was committed and the only change would be to the way in which it would be charged*."[7]

The change proposed is more than procedural, as the substantive effect would be to attach a maximum penalty of 25 years in place of individual offences carrying far lesser penalties. This result would offend basic principles of fairness and longstanding principles concerning retrospectivity in the criminal law. Further submissions on this issue are discussed under 'Sentencing', below.

[6] Per McClellan CJ at CL in *R v Langbein* (2008) 181 A Crim R 378 at [115].
[7] At page 194 of the Consultation Paper.

In 2009 the NSW Sentencing Council examined the operation of section 66EA.[8] The Council noted concerns that, contrary to the original legislative intent, the provision had been interpreted by courts as a procedural offence that merely relieves the complainant of the task of remembering precise dates or circumstances. The Sentencing Council also accepted the submission of the NSW Office of the Director of Public Prosecutions (**ODPP**) that the section should be recast to make it clear that the offence of engaging in a course of sexually abusive conduct is a separate offence, the gravamen of which is the persistence of the criminal conduct, which would be more serious than the total of its constituent assaults.

Legal Aid NSW supports implementation of Recommendation 4 of the Sentencing Council.[9] As emphasised in the Consultation Paper, an accused is entitled to have a fair trial and to know the case against him or her. Reforming section 66EA in the manner recommended by the NSW Sentencing Council is a preferable approach to this issue.

## Grooming: Section 66EB of the *Crimes Act 1900* (NSW)

The Commission seeks feedback on whether there would be any benefits or risks in creating a "broad grooming offence" in relation to institutional CSA.

Legal Aid NSW is concerned that any broadening of the current NSW offence provision will be to the detriment of what the Commission describes as "conduct that is common – and, in many cases, desirable - in healthy adult-child mentoring relationships."[10] Any educative benefit in a broader grooming offence may be outweighed by the real risk that a broader offence would capture entirely innocent conduct encompassing everyday acts of kindness and sociability, ultimately discouraging individuals from becoming involved as volunteers in any child-related setting, such as the school canteen. This is particularly concerning in light of the recent application of the standard non-parole period scheme to all grooming offences in NSW.[11]

Further, removing the current references to the forms of contact that are inherently indicative of intention to procure a child for unlawful sexual activity - exposure of a child to indecent material or the use of intoxicating substances – may not ultimately change the rate of prosecutions of grooming behavior. As noted by the Commission, "broader grooming offences are likely to be very difficult to prove in cases other than the narrower online or specific grooming offences."[12]

[8] NSW Sentencing Council Report *Penalties for Sexual Assault Offences* Vol 1, pages 19ff.
[9] Recommendation 4 is that consideration be given to *providing a note to, or amending s66EA Crimes Act 1900 (NSW) 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.*
[10] Consultation Paper, page 196.
[11] The *Crimes Legislation Amendment (Child Sex Offences) Act 2015* introduced standard non-parole periods for all offences under s 66EB, committed on or after 29 June 2015.
[12] Consultation Paper, page 205.

We agree that institutional codes of conduct which clearly identify and prohibit types of conduct which could amount to grooming by their members and employees may be a preferable means of addressing grooming behavior. Codes of conduct should be public and provided to parents and guardians of children within the institutions.

Notwithstanding the above concerns, Legal Aid NSW would not oppose further consideration of the current Victorian grooming provision and/or alternatives including whether grooming should be specified as an express aggravating factor on sentence for child sexual assault offences. However, we note that as a matter of practice, the manner by which the offender gains access to a child is already part of the factual matrix on which the offender is sentenced, including any grooming of a child or those close to the child.

## Persons in authority: section 73 of the *Crimes Act 1900* (NSW)

The Commission has sought views about any gaps in the regimes that recognise relationships of authority as aggravating factors in CSA offences, and whether all jurisdictions should adopt a specific person in authority offence.

### Legal Aid NSW's concerns about section 73 of the *Crimes Act 1900* (NSW)

Section 73 of the NSW Crimes Act provides for the offence of sexual intercourse with a child between 16 and 18 under special care. "Special care" is defined as follows:

> (3) For the purposes of this section, a person ("the victim") is under the special care of another person ("the offender") *if, and only if:*
>
> (a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or
>
> (b) the offender is a school teacher and the victim is a pupil of the offender, or
>
> (c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
>
> (d) the offender is a custodial officer of an institution of which the victim is an inmate, or
>
> (e) the offender is a health professional and the victim is a patient of the health professional.

Consent is not a defence to this offence.[13] NSW law also provides for the negation of consent to sexual intercourse where it has occurred by the existence or abuse of a position of authority.[14] It also provides for the aggravation of offences if there is abuse of authority or if the victim was under the authority of the offender.[15]

We do not consider there are any gaps in the list of categories of relationships in NSW.

[13] Section 77 of the *Crimes Act 1900* (NSW).
[14] Section 61HA(6)(d) of the *Crimes Act 1900* (NSW).
[15] Section 21A (2)(k) of the *Crimes (Sentencing Procedure) Act 1986* (NSW).

Indeed, we recommend the Commission consider whether section 73(3)(c) is drafted too broadly. The phrase "in connection with" may be interpreted to mean that the special care relationship extends beyond the instructor to anyone who is "connected with" the provision of instruction. For example, a 17 or 18 year old sports mentor or captain of the team who has consensual sex with a 17 year old teammate would be committing an offence under section 73.

## Need for national uniformity

Legal Aid NSW submits that the current inconsistencies between the various NSW provisions and across jurisdictions should be addressed by amendments to require proof of an actual abuse of the position of authority.

The present inconsistency between jurisdictions' approach to position of authority offences undermines the objectives of child protection regimes and the recommendations of the Commission in its *Working with Children Check Report*. This is illustrated by the case of *Queensland College of Teachers v Morrow* where a "disqualifying offence" under the Victorian person of authority provision was found to be inconsistent with the Queensland offence: the Victorian offence requires proof that consent to sexual penetration of a 16 or 17 year old under care has been vitiated by the existence of a relationship of authority, whereas the Queensland provision requires consent to have been vitiated by the exercise of authority. [16]

Subject to the above concerns about section 73 of the NSW Crimes Act, Legal Aid NSW considers the NSW offence provision would provide an appropriate model for other jurisdictions. Adoption of the NSW model would entail the following elements:

- the existence of a position of authority based on an exclusive list of relationships
- abuse of that position (this is even more important if an exclusive list of relationship categories is not adopted)
- the unlawful conduct is restricted to sexual intercourse

Where the position of authority is relied on as an aggravating feature on sentence, the appropriate model would require the abuse of that positon, consistent with the NSW approach.

[16] [2011] QCAT 184.

## Limitation periods on criminal prosecutions: section 78 of the *Crimes Act 1900* (NSW)

Legal Aid NSW notes the Commission's discussion concerning the repeal in 1992 of the former section 78 of the NSW Crimes Act.[17] The Consultation Paper notes that it is unclear whether the repeal of section 78 operates retrospectively, so as to remove any immunity that had already arisen under the limitation period.

We submit that High Court authority supports the interpretation of removal of the limitation periods as operating prospectively. In *Rodway v The Queen*, the High Court stated:

> *A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance. But the difference between substantive law and procedure is often difficult to draw and statutes which are commonly classified as procedural - statutes of limitation, for example - may operate in such a way as to affect existing rights or obligations. When they operate in that way they are not merely procedural and they fall within the presumption against retrospective operation.*[18]

The experience of our lawyers working in Indictable Crime confirms this interpretation of section 78. While pre-1992 matters continue on occasions to be charged in ignorance of section 78, they are invariably withdrawn following representations to the NSW ODPP concerning the limitation period. Particular injustice would arise in these matters if amendments were passed to retrospectively remove any immunity that had already arisen under the previous section 78 limitation period.

## Offence of concealing a serious indictable offence: section 316(1) of the *Crimes Act 1900* (NSW)

Legal Aid NSW shares the concerns expressed by the NSW LRC about the breadth and ambiguity of the offence of concealing a serious indictable offence in section 316(1) of the NSW Crimes Act.[19] We agree that it should be repealed and replaced with an offence targeting failure to disclose child sexual assault offending.

We note the Commission's comments that the offence has rarely been used to prosecute concealment of child sexual abuse offences.[20] In our experience, the offence is used on occasions to pressure suspects to provide statements to police, notwithstanding their right to silence and the privilege against self-incrimination. The case of *R v Imo Sagoa* is an example of the provision being used in this way.[21]

[17] On page 211 of the Consultation Paper.
[18] *Rodway v The Queen* (1990) 169 CLR 515 at [4].
[19] As cited on page 226 of the Consultation Paper.
[20] Consultation Paper, page 224.
[21] Cited on page 223 of the Consultation Paper.

The provision is also used to pressure other witnesses, such as relatives of a suspect, to provide information about their relative's offending. This places witnesses in a vulnerable situation and risks evidence being obtained which is subsequently found to be unreliable.

Further, the breadth of potential offences captured by section 316 does not support a clear policy objective of educating the community about the moral and legal obligations to report child abuse to prevent further harm to children.

Legal Aid NSW also shares the NSW LRC's concern that the current provision can operate unfairly, including to prosecute victims of family and domestic violence as well as victims of sexual assault offending.[22]

Given these concerns, Legal Aid NSW supports replacing section 316 with an offence modeled on the Victorian offence of failure to disclose a child sexual assault offence.[23] The offence should apply only to adult offenders and should contain safeguards that appropriately balance the welfare of victims of domestic and family violence and the interests of the child. As previously noted, there is no "young love" defence to sexual offending in NSW. Therefore any reforms would need to ensure that the offence did not capture, for instance, gossip amongst teenagers about the sex lives of their friends. We also agree with the submission 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".

## Offence of criminal neglect

For the reasons below, Legal Aid NSW does not support an offence of criminal neglect based on the South Australian provision being introduced in NSW.

First, there are existing criminal sanctions for child neglect in the *Children and Young Persons (Care and Protection) Act 1998* (**the Care Act**) and the NSW Crimes Act. They include:

- Section 227 of the Care Act: offence for any person to do an act intentionally that causes or appears likely to cause injury or harm to a child or young person.
- Section 228 of the Care Act: offence for a person who has care of a child or young person to fail to provide the child or young person with adequate and proper food, nursing, clothing, medical aid or accommodation.
- Section 43 of the Crimes Act: offence for a person with parental responsibility to fail to provide a child under their care with the 'necessities of life' (generally defined as the provision of accommodation, food, clothing and access to healthcare, and education). This offence carries a maximum penalty of five years' jail.
- Section 44 of the Crimes Act: failure to provide the necessities of life. This offence carries a maximum penalty of five years' jail.

[22] See page 226 of the Consultation Paper.
[23] See section 327(2) of the *Crimes Act 1958* (Vic).

In addition, serious cases of child abuse and neglect which cause permanent or fatal injury can be dealt with under the general criminal law, for example using offences of assault or manslaughter.

Second, chronic disadvantage typically lies at the heart of child neglect. We therefore suggest government focus on ways to appropriately support disadvantaged parents and build their parenting capacity, rather than criminalising them. To further criminalise neglect beyond current civil and criminal sanctions may result in the prosecution of women, particularly indigenous women, who are themselves victims of domestic and family violence. As the ALRC has found:

> *Child abuse and neglect are often closely linked to family violence. An offender may be abusing both a parent and children; exposure to incidents of family violence between adults may be a risk to the child's health and safety; or violence may interfere with a person's capacity to be an effective parent.*[24]

Third, we are concerned that creating an offence of criminal neglect may have unintended consequences. For example, when the criminal neglect offence was introduced in South Australia, the South Australian Law Society expressed concern that the offence could encourage:

- inadequate investigation by police and forensic experts
- the presentation of weak prosecution cases
- the criminalisation of innocent people, and
- the failure properly to prosecute an offender for the substantive offence.[25]

Finally, we question the claim an offence of criminal neglect could provide an incentive for a parent or carer who has not committed an unlawful act occasioning death or serious harm to a child to provide evidence incriminating the perpetrator. As noted by the Law Society of South Australia when the South Australian offence was introduced:

> *… it is considered equally likely that the legislation will create an incentive to fabricate, shift blame and to make false accusations. We envisage a likely consequence of the legislation is that persons potentially liable will seek to cast blame upon each other, leaving both liable to conviction for criminal neglect and potentially resulting in an innocent party suffering conviction on that charge while the perpetrator avoids conviction for the substantive offence*.[26]

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[24] Australian Law Reform Commission *Family Violence - A National Legal Response* (ALRC Report 114) at [20.8].
[25] L Roth *Criminal liability of carers in cases of non-accidental death or serious injury of children:* NSW Parliamentary Research Service September 2014 e-brief 12/2014, at pages 10-22.
[26] I Redmond, SA Parliamentary Debates (LA), 8 December 2004, p1257 and R Lawson SA Parliamentary Debates (LC) 7 February 2005, p889, as cited in L Roth *Criminal liability of carers in cases of non-accidental death or serious injury of children:* NSW Parliamentary Research Service September 2014 e-brief 12/2014.

## Evidence of victims and survivors

Legal Aid NSW supports the extension of special measures in the current NSW Child Sexual Assault Pilot in the Downing Centre and Newcastle District Courts to all vulnerable witnesses, as well as extension of the role of witness intermediaries in supporting child witnesses in the Children's Court.

The benefits of a pre-recording scheme are supported by the recent process evaluation of the UK's pilot of recorded pre-trial cross-examination under section 28 of the *Youth Justice and Criminal Evidence Act 1999* (United Kingdom). In the pilot, vulnerable and intimidated witnesses were entitled to video recording of their cross-examination before trial.[27] The evaluation found:

- reduced levels of distress and trauma were experienced by witnesses
- shorter cross examinations times
- improved ability of witnesses to recall events.
- reports of practitioners' concerns about the additional workload resulting from expedited timeframes in pre-recording hearings (although many of the judges in the pilot observed that front-loading proceedings through work on pre-recording hearings had a positive effect on the amount of work required towards the end)
- concern about adjournments of cross-examination dates, sometimes at short notice, including due to the unavailability of the defendants' representatives and judges
- shorter trial length, even taking into account the longer preliminary hearings[28]
- fewer matters proceeded to trial where evidence had been pre-recorded
- little difference in the rates of conviction at trial for matters where evidence had been pre-recorded in full.

These findings are particularly relevant to the Royal Commission's discussion of reducing delay and encouraging appropriate early guilty pleas in CSA proceedings.

Legal Aid NSW submits that witness intermediaries should also be made available to vulnerable defendants on application of the defence on the basis that it is unfair to deny them the same level of communication assistance provided to other witnesses in the proceedings. This assistance is essential in ensuring both the defendant's effective engagement in proceedings and the credibility of their evidence. Courts in the United

[27] UK Ministry of Justice *Process evaluation of pre-recorded evidence pilot* available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

[28] Though the evaluation noted the need for more evidence to establish other potential factors which may contribute to shorter trials.

Kingdom have been critical of cases where a witness intermediary has not been appointed to assist a vulnerable defendant. [29]

We also recommend the Commission consider how to ensure the effective participation of indigenous witnesses in CSA proceedings. This could be facilitated by:

- expanding the current CSA Pilot to a court in rural or regional NSW where there is a significant proportion of indigenous complainants, and
- undertaking targeted recruitment of indigenous witness intermediaries.

In any event, any expansion of the Pilot should be supported by adequate resourcing of legal representatives given the additional pre-trial steps required in respect of ground rules hearings and pre-recorded evidence hearings.

As a final point, we share stakeholders' ongoing concerns about the term "Children's Champions" in the *Criminal Procedure Act 1986* (NSW), given the neutrality and independence of the role of intermediaries and their status as officers of the court.

## Delays in prosecutions

Legal Aid NSW supports implementation of the NSW LRC Report 141 *Encouraging Appropriate Early Guilty Pleas* subject to:

1) adequate resourcing of both Legal Aid NSW and the ODPP to effectively implement the reforms, and
2) further consideration of the supervisory function of the Court in terms of the doli incapax principle.

## Evidence & Jury Directions

Legal Aid NSW agrees with the Law Council's suggestion that the Commission's preliminary views on tendency and coincidence evidence and joint trials be referred to the Australian Law Reform Commission, given the fundamental implications of any reform for all criminal proceedings. In the alternative, we support the current NSW position on tendency and coincidence and joint trials, based on the advice prepared for the Royal Commission that:

> *the tests regarding the admission of tendency and/or coincidence evidence in Australia are for the most part appropriate and strike the right balance between ensuring relevant and probative evidence is placed before the jury and protecting an accused's right to a fair trial*.[30]

29 See *C v Sevenoaks Youth Court* 2009 EWHC 3088 referring to *R v H* 2003 EWCA Crim 1209 and *SC v United Kingdom* 2005 40 EHRR 10 and *The Queen v Great Yarmouth Youth Court* 2011 EWHC 2059: as cited in F Gerry QC: The Justice Gap: Vulnerable defendants and the courts (April 2012) http://thejusticegap.com/2012/04/vulnerable-defendants-and-the-courts.

30 Tim Game SC, Julia Roy and Georgia Huxley Advice provided to the Commission on *Tendency, Coincidence and Joint Trials* (September 2015) at [16.1].

In response to the Commission's query about whether jury directions should be codified, Legal Aid NSW notes that the NSW LRC considered and firmly rejected this proposal in 2009 on the following bases:

- It would not result in any simplification or improvement in trial practice.
- It would risk unsettling and increased complexity in the law.
- There would be 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 would risk 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.

Legal Aid NSW agrees with the NSW LRC that that the law in this area should not be codified. Further, any review of the lack of uniformity between jurisdictions as to jury directions should be referred to the Australian Law Reform Commission. We further agree with the view of the Law Council of Australia that the Markuleski direction should not be abolished.

# Sentencing

## Sentencing standards in historical cases

Legal Aid NSW strongly opposes NSW adopting the UK Sentencing Council Guideline model where offenders are sentenced based on the sentencing regime applicable at the date of sentence.

Sentencing reforms in NSW over the last 25 years have led to increasingly heavy sentences in respect of CSA offending. These reforms were summarised in *R v Magnussen*[31] and include:

- the creation of the statutory ratio between the non-parole period and the head sentence by way of the *Probation and Parole (Serious Offences) Amendment Act 1987*, and its expansion to all offences by way of the *Sentencing Act 1989*
- the abolition of remissions under the same legislation
- the creation of "natural life" sentences
- the steady increase in maximum penalties, including but not limited to sexual offences

[31] *Magnuson v R* [2013] NSWCCA 50 per Button J at [117].

- the judgment of the High Court in *Pearce v The Queen*, which led to more focus on accumulation and partial accumulation when sentencing for more than one offence[32]
- the development of guideline judgments of the Court of Criminal Appeal[33]
- the "watershed decision" of the Court of Criminal Appeal in *R v AEM* [2002] NSWCCA 58, leading to subsequent lengthier sentences for serious sexual offences, and
- the commencement of the regime of standard non-parole periods (**SNPPs**) in 2003.

In addition, Legal Aid NSW notes that:

- Since 2007, non-parole periods have continued to rise for some SNPP offences such as aggravated sexual assault and sexual intercourse with a child under 10 years.
- The SNPP scheme was expanded in June 2015 to include the offence of sexual intercourse with a child between 10 and 14 years and the aggravated offences of sexual intercourse with a child between 10 and 14 years and between 14 and 16 years.
- The maximum penalty for the non-aggravated form of sexual intercourse with a child under 10 was increased to life imprisonment in 2015.
- Maximum penalties for breach of Extended Supervision Orders under the *Crimes (High Risk Offenders) Act 2006* (NSW) were significantly increased in 2014.

In more recent times, an increased focus on punitive approaches to CSA offending has also been accompanied by a decrease in available rehabilitation options for convicted CSA offenders.[34]

Legal Aid NSW submits that reforms to sentencing principles should be considered within this context. The inevitable, and clearly intended, result of applying contemporary sentence standards will be that an offender sentenced for a crime in 1976 will face a much harsher penalty on sentence in 2016.

We set out below our reasons for opposing the sentencing approach adopted in Victoria and the United Kingdom.

[32] [1998] HCA 57; (1998) 194 CLR 610.
[33] Commencing with *R v Henry* [1999] NSWCCA 111; (1999) 46 NSWLR 346; (1999) 106 A Crim R 149.
[34] The NSW Pre-Trial Diversion Programme (Cedar Cottage) was closed in September 2014, despite its positive effect on reoffending rates even for those offenders who do not complete treatment: see Butler L et al., (2012) Effectiveness of Pretrial Community-Based Diversion in Reducing Reoffending by Adult Intrafamilial Child Sex Offenders, *Criminal Justice and Behaviour* 39: 493-513.

The Consultation Paper states that *"it may be difficult to accept that an offender should benefit from a lighter sentence because the effect of their offending resulted in the victim substantially delaying reporting*."[35] This approach fails to adequately acknowledge that the sentence the offender will receive will reflect 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.

This approach also fails to acknowledge the practical impact on offenders of the delay between the offence and sentence. As noted by the Commission's *Sentencing Research Report*, there is no automatic right to a discount in sentence due to delay, which can influence the sentence in a number of ways - some aggravating, and some mitigating.[36]

Courts have recognised that an offender's old age at the time of sentencing may make the sentence, particularly a custodial sentence, more onerous because of age-related disability and illness.[37] Further, the old age or reduced life expectancy of the offender will mean that a custodial sentence is, in effect, a life sentence. While sentencing discretion can address some of these factors, delay may disadvantage offenders in ways that cannot be addressed, such as where community based sentencing options may no longer be available, noting, for example, the termination of the Cedar Cottage programme.

Regardless of the date of the offence and the sentence imposed, a CSA offender will most probably face lifelong registration as a sex offender and the consequences of that status in terms of employment, social regard and reputation.

Therefore it may not be entirely accurate to assume that offenders in cases involving lengthy delay have "benefitted" from that delay.

Legal Aid NSW also takes issue with the statement in the Consultation Paper that "*applying historical sentencing standards can … be complicated.*"[38] This statement does not take into account the material on historical sentencing standards that is increasingly available in numerous decisions of the NSW Court of Criminal Appeal, in sentencing tables published by the Public Defenders[39] and in legal libraries. Any challenges in accessing this material, to the extent they may differ from sentencing more recent offending, should not justify a fundamental departure from existing sentencing principles and the principle against retrospective punishment.

Most importantly, the proposal to apply current sentencing standards to historical offences undermines fundamental notions of fairness and the principle against retrospectivity of criminal penalty. This principle is entrenched in both common law and international human rights law. Australia, as a signatory to the *International Covenant on Civil and Political Rights* (ICCPR), is bound by Article 15. 1. This article prohibits a state from imposing a heavier penalty on a person held guilty of a criminal offence "*than the one that was*

[35] Consultation Paper at page 513.
[36] Freiburg, Donnelly and Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (July 2015), page 89.
[37] For example see *R v Robert Flaherty* [2016] NSWDC 124; *Barton v R* [2009] NSWCCA 164; *R v Mammone* [2006] NSWCCA 138.
[38] Consultation Paper, page 49.
[39] See Public Defenders Sentencing Tables: available at: www.publicdefenders.nsw.gov.au

*applicable at the time when the criminal offence was committed*." Article 15.1 also provides that "[*i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby*".

At international law, the scope of the term "penalty" in article 15 raises "complex issues".[40] However, when one compares historic and contemporary sentencing standards in the context of the NSW legislative history outlined above it is readily apparent that "penalty" comprises both maximum tariff and applicable sentencing standards.[41] As such, reforms of sentencing legislation aimed directly at increasing sentences for historic CSA offending are likely to fall foul of Article 15.1.

In our submission, any recommendations of the Commission concerning criminal justice should be developed in the light of the international human rights framework, including the safeguards of the rights of accused persons under the ICCPR. This submission applies equally to those other aspects of the Consultation Paper proposing retrospective application of criminal offences or their elements, such as the discussion around potential reforms to section 66EA of the NSW Crimes Act.

## Appeals

The Commission seeks views on:

- whether reform is needed in any state or territory to expand the prosecution's right to bring interlocutory appeals, and
- whether there are any remaining difficulties in relation to "inconsistent verdicts" which we should consider addressing.

In response to the first question, Legal Aid NSW supports amendment of section 5F of the *Criminal Appeals Act 1912* (NSW) to implement Recommendation 11.2 of the NSW LRC *Report 140 Criminal Appeals*. That is, we support amendment to provide that interlocutory appeals by all parties should be by leave.

In response to the second question, Legal Aid NSW considers the development of law concerning "inconsistent verdicts" should be left to the courts on a case by case basis.

[40] Human Rights Committee: Communication 50/1979, Van Duzen v. Canada, Views adopted on 7 April 1982, paragraph 10.3.

[41] Retrospective changes to parole laws, on the other hand, have been found to be consistent with Article 15, as parole is a procedural aspect of the sentence dictating how it will be served. It concerns the means of administration of the penalty imposed at sentencing, which can result in part of the sentence being served in the community on certain conditions, rather than in custody: see United Nations Human Rights Committee Communication No. 1968/2010 Views adopted by the Committee at its 112th session (7 – 31 October 2014) Submitted by: Bronson Blessington and Matthew Elliot. Available at: http://hrlc.org.au/wp-content/uploads/2014/11/CCPR-C-112-D-1968-2010-English.pdf

## Post-sentencing issues

The Commission seeks submissions that discuss the issues raised in Chapter 14 of the Consultation Paper, and identify any additional post-sentencing issues in relation to institutional child sexual abuse offenders.

We note reference to the extended sentence regime under the *Crimes (High Risk Offender) Act 2006* (NSW) (**HRO Act**). Since 2006, in-house criminal lawyers from Legal Aid NSW's Indictable Crime Division have represented offenders in applications under the HRO Act. The HRO Act has been expanded over time to cover a far wider cohort of offenders than in its original form, despite the extraordinary place such legislation has in a democratic society.

Legal Aid NSW is concerned that the HRO Act, while only applying to adult offenders, includes offences committed as a juvenile as "index offences." This highlights our previous submission about the lack of a "close in age" or "young love" defence to consensual sexual offending in NSW. Including offences committed as a juvenile in the HRO Act also runs counter to the well accepted understanding of the unique nature of juvenile offending. Legal Aid NSW submits that the HRO Act should be amended to exclude offences committed by juveniles as index offences.

Legal Aid NSW is also concerned about the disproportionate impact of the proposals on offenders who are indigenous and those who suffer from cognitive impairment. These groups are already starkly overrepresented in applications under the HRO Act. Anecdotally, the use of Continuing Detention Order applications against indigenous offenders appears to be increasing.

Cases such as *State of NSW v Carr*[42] and *NSW v Strong*[43] reveal the harsh and unjust impact of the legislation on indigenous offenders in particular. In the first case, a young indigenous offender with an intellectual disability was incarcerated five times after an extended supervision order was made, not for committing a further relevant offence, but because he had breached the conditions of the supervision order.[44] In the second case, an indigenous, intellectually impaired offender was subject to a continuing detention order of two years after the completion of his sentence. This was because of the lack of available appropriate community based supervision and treatment options for his complex therapeutic needs.

The unduly harsh and disproportionate impact of the HRO Act on indigenous and cognitively impaired offenders should be closely considered in the context of the Commission's criminal justice work. We acknowledge that those who commit child sexual assault in institutional settings are less likely to be indigenous or have cognitive impairment. Such offenders are also more likely to have the community support and ability to successfully undertake courses to attenuate the risk of committing further sex offences. However, any reforms to substantive criminal offences, and any weakening of evidentiary

[42] [2014] NSWSC 1348 (1 October 2014).
[43] *NSW v Strong* [2016] NSWSC 1041.
[44] *NSW v Strong* [2016] NSWSC 1041at [41].

safeguards and fundamental principles protecting the rights of defendants to a fair trial, will necessarily impact on those who offend outside an institutional context and ultimately, outside the context of CSA offending.

# Juvenile Offenders

Legal Aid NSW agrees that child-on-child sexual abuse in institutions is a significant issue that should be addressed by the Royal Commission.[45] It is not only an historical issue, but a contemporary one. Child-on-child sexual abuse continues to occur in a range of institutions, including out-of-home care, juvenile detention centres and schools.

Legal Aid NSW is concerned that "*[a]part from the issue of treatment, the criminal justice system's response to child-to-child sexual abuse has not been raised with [the Royal Commission] as a significant issue*".[46] In our view, this may be because the Royal Commission has not had the opportunity to speak with "contemporary" child offenders. This may in turn be due to privacy restrictions or other concerns.

The Legal Aid NSW Children's Legal Service advises and represents children charged with sexual offences. It is well placed to inform the Royal Commission on issues relating to the criminal justice response to child sexual abuse committed by other children in institutions. In our view, there are issues in this area which have been overlooked by the Commission.

## Data on juvenile offending

As the Consultation Paper notes, the available data indicates that children are responsible for a significant proportion of sexual offences, and they offend at a much higher rate than the general offender population.

In recent years, legislative reform of sex offences in all Australian jurisdictions has increased. Legal Aid NSW is concerned that this reform is often pursued without adequate consideration of the impact on juvenile offenders, including in the areas of child pornography and 'sexting', discussed below.

## Age of criminal responsibility

Legal Aid NSW is of the view that the age of criminal responsibility in NSW (10 years) is too low and should be raised to at least 12 years. It is the experience of Legal Aid NSW that children aged 10 and 11 fall far short of knowledge that an act charged is seriously wrong in the criminal sense. This was demonstrated recently when Legal Aid NSW acted on behalf of a 10 year old child in Grade 5 who failed to appear in court and was subsequently arrested and held overnight in custody. A child of this age is likely to lack the requisite knowledge to be held criminally responsible, as well as lack a proper understanding of the court process and practical skills needed to get to a particular court at a particular time. While other factors contributed to the child's arrest and detention, such

[45] Royal Commission, Interim Report Vol 1, page 122.
[46] Consultation Paper, page 548.

a situation would not have arisen if the age of criminal responsibility was raised to 12 years.

This would reflect most research into child development and intellectual capability[47] and more closely align with the age most children transition into high school and further develop their intellect. It would also be consistent with the approach in international jurisdictions and in international law, noting:

- An investigation of 90 countries found the minimum age of criminal responsibility ranged from 6 to 18 years and the median age was 13.5.[48]
- The United Nations Committee on the Rights of the Child has concluded that "*a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable".*[49]
- The commentary to the United Nations Standard Minimum Rules for Administration of Juvenile Justice provides:

  *The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless.*[50]

Legal Aid NSW endorses the principles of *doli incapax.* These principles are long established and are consistent with the empirical evidence referred to above on the social and neurological development of children.

Legal Aid NSW submits that the principles of doli incapax are particularly important for child sexual offences, as often children have not had the opportunity to engage in appropriate sexual education. We agree with the Law Council that the principle should be retained.

[47] For example, Swiss psychologist Jean Piaget believes that it is only around the age of 12 years when most children gain the necessary moral and cognitive development to know right from wrong. He also states that children below 12 years may lack the intellect to properly instruct legal representatives, and may not understand legal concepts such as "not guilty": see Dalby J T, Criminal Liability in Children" (1985) 27 *Can J Crim* 137 as cited in Bala N and Mahoney D, *Responding to Criminal Behaviour Of Children Under 12: An Analysis of Canadian Law & Practice*: http://qsilver.queensu.ca/law/bala/papers/crimbeh.htm at 3 (21 March 2000)
48 Hazel N 2008. Cross-national comparison of youth justice. London: Youth Justice Board for England and Wales: <http://www.yjb.gov.uk/publications/resources/downloads/cross_national_final.pdf>
[49] Paragraph 32 of *General comment No. 10: Children's rights in juvenile justice (2007)*
[50] *United Nations Convention on the Rights of the Child*, rule 17 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules), Principle 4

## Sexting

Sexting is the sending of provocative or sexual photos, messages or videos, usually by mobile phone but also by posting online.[51] It has become increasingly common in recent years, especially among young people who are regular users of mobile phones and social media. Sexting can occur in an institutional context, particularly in schools.

Legal Aid NSW is concerned that young people who engage in sexting may inadvertently commit CSA offences, even where the sexting is consensual. For instance, under NSW law, consensual sexting between two children under 16 is a criminal offence because the images would be categorised as "child abuse material."[52] Further, if convicted, a child may be classed as a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) (**CPOR Act**). Similarly, two young people under 18 engaged in consensual sexting may be captured by child pornography offences under Commonwealth law.[53]

Legal Aid NSW recommends the Royal Commission consider sexting in the context of its criminal justice work, including alternative legislative approaches to sexting where no exploitation is involved. In our view, the law should distinguish between the different types of conduct which are currently captured by the child pornography provisions; consensual sexting, on the one hand and conduct which exploits or abuses children, on the other. The law should also make distinctions where children engage in the relevant conduct. For instance, Victoria recently amended its *Crimes Act* to make it an exception to child pornography offences for a child under the age of 18 years to take, store or send images of a child not more than two years younger.[54] Commonwealth law also requires the consent of the Attorney General before a minor is prosecuted for offences relating to use of a carriage service for child pornography material or child abuse material.[55]

Legal Aid NSW also notes the inconsistency across Australian jurisdictions with respect to the definition of a child for the purposes of child pornography offences.[56] We recommend that there be consistency across Australian jurisdictions, and that the age of a child should be set at 16 years. This would be consistent with the recommendations of the Australian Law Reform Commission and the NSW LRC regarding the age of consent for sexual offences.[57] However, Legal Aid NSW agree that for the purposes of child prostitution, including commercial child pornography, the relevant definition of a child should be anyone under 18 years of age. This would comply with Article 3 of the International Labour Organisation *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* and Article 34 of the *Convention on the Rights of the Child.*

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[51] Office of the Children's e-safety commissioner, at https://www.esafety.gov.au/esafety-information/esafety-issues/sexting

[52] See Division 15A of the *Crimes Act 1900* (NSW).

[53] See for instance s.471.17 of the *Criminal Code 1995* (Cth).

[54] See new section 70AAA of the *Crimes Act 1958* (Vic).

[55] See section 474.24C of the *Criminal Code 1995* (Cth).

[56] We note that legislation varies in its terminology, referring to "child pornography" (eg Cth, Vic), "child abuse material" (eg NSW) or "child exploitation material" (eg WA) offences.

[57] *Family Violence – A National Legal* Response, Final Report, ALRC Report 114, NSWLRC Report 128, October 2010, 1141 [25.49].

## Prosecution of juveniles

As the Consultation Paper notes, specialist children's courts in many Australian jurisdictions have exclusive jurisdiction over children accused of committing sexual offences. In NSW, however, the Children's Court has jurisdiction to hear and determine any offence by a child other than a "serious children's indictable offence", which must be dealt with "according to law" in the District Court.[58] Many sexual offences are "serious children's indictable offences", such as aggravated sexual assault.

Legal Aid NSW would support reform to give the NSW Children's Court jurisdiction over all offences committed by children, including all sexual offences, and subject to appropriate discretion in the Children's Court to refer particularly serious matters to higher courts be dealt with at law. This position, adopted by many other Australian jurisdictions, is consistent with international child justice principles.

## Alternatives to prosecution

Legal Aid NSW recommends that there be greater opportunity to divert children charged with child sexual offences from prosecution. In NSW there is very limited scope to use either cautioning or conferencing for sexual offences under the *Young Offenders Act 1997* (**YOA**). For example, consensual sex between 15 year olds cannot be dealt with through a caution or conference because sexual intercourse with a child between 10 and 16[59] cannot be dealt with under the YOA. Further, even though some sexting offences can be dealt with under the YOA,[60] police practice in this area has been inconsistent.

The Children's Legal Service regularly provides advice to children facing police action for consensual sexting. Even where such matters are dealt with under the YOA, the child may suffer long term consequences. While the child will not have a criminal record, they will get a police record which can affect future employment and will attract risk assessment under the Working with Children Check. Police may also use sexting to apply for an Apprehended Violence Order, with the further risk of criminalisation of the child.

This area of police discretion may therefore benefit from greater guidance.

[58] *Children (Criminal Proceedings) Act 1987*, section 17.
[59] *Crimes Act 1900* (NSW), section 66C.
[60] For example, charges under 61O(2A), 66EB(2,)(2A) and (3) of the *Crimes Act 1900* (NSW).

## Sentencing of juveniles

Legal Aid NSW is of the view that the *Children (Criminal Proceedings) Act 1987* (**CCPA**) and the YOA, as originally enacted, reflected the right approach to offending by children and young people. That legislation focused on diversion and recognised detention as an option of last resort. However, there has been a gradual erosion of the original intention of both Acts with subsequent legislative amendments introducing a more punitive approach to dealing with children and young people.

### Other custodial sentencing options for children

Consistent with international child justice principles, detention should be a measure of last resort. To this end, Legal Aid NSW would support expansion of community based sentencing options appropriate for children. We note that such measures are available in other jurisdictions but not in NSW.[61]

### Juvenile offenders in adult detention

In NSW, children sentenced according to law for serious children's indictable offences, or for other indictable offences dealt with in higher courts, can be sentenced to imprisonment. The sentencing court may make an order directing that the whole or any part of the term of the sentence of imprisonment be served as a juvenile offender.[62] However, for serious children's indictable offences, the court must be satisfied that there are special circumstances justifying detention of the person as a juvenile offender, and the person's youth alone is not a special circumstance.

Juvenile Justice NSW can also administratively transfer a juvenile offender to an adult prison.

Any inmate serving a sentence of imprisonment for a child sexual offence can be at risk and is often put in protection. Juvenile offenders serving a sentence of imprisonment for a sex offence are particularly vulnerable and their protection should be considered.

## Risk management issues

### Child sex offender registries

As the Consultation Paper notes, jurisdictions vary in terms of whether the registration of a child sex offender is mandatory or discretionary. In NSW, registration is mandatory. A person automatically becomes a "registrable person" if they have been sentenced in respect of a "registrable offence".[63] There are some limited exceptions for juvenile offenders who have committed offences involving indecency and child pornography.[64]

[61] See Consultation Paper, page 563.
[62] *Children (Criminal Proceedings) Act 1987* (**CCP Act**), section 19.
[63] *Child Protection (Offenders Registration) Act 2000* (**CPOR Act**), section 3A.
[64] CPOR Act, section 3A(2)(c).

Legal Aid NSW considers that the registration scheme fails to adequately distinguish between the risks posed by adult and juvenile offenders. While the CCPR Act makes some allowances for juveniles by halving the reporting periods and providing exceptions for indecency and child pornography offences, it does not go far enough to ensure that children who commit offences against other children are dealt with in a manner appropriate to their age and circumstances.

Children are also unfairly impacted by the registration scheme because they may be criminalised for consensual sexual activity with people of similar age, or unknowingly commit Commonwealth child pornography offences by sexting, as outlined above. While in some cases the courts deal with this behaviour without proceeding to conviction,[65] and consequently exempting the offender from registration, this is not always the case. This is demonstrated by the following case study.

***Case study: juvenile offending and sex offender registration***

Graham pleaded guilty to 2 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. Despite that, 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.

Legal Aid NSW is also concerned about the practical impact of the scheme's reporting requirements on juvenile offenders. For instance, the personal information that a registrable person musty report includes the name, date of birth and address of each child with whom the person has had contact, where certain circumstances exist.[66] These circumstances include where the person was exchanging contact details with a child or attempting to befriend a child. This means that a juvenile offender on the register would need to report the details of all their friends and peers.

[65] CCP Act, section 33(1)(a).
[66] CPOR Act, section 9(1A).

In summary, Legal Aid NSW submits that offences involving consensual sexual activity between children should be registrable offences. In the alternative, Legal Aid NSW submits that

- registration of a juvenile child sex offender should be discretionary rather than mandatory,
- registration should only occur where a court is satisfied that the offender poses an ongoing risk to the safety of children, and
- the offender should have a right to appeal a decision to register and to apply for an exemption from registration at any time after sentence on the basis that they no longer pose a risk to children.

## Working with Children Check

Legal Aid NSW notes the Royal Commission has previously examined and made recommendations about Working with Children Check (**WWCC**) schemes. However, Legal Aid NSW reiterates its concerns about the potential impact of some of the recommendations on individuals charged or convicted of offences when under the age of 18.

### Recommendation 17: Criminal history information

Legal Aid NSW supports the Royal Commission's recommendation for a standard definition of criminal history for WWCC purposes. However, Legal Aid NSW does not support a broad definition in relation to a person's history as a child which includes:

- all convictions, whether or not spent,
- findings of guilt that did not result in a conviction recorded, and
- charges, regardless of status or outcome, including where charges were withdrawn or led to acquittals.

To include charges, regardless of outcome, will mean that a person who was charged inappropriately by police as a child, or who was acquitted of a charge, will nonetheless have that charge considered in the context of future employment. We can see no legitimate argument why this would be fair, appropriate or necessary. In these circumstances, there is no objective risk to child safety that could outweigh the prejudicial impact on the person.

We also hold the view that it is not appropriate to apply a broad definition of criminal history which includes findings of guilt that did not result in a conviction as a child. It is long established and well recognised that different considerations apply when dealing with offending behaviour by children. In particular, rehabilitation is a paramount consideration. This is reflected in international child rights law, as well as domestic legislative provisions

and principles.[67] Legal Aid NSW therefore submits that a child who is found guilty of an offence but has no conviction recorded should not have that matter considered in the context of WWCC checks as an adult. To do so jeopardises the employment prospects and therefore rehabilitation of that person.

We recommend that a WWCC criminal history definition should only include a very narrow range of convictions in a child's criminal history, and not charges or findings of guilt that did not result in a conviction being recorded. Further, a criminal history should not include spent juvenile convictions.

### Recommendations 20 and 21: Scope of criminal records

We are also concerned about the scope of juvenile records and/or non-conviction charges that would trigger an assessment of a person's suitability for a WWCC, under recommendation 20 and 21. Recommendation 20(c) states that "all other relevant criminal, disciplinary or misconduct information should trigger an assessment of the person's suitability for a WWCC". Recommendation 21(a) then provides that relevant criminal records "include but are not limited to: juvenile records and/or non-conviction charges for the offence categories specified in recommendation 20(b)". We submit that only juvenile convictions for the offence categories specified in recommendation 20(b) should trigger a risk assessment.

### Recommendation 29: Appeals

Recommendation 29 is for a prohibition on appeals for people convicted of certain categories of offences and certain sentences or orders as result of the conviction. It is unclear whether this prohibition would apply to people who were convicted of such offences as children. We submit that, consistent with recommendation 20(b), this prohibition should not apply unless the person was at least 18 years old at the time of the offence.

## Employment restrictions in the *Disability Inclusion Act 2014* (NSW)

There are other far-reaching consequences for juveniles convicted of sexual offences in NSW, including offences where the parties were close in age and the sexual activity was consensual.

The *Disability Inclusion Act 2014* (NSW) (**DI Act**) prohibits the Department of Family and Community Services and government funded disability services from engaging or continuing to engage people who have been convicted of prescribed sexual offences to work directly with people with disabilities.[68] There is no discretion and no procedure for review. The DI Act expressly states that the NSW Industrial Relations Commission and

[67] See for instance, art 40 of the *United Nations Convention on the Rights of the Child*, rule 17 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules), section 6 of the CCP Act, and the various provisions that enable a court to deal with an offender without conviction, such as section 14 of the CCP Act as well as the YOA, providing for diversion of young offenders.

[68] DI Act, see sections 32 and 36.

any other court or tribunal does not have jurisdiction to reinstate or redeploy a person contrary to the restrictions in the DI Act, or award compensation or damages to anyone dismissed from employment as a result of the restrictions.[69] The DI Act also requires that people convicted of prescribed sexual offences not continue to be engaged to work directly with people with disabilities. This means people with such convictions who do not pose a risk must be dismissed or redeployed to a role which does not require direct contact. Again there is no discretion or procedure to appeal.

These restrictions can lead to the unfair and perhaps unintended outcome of prohibiting people who do not pose a risk from working directly with people with disabilities. For example, the DI Act would prohibit a person with a historical conviction of carnal knowledge in circumstances of a consensual relationship between young people, from working directly with people with disabilities, without any avenue for review. The lack of any discretion or an appeal procedure in the DI Act results in a scheme that is more prohibitive than that contained in the *Child Protection (Working with Children) Act 2012* (NSW). The regime is also inconsistent with recommendations of the Commission in its report on the WWCC.[70]

In Legal Aid NSW's view, it would be appropriate to review this area of law. It may be appropriate to exclude certain offences committed by juveniles from the regime as occurs with the sex offender register. To introduce discretion and/or a review procedure in the DI Act would also address the potential for unjust employment restrictions, without undermining the protection of people with disabilities.

## Forensic procedure applications in respect of registered sex offenders

Placement on a child protection register has implications for forensic procedure applications under Part 7B of the *Crime (Forensic Procedures) Act 2000* (NSW). Under this legislation, a court can order both intimate and non-intimate forensic procedures in respect of a registrable person under the CPOR Act whose DNA profile is not contained in the offenders' index of the DNA database system, where the court is satisfied that the procedure is justified in all the circumstances. The recent decision of the NSW Supreme Court in *W4 v Detective Senior Constable Ayscough* [2016] NSWSC 1106 highlights the impact of sex offender registration on a juvenile sex offender, as summarised in the following case study.

[69] See section 40 of the DI Act.
[70] In particular Recommendation 29.

***Case study: juvenile registered as a sex offender***

Legal Aid NSW acted on behalf of Ben. When he was 14 years old, Ben committed a sexual assault of a child under 13 in Western Australia. The victim was a 12 year old girl. The Court found the conduct involved very brief consensual sexual activity with the victim, who he believed was 13. Ben was sentenced by the Perth Children's Court to a Youth Community Based Order for six months in 2011. As a result, he became a registered sex offender in WA and then in NSW when his family relocated here. His DNA profile was not on the offenders' index of the DNA database system.

In 2013 police applied for a final order from the Children's Court to carry out a forensic procedure on Ben, who was then still under 18. The Magistrate refused this application. In 2015, the police made a second application for a final order from the Local Court. At the time of this application, Ben had turned 19. The order was granted for a non-intimate forensic procedure. The order was stayed pending an ultimately successful appeal: see *W4 v Detective Senior Constable Ayscough* [2016] NSWSC 1106.

The police have relisted the application in the Local Court seeking a forensic procedure order.

Ben has never been charged with any further sexual offences. As a registered sex offender, however, he has been harassed by police and charged with breach of his reporting obligations when he failed to update his address and failed to report contact with his own baby.